Date: 1 March 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

Statement on the Applicant's Change Request 2:

a) **Regulation 4(2) of Infrastructure Planning (Environmental Impact Assessment) Regulations 2017;**
b) **Breach of the Infrastructure Planning (Compulsory Acquisition) Regulations 2010 (SI 2010/104) (as amended);**
c) **Lack of Jurisdiction to Change Order Limits.**

Submitted in relation to Deadline 8 of the Examination Timetable

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INTRODUCTION

1. This Statement comprises part of the Affected Party's Deadline 8 submissions and amplifies matters raised before the ExA as well as responding to questions raised by the ExA and further Notes requested by it on certain matters.
2. In essence:
   a) Regulation 4(2) of the Infrastructure Planning (Environmental Impact Assessment) Regulations 2017 (as amended) precludes the grant of development consent in this Application otherwise than for the extent of the Application scheme as originally certified on the 25th February 2020. No *certificates* required by Regulation 20(3)(i) have been provided to the Examination to show discharge of Regulation 20(3) requirements, and so, there can be no "EIA" (as defined by Regulation 5(1)(a)-(c)) save that previously certified;
   b) (subject to Regulation 4, see below), Regulation 12(1)(a)-(e) of the Infrastructure Planning (Compulsory Acquisition) Regulations 2010 remains not yet, nor able within the remaining Examination to be, satisfied and so Regulation 4 procedure remains unconcluded. Consequently, the envisaged compulsory purchase powers by which the Applicant seeks to impose rights over Stoneacre Copse cannot be extended over that "Additional Land";
   c) The scope of jurisdiction over the extent of the Order Limits flows from the Application Order Limits and cannot be more extensive than as was *originally* applied for to the Secretary of State. The ExA has no jurisdiction to extend beyond the extent of the Order Limits applied for originally the geographical area of the Order Limits so as to include further land of Stoneacre Copse. See Kent (1977) 33 P&CR 70; Bernard Wheatcroft. Regulation 4 cannot be satisfied.
3. The analysis above applies to each:
   a) uncertified inclusion of "further information" within the "environmental statement"; and
   b) area of Additional Land envisaged during the Examination to be included as part of the Application Order Limits.

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SECTION A – EXECUTIVE SUMMARY

1. Mr. Geoffrey Carpenter and Mr. Peter Carpenter, are the freehold owners of Little Denmead Farm, which includes Stoneacre Copse ("the **Affected Party**").

2. On 14 November 2019, Aquind Limited (the "**Applicant**") applied under section 37 of the Planning Act 2008 (" **PA 2008**)" to the Secretary of State for a development consent order in relation to a new 2000 MW subsea and underground High Voltage Direct Current ("**HVDC**") bi-directional electric power transmission link between the south coast of England and Normandy, France ("Application").

3. The extent of land specified in the Application as originally made to the Secretary of State was set out by reference to a series of plans and details contained within a draft development consent order ("**dDCO**"). We refer to that extent of land set out in the Appplication as originally made as the "**Order Limits**".

4. On the 11th December 2021, the Applicant made a written request to the Examining Authority (" **ExA**") to change the scope of the Order Limits ("**Change Request 2**") so as to increase the geographical area of the Application Order Limits by the addition of two new areas of land outside of the extent of the Order Limits and that were to be also made subject to the power to compulsorily acquire new rights under Part V of the dDCO (using the description of SI 2010/104 to cover the extent of further land envisaged to be subject to those powers, "**Additional Land**").

5. Section 2 of Change Request 2 sets out a description of the Additional Land, which includes the extent of ancient woodland known as "Stoneacre Copse". Stoneacre Copse is currently shown as being plot 1-32b in the draft Land Plans (document reference **[REP7-003]**).

6. The Affected Party has not consented to the imposition of any third party rights over it land, including Stoneacre Copse and maintains its objection to the inclusion of Stoneacre Copse within the Order Limits (as envisaged to be extended) and also the Additional Land (as also envisaged to be extended and with rights in favour of a third party).

7. Change Request 2 should, in its entirety, be rejected as the relevant requirements of the Infrastructure Planning (Environmental Impact Assessment) Regulations 2017 and of the Infrastructure Planning (Compulsory Acquisition) Regulations 2010 have not been satisfied and cannot be. It is also unlawful to extend the Order Limits. This Statement sets out the Affected Party's reasons why.

Change Request 2

8. In summary, paragraph 3.1 of Change Request 2 sets out the Applicant's reasons for requiring the Additional Land. Paragraph 3.1 states:

   "*The Additional Land is required in order to address the impact of ash dieback and the consequential effect on the landscape and visual impacts of a part of the proposed development, the converter station. The disease has spread more rapidly than expected when the Landscape and Visual Impact Assessment (LVIA) (Chapter 15 of the ES (APP130)) was undertaken between 2017 and 2019*."

9. The evidential basis for including Stoneacre Copse within Change Request 2 therefore, is due to an actual change identified by the Applicant in the constituent woodland of Stoneacre Copse, by which the many trees within that Copse are foreseeably expected to provide **less** barriers to the predicted landscape and visual effects of the proposed Converter Station. .

10. The impact of ash dieback at Stoneacre Copse and the consequential effect on the landscape and visual impacts at the proposed converter station result in a change in the assessment (evaluative) baseline of the assessments in Chapter 15 of the original and certified ES (document reference **[APP-130]**) required as part of the Application, and upon which relies the consequential evaluative conclusion of whether or not "likely significant effects" on landscape and visual matters may result (in turn requiring, if – as here – 'adverse', to be mitigated by 'measures' – as here).

11. Thus, Change Request 2 masks, but engenders, the consideration and satisfaction of certain requirements in three separate sources of procedure within one Request:

    a) the Infrastructure Planning (Environmental Impact Assessment) Regulations 2017 ("**IPEIA Regulations**"); and
    b) the Infrastructure Planning (Compulsory Acquisition) Regulations 2010 ("**CA Regulations**"); and
    c) The scope of jurisdiction in respect of whether, in law, the Order Limits can be increased to cover more land than originally applied for in the Application as made to the Secretary of State.

12. The structure of the CA Regulations results to require jurisdiction for the extension of "Additional Land" as a logically prior requirement under Regulation 4 of those Regulations.

13. Not all of the relevant requirements relating to the EIA Regulations, the CA Regulations, and whether Order Limits can be extended, have been satisfied.

IPEIA Regulations

14. All references to regulation numbers in this section are in relation to those in the EIA Regulations.

15. The following regulations needs to be considered and satisfied:

    a) discharge of the requirements of Regulation 20;
    b) consultation requirements enshrined in Regulation 20(2) ("further information");
    c) Regulation 20(3)(iv) (to suspend the consideration of the Application);
    d) Regulation 20(3) (vi) (the availability of further information);
    e) Regulation 20(3) (x) (a deadline for receipt of responses being not less than 30 days following the date on which the notice is last published);
    f) Regulation 20(3)(i) certification requirements in relation to each package of "further information" envisaged to be included within the "environmental statement" certified on 25th February 2020 **[OD-007]**;
    g) Disengagement of Regulation 4(2) as a result of satisfaction of Regulations 20 and 5(2)(a)-(c).

16. In short, the Affected Party is unaware of (as it cannot locate it in the Examination Library (dated 26th February 2021) as at Deadline 8, 1st March 2021):
    a) a Regulation 20(3) notice having been published after the 18th December 2020 or at all nor of the 30 day period then commencing, after the end of which the Affected Party (and any third party) is entitled to submit representations on the further information (but which minimum period will expire from at least the 1st February 2021 after the statutory Examination Period ends);
    b) A Regulation 20(3)(i) certificate for each item of "further information" required by the Applicant to be within the "environmental information" certified in February 2020.

17. The Affected Party assumes that the Applicant did not therefore publish a Regulation 20(3) notice. This is because the Applicant stated in paragraph 6.2 of its letter submitting Change Request 2 to the ExA dated 11 December 2020 (document reference **[AS-052]**) that: (Emphasis added)

    "*There is <u>no</u> specific procedure to be followed where updated environmental information is submitted during the course of an examination provided for within the EIA Regs*.".

    and in paragraph 6.3 of document reference **[AS-052]** the Applicant stated that:

    "*…the Applicant is of the view that it is not necessary to undertake any additional notification or consultation processes in the interests of procedural fairness beyond those already provided for by virtue of the Examination process*."

18. In light of this, the Affected Party concludes that the IPEIA Regulations have been breached. As a result of this, the application for Change Request 2 cannot be considered by the ExA. But there is a specific procedure in Regulation 20.

CA Regulations

19. All references to regulation numbers in this section are in relation to those in the CA Regulations.

20. The relevant consideration regarding the CA Regulations is whether their requirements have been complied with, and if they have not, can they be complied with within the time left for Examination. In short and in fact, the CA Regulations have not been fully complied with, and they cannot be fully complied with because there is not enough time left within the Examination period (which ends on 8 March 2021). Paragraph 20, bullet 2 of the "Planning Act 2008: Guidance related to procedures for the compulsory acquisition of land (September 2013)":

> *20. A development consent order may only contain a provision authorising compulsory acquisition if one of the conditions set out in section 123(2)–(4) are met. These are that:*
> *• the application for the order included a request for compulsory acquisition of land to be authorised - in which case the proposals will have been subject to pre-application consultation, and the other pre-application and application procedures set out in the Planning Act have been followed; or*
> *• if the application did not include such a request, then the relevant procedures set out in the Infrastructure Planning (Compulsory Acquisition) Regulations 2010 have been followed; or*
> *• all those with an interest in the land consent to the inclusion of the provision.*

21. Not all of the obligations under Regulation 12 (timetable for the examination of a proposed provision), Regulation 13 (written representations), Regulation 14 (hearings about specific issues) and Regulation 15 (compulsory acquisition hearing) of the CA Regulations have been discharged.

22. To date with respect to Change Request 2, only:

    a. an initial assessment of the issues has been carried out by the ExA pursuant to Regulation 11 of the CA Regulations (document reference **[PD-032]**);

    b. a partially revised timetable was issued by the ExA on 11 January 2021 pursuant to Regulation 12 of the CA Regulations (document reference [**PD-032**]) which we note does not cover all the elements *required* by Regulation 12, in particular (e);

    c. *relevant representations* (as defined by Regulation 2 of the CA Regulations) have been submitted (in the form required pursuant to Regulation 10 of the CA Regulations); and

    d. one compulsory acquisition hearing (during which no documents or evidence could be presented) was held on 19 February 2021 in relation to Stoneacre Copse (before any affected party submitted full *written representations* (as defined by Regulation 2(1))).

23. With regard to the timetable for the examination of Change Request 2 (which is governed by Regulation 12), there has been no "written representations" stage which is required under Regulation 12(1) (a) nor the consequential (b)-(e) matters.

24. The term "written representations" is defined by Regulation 2(1) as being the full particulars of the case which a person puts forward in respect of an application or the proposed provision and includes any supporting evidence or documents. The timetable issued by the ExA on 11 January 2021 (document reference **[PD-032]**), did not provide for the Affected Party to present its full case (including evidence) in writing to the ExA with regard to the inclusion of Stoneacre Copse within the Order Limits.

25. The timetable issued by the ExA on 11 January 2021 (document reference **[PD-032]**) also does not:

    a. include the period within which the Examining authority can raise written questions about Change Request 2, the written representations, and any other relevant matter, as required by Regulation 12(1)(b);

    b. include the period within which the Applicant can comment on written representations and respond to written questions, as required by Regulation 12(1)(c);

    c. include the period within which any additional affected person, additional interested party or interested party will have the opportunity to comment written representations and responses to written questions, as required by Regulation 12(1)(d);

    d. include any provision for any further compulsory acquisition hearings that may be necessary as a result of the above, in particular the requirement in Regulation 12(1)(e) that the timetable must specify the date by which any additional affected person must notify the Examining authority of their wish to be heard an a compulsory acquisition hearing.

26. Therefore, with regard to Change Request 2 and the inclusion of Stoneacre Copse within the Order Limits: the Affected Party has not been given the Regulation 12(1)(a) opportunity to submit written representations; the Applicant has not been given any opportunity to comment on those written representations; no written questions have been raised under Regulation 12(1)(b) in relation to Change Request 2 that are then responded to; no written questions have been raised in relation to written representations; and no additional affected person, additional interested party or interested party has had the opportunity to comment written representations and responses to written questions; and no provision has been made in the timetable for a compulsory acquisition hearings under Regulation 12(1)(e) in relation to Change Request 2 if one is wished (as it is herein confirmed) to be by the Additional Affected Party further to and consequent upon the above steps.

27. As not all of the mandatory requirements within Regulation 12 have been complied with, this has consequently significantly prejudiced the Affected Party in relation to Change Request 2 (and indeed all affected parties subject to Change Request 2).

28. In addition, the Affected Party, as an Additional Affected Party, is not able to comply with Regulation 13(1) which specifies the deadline by which the Affected Party needs to submit any written representations relating to Change Request 2. Regulation 13(2) allows the ExA to specify the date (being a date *not earlier than* the end of a period of 21 days) by which a written representation to be submitted, but there is less than 21 days left in the remaining Examination period.

29. In short, the Affected Party, as an Additional Affected Party, therefore awaits a full timetable with respect to the examination of Change Request 2 but it cannot be concluded within the Examination Period.

30. Whilst the ExA has the ability under Regulation 12(3) to vary the timetable to accommodate the mandatory requirements in Regulation 12 that have been missed, there is not enough time left within the Examination period. It ends in 5 working days' time, on 8 March 2021 (as at the date of the submission of this Statement) and the Additional Affected Party is entitled to the full written representations (including on law) of the Applicant in advance and so as to give effect to the Regulation 13(4) entitlement to comment on the same.

31. The process effectively laid down by Regulation 12 is a 'mini-DCO examination' process that applies to Change Request 2.

32. It is unclear to the Affected Party (and as an Additional Affected Party) quite why so many important stages have been skipped by both the Applicant and by the ExA itself. The Affected Party cannot identify a power granted to the ExA to modify the mandatory elements of Regulation 12. The stages set out within Regulation 12 are a ‘must’, flow from sections including section 123 of the PA 2008, and they cannot be re-written unilaterally by any party.

33. The CA Regulations have been breached in this respect and the entirety of Change Request 2 cannot, and should not, be accepted as part of the dDCO land to which compulsory powers of acquisition (including the imposition of rights over land) could apply.

Extension of the Order Limits

34. The engagement of the CA Regulations flows from Regulation 4 that requires its own criteria to be satisfied. Whilst the Affected Party has not consented to the envisaged acquisition (and it deemed by Regulation 4(b) to be object by reason of not expressing consent to imposition of rights over his land, the logically prior step is whether the Order Limits (i.e. the land identified *in the Application as*

made to the Secretary of State) can, in law, be increased in geographical extent over and above the extent originally applied for in the Application.

35. In short, in law, whereas they may be reduced in extent (see *Wheatcroft)* they cannot be increased in extent (see *Kent*).

36. In *Kent* (1977) 33 P&CR 70, the High Court said this: (Emphasis added)

> *It seems to me that everything in Part III flows from and is consequential on the provision in section 23 that planning permission is required for the carrying out of any development of land; hence, when the matters come before the determining authority, in this case the first respondent, what that authority has to do is to decide whether, having regard to the provisions of the development plan and to any other material considerations—that is, planning considerations—permission ought to be granted, and, if so, what, if any, conditions should be imposed. It further seems to me that, as a matter of common sense, the determining authority can grant as much of the development applied for as they think should be permitted.*

37. "As a matter of common sense", everything (including jurisdiction) flows from section 37 of the PA 2008 and the Application made thereunder. The Order Limits cannot be extended and the extension of rights over land under the CA Regulations pre-supposes the subsisting Limits' extent. If it were otherwise, the Additional Land tail would wag the Order Limit dog and paragraph 113 of the Examination Guidance would not refer to *Wheatcroft* (a case about reduction of the extent development applied for):

> *In considering a proposed material change to an application and before making a procedural decision8 about whether and how to examine the changed application, the Examining Authority will need to ensure it is able to act reasonably and fairly, in accordance with the principles of natural justice[9] and in doing so, there will be a number of factors to consider such as: • whether the application (as changed) is still of a sufficient standard for examination; • whether sufficient consultation on the changed application can be undertaken to allow for the examination to be completed within the statutory timetable of 6 months10; and • whether any other procedural requirements can still be met.*
> *[Footnote 9: See Bernard Wheatcroft Ltd V Secretary of State for the Environment (1982) 43 p & CR 233 where it was held that anyone affected by amended proposals should be provided with a fair opportunity to have their views on these amendments heard and properly taken into account.]*

38. For these reasons, Change Request 2 cannot and should not be accepted because Regulation 4 cannot be satisfied by an increase in Order Limits and could in law only be satisfied by the extension of compulsory acquisition rights over an area within the Application Order Limits not already envisaged to be subject to such compulsory acquisition. In this respect, the ***Sainsbury's*** case [2011] 1 AC 407 reinforces that such an interpretation of Regulation 4 is required: (Emphasis added)

> *11. …*
> *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."*

SECTION B – IPEIA REGULATIONS – ANALYSIS

39. The Affected Party owns the extent of ancient woodland known as “Stoneacre Copse" and it is the last resting place of the ashes of their father, being a particularly special place for the whole Carpenter family.
40. Change Request 2 was accompanied by a number of documents that included a covering letter dated 11 December 2020 from the Applicant's solicitors (document reference **[AS-052]**) and a document entitled 'Request for Changes to the Order Limits' (document reference **[AS-054]**)).

41. In its covering letter (document reference **[AS-052]**) , the Applicant stated: (Emphasis added)

"3.2 … the Applicant has recently surveyed the woodlands ***on which the future baseline relies*** *for visual screening and has identified a number of* ***mitigation measures*** *which may be put in place to address the loss of trees as a consequence of ash dieback* ***so that*** *the future baseline does* ***not change****. These measures include the Applicant actively managing these two woodlands, which are not currently within the Order limits…"*

"6.1 … There will be no increase in the level of significance as set out in the ES for relevant recreational and residential receptors, ***save for an increase in the significance of the effect experienced by recreational users of the public right of way to the south of the site (footpath DC19 / HC28) at year 10 (which would change from Minor to moderate (not significant) to Moderate (significant)…"***

"6.2 There is no specific procedure to be followed ***where updated environmental information is submitted*** *during the course of an examination provided for within the EIA Regulations…"*

42. Two points arise for consideration:
    a. Whether the IPEIA Regulations 2017 provide a “specific procedure” for updating of an original ES during an Examination. They do provide a specific procedure, but the Applicant has actually asserted that the EIA Regulations do not; and

    b. The Applicant’s evidence is that the anticipated actual change of the ancient woodland at Stoneacre Copse of loss of canopy leaf cover so as to increase porosity as so increase the views through the trees of the proposed development as a result of increased to ash die back is assessed to result in **the introduction of a new likely significant effect that in itself requires a new measure (woodland management)** to ensure the assessment of the original ES remains not changed. Put another way, the Applicant itself states **there will be a new likely significant effect caused by the ash die back at Stoneacre Copse.** Surprisingly, the ExA has concluded (contrary to

the Applicant's own assertion) that this **does not** generate **new** likely significant effects. An analysis is required of whether the ExA's conclusion is correct

POINT 1 - Do the EIA Regulations contain a specific procedure for updating an environmental statement during an Examination?

43. Yes. Regulation 20.

44. Regrettably, the Applicant's statement in paragraph 6.2 of its covering letter dated 11 December 2020 (document reference **[AS-052]**) that –

"*There is no specific procedure to be followed where updated environmental information is submitted during the course of an examination provided for within the EIA Regulations…"*

– appears to the Affected Party to be incorrect, untrue, and misleading.

45. This is because Regulations 20(1) and (2) and (3) of the IPEIA Regulations state: (Emphasis added)

"(1) Where an Examining authority is examining an application for an order granting development consent and paragraph (2) applies, the Examining authority must—
(a) issue a written statement giving clearly and precisely the reasons for its conclusion;
(b) send a copy of that written statement to the applicant; and
(c) ***suspend consideration of the application*** *until the requirements of paragraph (3) and, where appropriate, paragraph (4) are satisfied.*
(2) This paragraph applies if—
(a) the applicant has submitted a statement that the applicant refers to as an ***environmental statement****; and*
(b) the Examining authority is of the view that it is necessary for the statement to contain ***further information."*** *…*
(3) The requirements mentioned in paragraph (1) are that the applicant must—…
(b) publish a notice (in accordance with sub-paragraph (c)) which sets out the following information —
(x) a deadline for receipt of responses being not less than 30 days following the date on which the notice is last published; …
(c) publish the notice —

i) for at least 2 successive weeks in one or more local newspapers circulating in the vicinity in which the proposed development is situated;
(ii) once in a national newspaper;
(iii) once in the London Gazette and if land in Scotland is affected, the Edinburgh Gazette; and
(iv) in the case of offshore development, once in Lloyds List and once in an appropriate fishing trade journal; …

(i) certify to the Examining authority in the form set out in certificate 3 in Schedule 5 that the applicant has complied with the requirements of sub-paragraphs (b) to (h).

46. The application of Regulations 20(1) and (2) and (3) of the EIA Regulations is not confined to exclusively the initial submission to the original certified Environmental Statement.

47. Regulation 4(2) bars a grant of development consent unless and “EIA” has been carried out. “EIA” is defined by Regulation 5(1) to encompass both (a) the “environmental statement or updated environmental statement” and (b) “ the carrying out of any consultation, publication and notification as required under these Regulations or, as necessary, any other enactment in respect of EIA development…” . Regulation 3(1) defines “updated environmental statement” to men “*“updated environmental statement”* means the environmental statement submitted as part of an application for an order granting development consent, updated to include any further information” and “further information” to mean “ additional information which, in the view of the Examining authority, the Secretary of State or the relevant authority, is directly relevant to reaching a reasoned conclusion on the significant effects of the development on the environment and which it is necessary to include in an environmental statement or updated environmental statement in order for it to satisfy the requirements of regulation 14(2)”. Absent discharge of Regulation 20 requirements, including certification of each element of further information”, Regulation 5(1)(b) remains incomplete and so Regulation 4(2) remains engaged to bar a grant of development consent.

48. Rather, here, the Applicant “has submitted a statement” (which is the original certified Environmental Statement (document reference **[AP-116 to APP-487]**), and that triggers Regulation 20(2)(a). This in turn requires the ExA to form a view under Regulation 20(2)(b) as to whether it is necessary for the Environmental Statement to contain 'further information' in respect of each item of such further information required by the Applicant to be within the certified “environmental statement”.

49. “Further information” is defined under Regulation 3(1) of the EIA Regulations 2017 as

" *additional information which, in the view of the Examining authority, the Secretary of State or the relevant authority, is directly relevant to reaching a reasoned conclusion on the significant effects of the development on the environment and which it is necessary to include in an environmental statement or updated environmental statement in order for it to satisfy the requirements of regulation 14(2*);"

50. Regulation 14(2) of the EIA Regulations sets out what an environmental statement needs to include, It states (our emphasis added):

" *(2) An environmental statement is a statement which includes <u>at least</u>—*
(a) a description of the proposed development comprising information on the site, design, size and other relevant features of the development;
*(b) **<u>a description of the likely significant effects of the proposed development on the environment</u>**;*
*(c) **<u>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</u>**;*
*(d) **<u>a description of the reasonable alternatives studied by the applicant, which are relevant to the proposed development and its specific characteristics, and an indication of the main reasons for the option chosen, taking into account the effects of the development on the environment</u>**;*

(e) a non-technical summary of the information referred to in sub-paragraphs (a) to (d); and
(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."

51. The question for the ExA and Secretary of State, therefore, is as follows:

Does the additional information described by the Applicant in paragraph 6.1 of its covering letter [AS-052], (i.e. the "*increase in the significance of the effect experienced by recreational users of the public right of way to the south of the site (footpath DC19 / HC28) at year 10 (which would change from Minor to moderate (not significant) to Moderate (significant)*…"), constitute 'further information' as defined by Regulation 3(1) of the EIA Regulations?

52. As the Applicant has *itself* explained in paragraph 6.1 of its covering letter **[AS-052]** that there will be a significant effect caused by the ash die back at Stoneacre Copse, this meets the definition of what is "further information" under Regulation 3(1) of the EIA Regulations.

53. If the ExA forms the same view as the Affected Party view that the significant effect described by the Applicant itself does constitute 'further information' as per the definition under Regulation 3(1), then the ExA needs to decide ***whether it is necessary for the Applicant's Environmental Statement to contain such 'further information'***, as required under Regulation 20(2)(b).

54. If the ExA agrees with the Applicant and decides that it is necessary for the Applicant's certified Environmental Statement to contain within it this 'further information' from the Applicant pursuant to Regulation 20(2)(b), the ExA's consideration of the entire Application must be suspended pursuant to Regulation 20(1)(c) until the requirements of Regulation 20(3) and, where appropriate, Regulation 20(4) are satisfied. The suspension of the Examination (and the fact this did not occur, which is in breach of the EIS Regulations) is discussed in more detail later on in this Statement.

55. As stated above, thus far, the express related “specific procedure” of Regulation 20(3) would be engaged and it requires notice of the “further information” be published and a period of “at least” 30 days to pass before representations on that “further information” be accepted. Regulation 20(4), which supplements the notification and consultation requirements under Regulation 20(4) would also apply as the route of the proposed development exceeds 5km in length.

56. Regrettably, the Affected Party is driven to the conclusion that the Applicant, somewhat surprisingly, has actively misled the ExA (and Secretary of State) as to the non-existence of a “specific procedure” in paragraph 6.1 of its covering letter relating to Change Request 2 (**[AS-052])** and that "it is not necessary to undertake any additional notification or consultation processes" in paragraph 6.3 of the same letter.

57. The Affected Party has set out very clearly above that Regulation 20(1) and (2) expressly supply a specific procedure for “further information”.

58. Paragraph 137 of the *Pearce* case[1], paragraph 137, stated the same (in respect of the antecedent provision). Paragraph 137 stated: (Emphasis added)

> "137. … [*T]he Examining Authority and the Defendant had powers to obtain further information. Indeed, if the Authority had considered the application of regulation 17 of the 2009 Regulations and decided that additional material should have been included in the ES, they would have been obliged to require that information to be provided and suspend the examination in the meantime*."

59. The Affected Party, and no doubt many other parties have also been misled. That cannot be fair.

60. As the requirements of the EIA regulations have not been satisfied in relation to Change Request 2, Change Request 2 itself cannot not be allowed.

POINT 2 - Can the ExA conclude that there will be NO new likely significant effects engendered for evaluation by EIA within the certified environmental statement as a result of the further advancement of the Ashdie back within Stoneacre Copse?

61. No. It cannot. The Affected Party submits that the ExA was wrong and erred in concluding that there would be no new likely significant effects caused by the ash die back at Stoneacre Copse.
62. The Applicant asserts the following in document reference 7.9.41 : (Emphasis added)

> *"3.1.1 There is not a formal process for consultation on further environmental information within the Infrastructure Planning (Environmental Impact Assessment) Regulations 2017 (contrasting with the position provided for by Regulation 20 of the Town and Country Planning (Environmental Impact Assessment) Regulations 2017) (publicity where an environmental statement is submitted after the planning application)).*
> *3.1.2 Despite this, the consultation requirements provided for by the IP EIA Regs have been considered more generally by the Applicant to identify if any procedure contained therein should be followed in relation to the submission of the ES Addendum. In particular, the Applicant has considered the processes provided for by Regulation 16 and Regulation 20, both of which require information to be provided to the consultation bodies and the publication of notices.*
> *3.1.3 Regulation 16 relates to the acceptance of an application and therefore a new environmental statement being available for review, and Regulation 20 applies where an environmental statement is submitted but is determined not to be adequate and new updated information is required …*
> *3.1.4 The information included in ES Addendum 2 has been produced further to engagement with stakeholders. The Applicant has discussed the relevant matters contained therein with the relevant stakeholders prior to the submission of ES Addendum 2 and this is continuing to be discussed with those stakeholders following the submission of ES Addendum 2.*
> *3.1.5 Accordingly, the Applicant has taken and is continuing to take measures to ensure that relevant stakeholders are consulted and their views understood on relevant matters, so as to confirm the position on the outstanding matters for the ExA during the course of the Examination…*
> *3.1.8 It is noted in this regard that the period for consultation under Regulation 20 of the Town and Country Planning (Environmental Impact Assessment) Regulations 2017 is a period of not less than 30 days following notification of publication. The Applicant submitted ES Addendum 2 at Deadline 7 on 25 January 2021. ES Addendum 2 was published on the PINS website and*

[1] Pearce v Secretary of State for Business, Energy & Industrial Strategy & Norfolk Vanguard [2021] EWHC 326

persons notified of such publication on 28 January 2021. The Examination closes on 8 March 2021, with Deadline 8 being on 1 March 2021. There is in excess of a minimum of 30 days for persons to comment on ES Addendum 2 by Deadline 8, and therefore the timescale available for this is in excess of the analogous (albeit not applicable and expressly not provided for) provisions provided in the Town and Country Planning (Environmental Impact Assessment) Regulations 2017, which serves to support the conclusion that no procedural fairness issues arise in relation to the time available for persons to comment.
3.1.9 … it is not the case that additional 'formal' consultation processes need to be followed each time such further information is provided. This is because the examination already provides for the notification of the further information to persons interested in the Application, and serves as the basis on which they are consulted and invited to provide any representations on that information."

63. However, the accompanying evidence included as follows. See **Appendix 1** hereto.

64. In response to the letter, and its accompanying documents, and pursuant thereto, the ExA issued a (so-called) "procedural decision" on the 18th December 2020 (document reference **[PD-027]**).

65. The outcome of that decision in **[PD-027]** was that the ExA stated: (Emphasis added)

"I am writing to advise you of a Procedural Decision taken by the Examining Authority following the Applicant's confirmation of a second formal change request dated 11 December 2020 and formally received by the Examining Authority on Monday 14 December 2020 [AS-052]…
Changes 1 and 2 proposed by the Applicant comprise the addition to the Order limits of 10,122m² of woodland known as Mill Copse and 14,842m² of woodland known as Stoneacre Copse including a private access track (assigned plot numbers 1-32a and 1- 02a respectively in the Supplement to the Book of Reference [AS-053])…
In Chapter 4 of its statement, the Applicant summarises the implications of the proposed changes for the outcome of the environmental impact assessment of the Proposed Development, as presented in the Environmental Statement ([APP-116] to [APP-145]) and the Environmental Statement Addendum [REP1-139]. In brief, in the Applicant's view, the proposed changes to the Order limits do not worsen the outcome of the assessment and, from a few receptors, the predicted visual effects of the proposed Converter Station will be reduced against a new future baseline that has been set by the Applicant due to the accelerated progress of ash die-back disease in the area…
The Examining Authority's reasoning and decision
The Examining Authority recognises that in considering whether or not to accept the proposed changes for examination it needs to act reasonably and in accordance with the principles of natural justice. The Examining Authority must be satisfied that anybody affected by the proposed changes would have a fair opportunity to make their views on them known and to have their views properly taken into account…
The Applicant's submission in relation to the environmental impact assessment concludes that the proposed changes do not generate new or different likely significant effects, though, in a few instances, they are predicted to result in a slight reduction in the scale of adverse visual effects compared to the future baseline that might exist following the progression of ash die-back disease. We concur with this approach and view and are content that the environmental impact assessment's conclusions around significance of effects would remain the same…
We agree with the Applicant that the proposed changes do not materially alter the original application and that the development now being proposed remains in substance that which was originally applied for. We are therefore satisfied that the proposed changes would not amount to a different project being proposed…
The Examining Authority has nevertheless decided to accept these proposed changes to the application for examination, and we have written separately to the Applicant to advise this, and to provide a reminder of the Applicant's consequential duties under Regulations 7, 8 and 9 of the CA Regulations.
***Acceptance is made on the basis that** all the process can be completed in the required time prior to the close of the Examination and in accordance with the revised Examination*

Timetable that we will publish in due course. If this is not achieved, then we will not be in a position to take the change request into account in our recommendation report to the Secretary of State as it will not have complied with the relevant statutory procedures…
Next Steps…
It is now the Applicant's responsibility to publicise the proposed changes that incorporate additional land in accordance with the CA Regulations. We would stress that it is critical for this to start as soon as possible to allow the Examination to be completed within the statutory six-month time frame…"

66. The Affected Party submits that in relation to the contents of the ExA's (so-called) "procedural decision" on the 18th December 2020 **[PD-027]**:

a) The ExA incorrectly in fact considered that the implications of the proposed changes for the outcome of the environmental impact assessment are that the "*proposed changes do not generate new or different likely significant effects*" and in few instances would engender "reduced" adverse visual effects. In fact:

i) the Applicant's letter **[AS-052]** expressly identified a "new" "significant" effect from Year 10 in relation to a public footpath DC19/HC28 where (absent the actual woodland change) the "assessment" of the effect was previously evaluated by the Applicant as "not significant";

ii) Item 6 of Appendix 2 to the accompanying document entitled 'Request for Changes to the Order Limits' (document reference **[AS-054]**), also noted the introduction of the additional "significant effect", and that it was adverse, which in turn would require a measure (in the form of a woodland management scheme to avoid it);

iii) the evaluation by the ExA in its purported "decision" that the proposed changes would "*not generate new … likely significant effects*" remains unlawful and irrational, in the sense that it was not based on evidence of no new adverse effects;

iv) the evaluation by the ExA in its purported "decision" that the proposed changes would result in a "*reduction*" in the scale of adverse visual [likely significant] effects" remains unlawful and irrational, in the sense that it was not based on evidence of a reduction of new likely significant effects; and

v) the only need in EIA Regulation terms for measures to avoid or reduce likely significant effects derives from where such effects are judged to result.

b) The ExA's (so-called) "Procedural Decision" in its letter **[PD-027]** is simultaneously a confirmed decision but also not;

c) The (so-called) “acceptance” in the ExA's letter **[PD-027]** remains conditional upon the ability of the Applicant to actually discharge CA Regulations requirements (but not EIA Regulation requirements). This is procedurally incorrect;

d) The (so-called) “Procedural Decision” in **[PD-027]**) presents to a reader as a concluded decision, but in the face of the clear terms of paragraph 113 of the Secretary of State’s Guidance on Examination[2] that require no decision to be made in advance of having consulted upon it;

e) The ExA expressed a view on the environmental information but also expressed it on a misplaced basis;

f) The ExA (so-called) “Procedural Decision” is silent as to whether it has jurisdiction to increase the extent of the Application area above that originally applied for; and is silent on the consideration or engagement of Regulation 15(8) and (7)(b) of the EIA Regulations (which place specific obligations on the Secretary of State if it decided the environmental statement should contain "further information" as defined in Regulation 3(1) of the EIA Regulations), and the Regulation 20(3) consultation processes;

g) Indeed, page 1 of the (so-called) “Procedural Decision” is directed exclusively to the header provisions: section 89 of the PA 2008; Rule 9 of the Examination Procedure Rules; and section 123 of the PA 2008 and Regulation 6 of the CA Regulations;

h) The ExA has erred in failing to apply its mind to whether the inclusion “in the ES” of the “updating” material for the ES referred to in the Applicant’s letter of 11th December 2020 at paragraph 6.2, together with any “further information” (whether *described* as “updating”, “addendum” or otherwise) must be included “in the ES” or not. Put another way, the ExA has erred in failing to discharge its obligation under Regulation 20(2)(b) as it did not consider whether it is necessary for the Applicant's environmental statement to <u>contain</u> further information." We also refer the ExA to the section of this Statement below that considers the *Pearce* case in more detail; and

i) The ExA has erred in failing to consider whether, if the material is <u>not</u> to be included in the ES, whether the original ES submitted by the Applicant is deficient and sub-standard. That is because, in the Applicant's own words in paragraph 3.2 of its cover letter (document reference [AS-052]) , the Applicant states: (Emphasis added)

"3.2 … *the Applicant has recently surveyed the woodlands on which the future baseline relies for visual screening and has identified a number of mitigation measures which may*

[2] Department for Communities and Local Government Guidance 'Planning Act 2008: for the examination of applications for development consent', March 2015

*be put in place to address the loss of trees as a consequence of ash dieback **so that the future baseline does not change**. These measures include the Applicant actively managing these two woodlands, which are not currently within the Order limits*…"

That means that without the *inclusion* of this as a new likely significant effect in the environmental statement, the future baseline in the current environmental statement is necessarily incorrect – the future baseline is evaluated in the Charge Request 2 evidence as changed and to require measures to sustain it as not changed. See our detailed analysis of the *Pearce* case below).

67. Due to these reasons, the Affected Party concludes that the ExA was not entitled in law to conclude that there will be NO new likely significant effects caused by the ash die back at Stoneacre Copse because of the introduction of a new "likely significant effect" (in particular, upon footpath DC19/H28) whereas the certified environmental statement evaluated the situation as there being no "significant effect". The introduction of a new "likely significant effect" cannot be lawfully described as "more adverse" where before there was no likely significant effect and no measures were required to be applied to Stoneacre Copse to as to address necessarily that new "adverse" likely significant effect on that public footpath. The ExA, so far as it purported to make a decision, erred in law in considering the effect identified was "more adverse" when (it being absent previously) it cannot have been "more" than no significant effect.

68. The Affected Party has seen no written statement from the ExA giving clear and precise reasons for any consideration of, or conclusion that, the original ES needs to be updated (as is required by Regulation 20(1)(a) of the EIA Regulations).

69. The ExA has also not apparently suspended the consideration of the Application pending that logically prior (and required) written statement being published by it pursuant to Regulation 20(1)(a), and until the notification and consultation requirements under Regulation 20(3) and Regulation 20(4) have been discharged.

70. The IPEIA Regulations 2017 were in force from 16th May 2017, amended from the 1st October 2018 and amended again from the 31st December 2020. The most recent amendments expand the publicity to websites and telephone enquiries and delete Regulation 20(3)(aa). Regulation 20 otherwise remains the same (save for numbering changes). The Regulation 20 referred to is the most recent amendment. The 2017 Regulations replaced the 2009 Regulations that were considered in *Pearce* (see below). The 2009 Regulations contained, in Regulations 16 and 17(1)(c), a similar provision to Regulation 20 that included a requirement to "suspend the examination". The High Court held in *Pearce*, at paragraph 137, that Regulation 17 of the antecedent 2009 EIA Regulations was available to the ExA as a "power to obtain further information" (see below).

71. Applying Regulation 20 to the instant circumstances, the correct lawful approach required to have been taken was as follows:

a) The Application for the Interconnector is “EIA Development”, and was accompanied by an environmental statement (running to some 494 documents including **[APP-118]; [APP-130]**) and **[PD-010]** set out that from page B1 “Principle Issues”: “Adequacy of assessment of environmental effects of the alternatives that were considered in the Environmental Statement”; “Approach to EIA, including the use of the ‘Rochdale Envelope’ and the ‘design principles’, whether worst-case parameters have been used throughout the EIA, and whether all necessary parameters and mitigation measures are captured in the dDCO”; and “The impact of the Proposed Development on landscape and visual amenity”;

b) Regulation 20(3)(b) has, from, the moment of the Application being made, stated that the ExA must *suspend* consideration of the Application pending *both* provision of information “and” its being “publicised” in accordance with the obligations under (3);

c) Regulation 4(2) EIA Regulations states:

> *"… 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."*

d) Regulation 5(1) EIA Regulations defines “EIA” as a process that includes both preparation of an environmental statement “*and any consultation, publication and notification as* ***required under these Regulations*** *or, as necessary, any other enactment in respect of EIA development*”. That is, *without* the required consultation, publication and notification required under the EIA Regulations (and other regulations), there cannot be an “EIA” because the “process” entails required consultation, publication and notification;

e) Regulation 16(1) EIA Regulations applies where an application for an order for development consent for EIA development is accepted by the Secretary of State and contains, in Regulation 16(2), related notice obligations. In this Application, there was an application for EIA development comprised of an interconnector in the field of energy;

f) Regulation 3(1) contains definitions of “environmental information” and of “further information”. “Further information” is defined to mean: (Emphasis added)

> *… means additional information which, in the view of the Examining authority, the Secretary of State or the relevant authority, is directly relevant to reaching a reasoned conclusion on the significant effects of the development on the environment and which it is necessary to include in an environmental statement or updated environmental statement in order for it to satisfy the requirements of regulation 14(2);..*
>
> (“Updated environmental statement” is a defined term in Regulations 3(1) and 5(1)(a)). See paragraph 6.2 of the letter from the Applicant submitting Change Request 2 to the ExA dated 11 December 2020 (document reference [AS-052]), which stated that:
>
> "*There is no specific procedure to be followed where updated environmental information is submitted during the course of an examination provided for within the EIA Regs*.".

In fact, the correct approach was to refer to Regulation 20 and the requirement to certify;

g) Regulation 14 provides:

1) 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 —

a) a description of the proposed development comprising information on the site, design, size and other relevant features of the development;

b) a description of the likely significant effects of the proposed development on the environment;

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;

d) a description of the reasonable alternatives studied by the applicant, which are relevant to the proposed development and its specific characteristics, …

Regulation 14(2)(b) requires the environmental statement to include at least a description of the "likely significant effects" of the development. If a "likely significant effect" is not included, then the minimum required description cannot have been met;

h) Regulation 20 contains notice requirements upon the Applicant:

1) Under Regulation 20(3)(a) to provide the ExA with the further information. "Further information is a defined term". The Applicant here has provided at least "update[ing] environmental information" and an "Addendum 2" which can be said to qualify within the scope of "further information";
2) Under Regulation 20(3)(b) to publish a notice containing specified information under (i) to (iv) including that "consideration of the application by the Examining authority has been suspended until further information and any other information required for the environmental statement has been provided and publicised";
3) Under Regulation 20(3)(c)(i) – (iv), to publish the notice in a local newspaper; in a national newspaper; in the London Gazette;
4) Under Regulation 20(3)(d) display a site notice;
5) Under Regulation 20(3)(i), certified to the EXA that the Applicant has complied with (b) to (h);
6) Under Regulation 20(4), where (as here) "the proposed development consists of, or includes, works with a route or alignment exceeding 5 kilometres in length", the requirements in (4)(a) and (b) in relation to local newspapers and further site notices.

i) The consultation requirements are not exclusively confined at all, nor to "relevant" parties, nor to "stakeholders" or to "consultation bodies" but are cast in unlimited terms. Absent notice, the ExA and Secretary of State cannot be in a positon to know who may say something nor what they may say about the further information;

j) The trigger for the Regulation 20(3) consultation requirements are the terms of Regulation 20(2) and an obligation on the ExA in Regulation 20(1) that it is required to consider, evaluate and conclude:

2) This paragraph applies if —

a) the applicant has submitted a statement that the applicant refers to as an environmental statement; and

b) the Examining authority is of the view that it is necessary for the statement to contain further information.

k) Paragraph 20(1) provides:

1) Where an Examining authority is examining an application for an order granting development consent and paragraph (2) applies, the Examining authority must —

a) issue a written statement giving clearly and precisely the reasons for its conclusion;

b) send a copy of that written statement to the applicant; and

c) suspend consideration of the application until the requirements of paragraph (3) and, where appropriate, paragraph (4) are satisfied.

The engagement of the trigger ("if" and "necessary") in (1) is a question of fact and degree. See Regulation 20(2)(a) and (b). The Applicant "*has* submitted" a statement it refers to as an ES. The Applicant *has* submitted information that it itself categorises as "update[ing] environmental information" and "Addendum 2". See its Letter dated 11th December 2020, paragraph 6.2 and its new document reference 7.9.41, paragraph 3.1 "ES Addendum". There is an Examination on foot that can be, but has not yet, been "suspended".

l) On its ordinary reading, Regulation 20(2) applies throughout the Examination Period. If not, then the term "suspended" (in Regulation 20(3)(b)) would be otiose and so too would Regulations 20(1) and (2). Therefore, the Affected Party fundamentally disagrees with the assertions of the Applicant set out in paragraph 3.1 *et seq* of its new document reference 7.9.41.

m) There is no evidence in front of the ExA (nor in due course after the close of the Examination Period in front of the Secretary of State) that the Applicant has in fact certified its compliance with Regulation 20(3)(i) by providing to the Examination Library "certificate 3" in Schedule 5 of the Infrastructure (EIA) Regulations 2017;

n) The Regulation 20(2) trigger reflects that in Regulation 15(7) and (8) upon receipt of an application;

o) If the Applicant is correct in its contentions in paragraph 3.1 *et seq* of its new document reference 7.9.41, then it would result:

i) to delete Regulations 20(1), (2), and (3);

ii) to delete the definition of "further information" from Regulation 2(1); and

iii) to delete the phrase "updated environmental statement" from Regulation 5(1)(i).

The Applicant is not entitled to rewrite the EIA Regulations 2017 to make then mean what it wants them to mean. Neither is the ExA nor the Secretary of State.

72. It follows from the above that the ExA is not in law entitled to recommend a grant of development consent for the Aquind Interconnector. This is for the following reasons:
    a) Regulation 4(2) requires the Secretary of State to not grant development consent "unless an EIA has been carried out in respect of that application";
    b) "EIA" is defined by Regulation 5 to mean a "process *consisting of* – a) the preparation of an environmental statement or updated environmental statement; b) the carrying out of any consultation, publication and notification as required under these Regulations; and … " ;
    c) "environmental statement" is defined by Regulation 2(1) and so too is "further information";
    d) An environmental statement having been submitted originally with the Application, Regulation 20 provides a specific procedure for its updating with "further information" reflecting similar procedure in previous iterations of the same Regulations;
    e) The specific procedure requires there to have been an environmental statement submitted and for the ExA to consider that further information is "necessary" within the environmental statement;
    f) The prompt for the ExA to consider whether further information is necessary is not confined to the ExA exercising its own initiative but can be prompted by applications by the Applicant to it to "update" the environmental statement or to include in its "ES Addendums". That prompt has occurred at least twice during the Examination Period in respect of this Application;
    g) The Applicant's "updated environmental statement" and its "ES Addendum" remain required by the ExA to be evaluated by the ExA *itself* to choose either: i) the information must be contained within the environmental statement; or ii) the information does not fall to be included in the environmental statement. The Applicant's representations (see e.g. its 11th December 2020 letter, paragraph 6.2; document 7.9.41) evaluate the information as part of the environmental statement: "updated environmental statement" and "ES Addendum" and it considers that such information be included "within the ES". This is consistent with the defined meaning of "further information" in Regulation 3(1). Therefore, the ExA is required, in law, to form a view to choose to agree with the Applicant or to disagree with it in respect of each element of such so described "information" whether is "necessary" to be contained within the environmental statement (as the Applicant itself considers that it should be by its very descriptions of those documents). If the ExA agrees with the Applicant then the definition of "further information" is satisfied and Regulation 20(2)(b) will be then satisfied. If the ExA disagrees with the Applicant, then the ExA is required to give reasons for why it disagrees with the Applicant that satisfy the definition of "further information": "is [not] directly relevant to reaching a reasoned conclusion on the significant effects of the development on the environment and which it is [not] necessary to include in an environmental statement or updated environmental statement in order for it to satisfy the requirements of regulation 14(2)", being (for example) "at least – b) a description of the likely significant effects of the proposed development on the environment; 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; d) a description of the reasonable alternatives studied by the applicant";

h) In particular, the Applicant's "Request for Change 2" **[AP-054]** includes:

i) in Table 4.1, a direct link between ES Chapter 15 – Landscape and Visual Amenity and "Proposed Change … 2" and identifying the introduction of a new "likely significant effect" consisting of: "an increase in the significance of the effect experienced by recreational users of the public right of way to the south of the site (footpath DC19 / HC28) at year 10 (which would change from Minor to moderate (not significant) to Moderate (significant)";

ii) in Appendix 2, paragraph 1.2.2.2, that the Applicant has "s identified a number of mitigation measures which may be put in place to address the loss of trees as a consequence of ash dieback so that the future baseline does not change";

iii) in paragraph 1.1.5, "Due to the scale of ash dieback presented in this study, the extent of visual screening will lessen from that which was assumed in the LVIA. Mitigation measures to address this and therefore minimise the impact on visual screening and the conclusions of the LVIA are outlined in Section 1.4 … ensuring that the future baseline will remain unchanged." Measures are therefore, "necessary";

iv) in paragraph 1.4.1.1: "In light of the findings of the ash dieback survey of 29 September set out above, a number of measures are proposed to provide suitable mitigation and to maximise the visual screening function of Mill Copse (Woodland A) and Stoneacre Copse (Woodland F), in order to ensure the assumptions for the future baseline and LVIA conclusions contained in the Environmental Statement continue to be robust";

i) It follows from paragraph 1.4.1.1 that, without the measures, then the environmental statement assessment in relation to the effect on landscape and visual impact on DC19/HC28 will not itself be robust. This indicates that, without the *inclusion* of the "updated environmental statement" information, then the "environmental statement" will not contain "at least" a rational basis for, and an assessment of, the preservation of an absent "significant" effect whereas without the "updated environmental information" then a new "likely significant effect" upon footpath DC19/HC28 (and experienced by its public users) cannot be rationally excluded.

73. In the event that:

a) the ExA agrees with the Applicant's need for inclusion within its environmental statement of the above material, then Regulation 20(1)(c) requires immediate suspension of the Examination whilst the required publicity under Regulation is all executed and then certified by the Applicant as having been done. Since the 30 day period cannot be ensured to be accommodated during the currency of the Examination (required by section 98(1) of the PA 2008 to determine on the 8th March 2021), then the result will be that the "EIA" cannot be an "EIA" for the purposes of Regulation 5(1) for want of (b) publicity and consultation required by Regulation 20. It would follow that Regulation 4(2) bars the recommendation of a grant of development consent here because the Secretary of State would be barred from granting such consent by that Regulation.

The same logic and legal result applies to all additions to the environmental statement promulgated by the Applicant throughout the Examination Period to date;

b) the ExA disagrees with the Applicant – that none of its additional information is required to be "in the environmental statement" – then Regulation 20(2) would require the ExA to make its own evaluations and findings in respect of each of those additional information items was not "necessary". In that case, the ExA would be required to exclude each such item (and any attendant measure) from account as "environmental information" with reasons for doing so. In this respect, the Affected Party notes that the Secretary of State consented to judgment for an "arguable" lack of reasons in a High Court claim concerning the DCO for RAF Manston.

74. More recently, the High Court has quashed the Vanguard DCO a result of a failure by the ExA and Secretary of State to grapple with cumulative landscape and visual effects, and on the basis that their reasons for not doing so were unlawfully thin. See paragraph 138 of the Judgment in Pearce in **Appendix 2** hereto.

Point 3- Pearce Case

75. The Pearce case supports the foregoing Analysis. That case resulted in a quashing of the DCO on IPEIA Regulations grounds (concerning deferral of cumulative effect considerations from being within the "environmental statement" at the Examination).

76. In *Pearce v Secretary of State for Business, Energy & Industrial Strategy & Norfolk Vanguard* [2021] EWHC 326 (Admin), the High Court quashed the Vanguard DCO on the 18th February 2021 due to a breach by the defendant of the antecedent (2009) regulations to the Infrastructure EIA Regulations 2017. The developer applied, using *Rochdale* Envelope principles, for a development consent order for a Vanguard project that was examined between December 2018 and 10th June 2019 and was accompanied by an environmental statement. Before close of the examination, the developer submitted an application for development consent for a separate project called "Boreas". The environmental statement for the Vanguard project assessed the cumulative landscape and visual impacts arising from both projects and concluded that they were likely to be significant adverse environmental effects. However, when determining the Vanguard application, the secretary of state decided that the information about the Boreas project was "limited" and that it should be considered as part of the subsequent examination of the Boreas application.

77. In quashing the DCO, the High Court held, at paragraph 137, that the ExA and the Secretary of State "had powers to obtain further information" and, "if the [ExA] had considered the application of regulation 17 of the 2009 Regulations and decided that additional information should have been included in the ES, they would have been obliged to require that information to be provided and suspend the examination in the meantime". In particular: (Emphasis added)

> *127. Irrationality is not confined to decisions which simply defy comprehension, or which are beyond the range of reasonable responses to a given set of information. It also embraces*

decisions which proceed by flawed logic (R v North and East Devon Health Authority ex parte Coughlan [2001] QB 213 at [65])…
136. These considerations underscore the absence of any rational justification in the Vanguard decision letter for refusing to make any evaluation of the cumulative impact issue at that stage. The single, perfunctory reason given for deferral, the limited amount of information available on Boreas, could not, in the circumstances of this case, justify by itself leaving the issue entirely to the second examination, particularly where the information was in front of the Defendant, NVL considered it to be adequate and no one suggested the contrary.
137. … [T]he Examining Authority and the Defendant had powers to obtain further information. Indeed, if the Authority had considered the application of regulation 17 of the 2009 Regulations and decided that additional material should have been included in the ES, they would have been obliged to require that information to be provided and suspend the examination in the meantime.
138. Even putting that regulation to one side, and looking at the matter more broadly in the context of rule 17 of the 2010 Rules, the Defendant's decision was unlawful. A bare, unexplained statement that the information on Boreas was "limited", without any attention being given to an obvious solution, namely to ask for more material, or at the very least to consider the pros and cons of taking that step, could not rationally justify departing from the requirement that the significant adverse cumulative impacts at Necton should be evaluated and weighed before deciding whether to grant a DCO for the first of the two linked projects.

78. The Court summarised the legal principles: (Emphasis added)

129. The effect of the Directive, the 2009 Regulations and the case law was that, as a matter of general principle, a decision-maker could not grant a development consent without, first, being satisfied that he had sufficient information to enable him to evaluate and weigh the likely significant environmental effects of the proposal, having regard to any constraints on what an applicant could reasonably be required to provide, and secondly, making that evaluation. Those decisions were matters of judgement for the decision-maker, subject to review on Wednesbury grounds. In the instant case, the secretary of state had not disagreed with the assessment that the cumulative impacts were substantial. Accordingly, it was not a case where he could lawfully defer consideration of those impacts to a subsequent application on the basis that they were considered to be insignificant. The secretary of state had acted in breach of the 2009 Regulations by failing to evaluate the information before him on the cumulative impacts of the Vanguard and Boreas substation development, which had been assessed as likely to be significant adverse environmental effects (see paras 120, 122 of judgment).

79. Noting that: the Applicant's letter of 11th December 2020, paragraph 6.2, explained that its ES would be "updated" because, inter alia, in paragraph 6.1 the impact of Ash dieback would result in the introduction of a new "likely significant (adverse) effect" on landscape and visual environment of public footpath DC19/HC28 and described by the Applicant as "an increase in the significance of the effect experienced by recreational users of the public right of way … at year 10 (which would change from Minor to moderate (not significant) to Moderate (significant)" (that is, that the Applicant *itself* has assessed the effect on landscape and visual environment as "significant"); that letter was and has been in evidence before the ExA and Secretary of State since 11th December 2020; and that the ExA has not to date evidenced that it has itself evaluated whether or not the additional information advanced by the Applicant should or should not be included "in the ES" of the Applicant; and the consequential evaluation of whether or not the original ES is deficient in respect of landscape and visual environmental assessment; and, further, whether or not the mitigation *measure* comprised of management plans for the Stoneacre Copse be included as a measure in the ES to "ensure" (to quote the Applicant) the assessment baseline underpinning the environmental evaluation of effects remains constant and in turn the ES can be made to then be

adequate; in more detail, the Court considered including as follows: (Bold original emphasis, underlined emphasis added)

22. Under regulation 17(2), where the Examining Authority or the Secretary of State consider that the ES ought to contain further information they must, under regulation 17(1), issue a statement giving clearly and precisely the full reasons for that conclusion and suspend consideration of the application for a DCO until the applicant has provided the further information and the requirements in regulation 17(3) are satisfied. Those requirements include further consultation with the designated consultation bodies and other parties and publicity to enable representations to be made.

23. Alternatively, where the Examining Authority does not consider that additional information ought to be included in the ES, it may request an "interested party" to supply that material under rule 17 of the Infrastructure Planning (Examination Procedure) Rules 2010 (SI 2010 No. 103) ("the 2010 Rules"). By rule 2(1) an "interested party" refers to a person who is an "interested party" for the purposes of Chapter 4 of Part 6 of the PA 2008. By s. 102(1) of that Act an "interested party" includes the applicant for the DCO. Rule 17(2) requires the examining authority to consider whether an opportunity should be given to all interested parties to comment in writing on the further information received…

95. I accept the Defendant's submission that the 2009 Regulations did not require him to weigh every single piece of "environmental information" when deciding whether or not to grant development consent. But the material on cumulative impacts at Necton was not just any piece of environmental information. NVL's position was that they amounted to significant adverse environmental impacts falling within schedule 4. The Defendant did not disagree with that view. Furthermore, this information concerned an important controversial issue during the examination which had to be addressed by the Defendant through legally adequate reasoning as part of the reasons for his decision.

96. It is necessary to consider whether a decision to defer an evaluation and weighing of such impacts may in itself amount to a breach of the 2009 Regulations, in particular regulation 3(2)…

100. Article 3 requires the EIA to "identify, describe and assess in an appropriate manner in the light of each individual case, and in accordance with Articles 4 to 12, the direct and indirect effects of a project" on a number of features including "the landscape." …

*104. Th[e] distinction between the obligatory and discretionary contents of an ES has been reflected in the definition of "environmental statement" in regulation 2(1) of the 2009 Regulations (see [19] above) and the two parts of schedule 4 to those regulations (see [20] to [21] above). The judgment as to **whether** a topic falling within part 1 of schedule 4 should be addressed in an ES is a matter for the authority responsible for deciding whether development consent should be granted. The **extent** to which the ES should contain information on any of the topics listed in either part 1 or part 2 of schedule 4 is also a matter for the judgment of that same authority. The authority has the power to require additional information to be provided by the developer (Article 6(2) of the Directive and regulation 17 of the 2009 Regulations)…*

108. Although it is a matter of judgment for the decision-maker as to what are the environmental effects of a proposed project and whether they are significant, EIA legislation proceeds on the basis that he is required to evaluate and weigh those effects he considers to be significant (and any related mitigation) in the decision on whether to grant development consent (see e.g. Commission v Ireland [2011] Env. L.R. 478)...

109. The next issue is whether consideration of an environmental effect can be deferred to a subsequent consenting process. If, for example, the decision-maker has judged that a particular environmental effect is not significant, but further information and a subsequent approval is required, a decision to defer consideration and control of that matter, for example, under a condition imposed on a planning permission, would not breach EIA legislation (see R v Rochdale Metropolitan Borough Council ex parte Milne [2001] Env. L.R. 406).

110. But the real question in the present case is whether the evaluation of an environmental effect can be deferred if the decision-maker treats the effect as being
significant, or does not disagree with the "environmental information" before him that it is significant? A range, or spectrum, of situations may arise, which I will not attempt to describe exhaustively.

111. In some cases, the decision-maker may be dealing with the environmental implications of a single project. In R v Cornwall County Council ex parte Hardy [2001] Env. L.R. 473 the court held that the local planning authority had not been entitled to grant planning permission subject to a condition which deferred a requirement for surveys to be carried out to identify whether a

European species would be adversely affected by the development. The authority could only have decided that it was necessary for the surveys to be carried out and additional data obtained because they had thought that the species might be present and harmed. It was possible that that might turn out to be the case and so, in granting planning permission, the authority could not rationally have concluded that there would be no significant adverse effects in the absence of that data. Consequently, they were not entitled to defer that decision ([61] to [62]).

112. In other cases, it may be necessary to decide whether associated works form part of a single project. Once that decision is made, it may be obvious that consideration of the environmental effects of the associated works cannot be deferred…

113. In some cases where the decision-maker is dealing with a single project, the issue of whether the evaluation of significant environmental effects may be deferred has not been so straightforward. For example, a project for the laying out of a residential or business estate may evolve over a number of years in a series of phases, led by changing market demand. At the outset planning permission may be sought in outline. In such cases there is a risk that if outline planning permission is granted for a proposal lacking in detail, significant adverse environmental impacts may only be identified at the reserved matters stage when the authority is powerless to go back on the principle of the development already approved and so cannot prevent it from taking place. A decision to defer the evaluation of a significant adverse effect and any mitigation thereof to a later stage may therefore be unlawful (R v Rochdale Metropolitan Borough Council ex parte Tew [2000] Env. L.R. 1, 28-31).

114. In order to comply with the principle identified in Commission v Ireland, and illustrated by Tew and Hardy, consideration of the details of a project defined in an
outline consent may be deferred to a subsequent process of approval, provided that (1) the likely significant effects of that project are evaluated at the outset by adequate environmental information encompassing (a) the parameters within which the proposed development would be constructed and operated (a "Rochdale envelope"), and (b) the flexibility to be allowed by that consent and (2) the ambit of the consent granted is defined by those parameters (see ex parte Milne at [90] and [93] to [95]). Although in Milne the local planning authority had deferred a decision on some matters of detail, it had not deferred a decision on any matter which was likely to have a significant effect (see Sullivan J at [126]), a test upon which the Court of Appeal lay emphasis when refusing permission to appeal (C/2000/2851 on 21 December 2000 at [38]). Those matters which were likely to have such an effect had been adequately evaluated at the outline stage.

115. Sullivan J also held in ex parte Milne that EIA legislation plainly envisages that the decision-maker on an application for development consent will consider the adequacy of the environmental information, including the ES. He held that what became regulation 3(2) of the 2009 Regulations imposes an obligation on the decision-maker to have regard to a "particularly material consideration", namely the "environmental information". Accordingly, if the decision-maker considers that the information about significant environmental effects is too uncertain or is inadequate, he can either require more detail or refuse consent…

116. The principle underlying Tew, Milne and Hardy can also be seen in R (Larkfleet Limited) v South Kesteven District Council [2016] Env. L.R. 76 when dealing with significant cumulative impacts….

121. In the Vanguard ES NVL assessed the cumulative landscape and visual impacts as being "significant". Neither the Examining Authority nor the Defendant disagreed with that judgment. Accordingly, this was not a case where deferral of the consideration of those impacts to a subsequent consenting procedure could have been lawful on the basis that the decision-maker considered these impacts to be insignificant (see ex parte Milne)….

122. In the circumstances of this case, I am in no doubt that the Defendant did act in breach of the 2009 Regulations by failing to evaluate the information before him on the cumulative impacts of the Vanguard and Boreas substation development, which had been assessed by NVL as likely to be significant adverse environmental effects. The Defendant unlawfully deferred his evaluation of those effects simply because he considered the information on the development for connecting Boreas to the National Grid was "limited"… T]he Defendant could not have lawfully decided not to evaluate the cumulative impacts at Necton in the decision he took on the application for the Vanguard DCO.

SECTION C - COMPULSORY ACQUISTION REGULATIONS – ANALYSIS

80. The CA Regulations derive from section 123 of the PA 2008 and regulate the procedure where land is envisaged to be subject to compulsory acquisition powers.
81. Here, Regulation 4 must be satisfied and then a series of particular Regulations. But, Regulation 12 and 13 have not yet and cannot be satisfied here within the required minimum time limits.

82. The Affected Party does not accept that, in law, Regulation 4 engages Regulations 5 to 19 in this Change Request (nor any prior similar such Change Requests where increases in land extent was envisaged.
83. Regulation 6(2) requires the criteria of Regulation 5 to be satisfied. There is no reference in the Statement of Reasons of acquiring the land, the public interest derived from the Application project, nor in the Funding Statement 2 to the "Additional Land".
84. The Affected Party evidently qualifies as an "Additional Affected Party" and who has previously and still opposes the taking of their land against their will. See Regulations 2(1), and 9, 4(b) and 7(1).
85. In Regulation 4(b), the potential for "additional land" (assuming there is a gap inside of the Order Limit within which such additional land can fall) also requires a person with an interest in the additional land to "consent to the inclusion of the provision". The Affected Party responded to the notice and completed a 500 word limit page of the ExA website (as formal Relevant Representations) evidently not consenting to the proposed provision and noting the logically prior failure of the Applicant to explore "all reasonable alternatives". By Regulation 10, that Relevant Representation was required to be "treated as a relevant representation" if (a) it relates to the proposed provision, b) complies with the form and content for relevant representations, and was received by the deadline. It was so received. By Regulation 4 of SI 2015/462, the relevant representation included (within the 500 word limit) "an outline of the principal submissions which the [Affected Party] proposes to make in respect of the application". The Affected Party's representation (as an Additional Affected Party) was (theoretically) properly accepted as a relevant representation and they were invited to speak to CAH 3 and did so.

86. Regulation 11(1) requires the ExA to make an "initial assessment of the issues arising in connection with the proposed provision within 21 days of the deadline specified in the notice under Regulation 7(2). The Affected Party has not received any "initial assessment of the issues in connection with [Change Request 2]" to date or at all.

87. Regulation 11(2) requires the ExA to hold a meeting to discuss how the proposed provision should be examined. The Affected Party understood (in the absence of any agenda) CAH 3 to have been that meeting (see Regulation 11(3)(c)) but it now appears that the ExA did not itself understand that to be the purpose of that meeting.

88. Regulation 12(1) required the ExA after the meeting under Regulation 11 to "set the timetable for its examination of the proposed provision" for steps (a) – (e). Regulation 12(2) requires the ExA to

send the timetable for the Additional Affected Party. The Affected Party has not received to date the ExA's timetable for the examination *of the proposed provision* following receipt by the ExA of the logically prior relevant representation.

89. Regulation 13 provides for "written representations". Regulation 2(1) defines "written representations" to mean: "… the full particulars of the case which a person puts forward in respect of an application or the proposed provision and includes any supporting evidence or documents." Regulation 13 requires the Additional Affected Party to ensure that any written representation wished to be made about the proposed provision is received by the ExA "by the date specified in the timetable set under Regulation 12, or otherwise under this rule, by the [ExA]". The Affected Party has not received a set timetable and so is unable to express its opinion in the form of the required "written representations".

90. Regulation 13(4) requires that the Affected Party, as an additional affected person, "must be provided … with the opportunity to comment on any written representations, responses and further information received by it". That is, the Affected Party is entitled under the regulation to have at least "the opportunity to comment on":
    a) The Applicant's written representations (as defined) on the Additional Land;
    b) The Applicant's responses to the Additional Affected Party's written representations;
    c) Any "further information" provided by the Applicant.
91. To date of Deadline 8, the Additional Affected Party awaits the Regulation 12(1) timetable and the minimum period in which to make written representations and also be heard at a compulsory purchase hearing after receipt of the Regulation 12(1) documentation and in line with its entitlement under Regulation 12(1)(e) and 15(4) (21 days notice to the Additional Affected Party) as well as its entitlement under Regulation 13(4). However, as at Deadline 8, there do not remain 21 days of Examination Period remaining and so the CA Regulation procedure cannot be complied with.
92. It follows that Change Request 2 must be rejected in relation to its seeking to apply additional rights over the land of the Carpenters. It further follows that the Applicant is unable to secure the rights required by it to sustain its certified environmental statement baseline. In consequence, Regulation 4(2) of the IPEIA Regulations 2017 remains closed and bars a grant of development consent here.

SECTION D – EXPANSION OF ORDER LIMITS – ANALYSIS

93. On the 18th December 2020,the ExA issued a letter purporting to accept the "proposed provisions" in Change Request 2 and requiring the Applicant to adhere to Regulations 5 to 19 of the CA Regulations.

94. On the face of it, the ExA lacked, and lacks, original jurisdiction to accept such of those changes (and any prior changes) resulting in the extension of the extent of the Order Limits outside of the extent of the area of comprised in the Application as originally made. See the *Kent* case and below.

95. The Affected Party instead understands the ExA letter of 18th December 2020 to be an indication of its initial thoughts rather than it being a procedure decision. It cannot be such a decision because the ExA lacks jurisdiction to extend the Order limits.

96. Further, paragraph 113 of the Secretary of State's Planning Act 2008: Guidance on the Examination of applications of for development consent (March 2015) is clear and unambiguous in requiring that "before" (not after) making a procedural decision, the ExA "must ensure it is able to act reasonably and fairly, in accordance with the principles of natural justice [relying on the *Wheatcroft* case]".

97. If, which it failed to do, the ExA had asked everyone to whom it had written its letter to make representations on the increase in extent of the Order limits, then the Affected Party, and others, could have responded earlier. However, in the clear terms of the ExA:

> *The Examining Authority has nevertheless decided to accept these proposed changes to the application for examination…*

The Affected Party took the decision at face value and accepted it without further analysis. Until now and following the absence of any specific agenda for CAH 3.

98. The current position *appears* to be:
    a) The ExA is currently in breach of the principles of natural justice in having predetermined making a procedural decision in breach of the Secretary of State's express guidance terms, paragraph 113. That cannot be reasonable because it excluded from account the representations of the Affected Party and cannot be fair because that Party was not invited prior to the 18th December 2020 to make representations but was told a decision had been made;
    b) The ExA has no jurisdiction to extend any of the Order Limits and consequences for the Application flow from the evidence of the various Change Requests having been made to date. See section 37 of the PA 2008 and the standard of the Application, together with paragraph 113, bullet 1 of the Guidance on the Examination of Applications for Development Consent.

99. The Affected Party respectfully invites the earliest engagement of the ExA with these regrettable submissions and would appreciate its lawful guidance on next steps.

100. By section 37 of the PA 2008: (Emphasis added)

1) An order granting development consent may be made only if an application is made for it.
2) An application for an order granting development consent must be made to the Secretary of State;
3) An application for an order granting development consent must, so far as necessary to secure that the application (including accompaniments) is of a standard that the Secretary of State considers satisfactory –
a) *specify the development to which it relates,*
b) *be made in the prescribed form,*
c) *be accompanied by the consultation report, and*
d) *be accompanied by documents and information of a prescribed description.*
4) …
5) The Secretary of State may set standards for –
a) the preparation of a document required by subsection (3)(d);
b) the coverage in such a document of a matter falling to be dealt with in it;
c) all or any of the collection, sources, verification, processing and presentation of information required by subsection (3)(d).
6) The Secretary of State must publish, in such manner as the Secretary of State thinks appropriate, any guidance given under subsection (4) and any standards set under subsection (5)….

101. By section 97(1) of the PA 2008, the Secretary of State may make rules regulating the procedure to be followed in connection with the Examining authority's examination of the application.

102. By section 98:

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.

103. By section 104:

2) In deciding the application the Secretary of State must have regard to …
3) The Secretary of State must decide the application in accordance with any relevant national policy statement, except to the extent that one or more of subsections (4) to (8) applies…

104. The Infrastructure Planning (Applications: Prescribed Forms and Procedure) Regulations 2009 provides for applications for orders granting development consent. Article 5(2) requires the application to be accompanied by: h) "if the proposed order would authorise the compulsory acquisition of land o an interest in land or right over land, a statement of reasons and a statement to indicate how an order that contains the authorisation of compulsory acquisition is proposed to be funded"; i) "a land plan identifying: i) the land required for, or affected by, the proposed development; and ii) where applicable, any land over which it is proposed to exercise powers of compulsory acquisition or any right to use land". Article 9(4) requires at least 30 days notice be given for representations to be made in the case of EIA development after the date of the notice required by Article 9(1).

105. The Infrastructure Planning (Interested Parties and Miscellaneous Prescribed Provisions) Regulations 2015 provide, under Article 4(1) for "Relevant Representations" to be on a registration

form and include “an outline of the principal submissions which the person proposes to make in respect of the application”.

106. The Planning Act 2008 regime provides for changes to be made to development consent orders. The Infrastructure Planning (Changes to, and Revocation of, Development Consent Order) Regulations 2011 provides for changes to DCOs that have *already* been made.

107. By section 123(4) of the PA 2008: (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 one of the conditions in subsections (2) to (4) is met.*
> *2) The condition is that the application for the order included a request for compulsory acquisition of the land to be authorised.*
> *3) The condition is that all persons with an interest in the land consent to the inclusion of the provision.*
> *4) The condition is that the prescribed procedure has been followed in relation to the land.*

108. The original Application for a development consent order included provision under draft Part V for the authorisation of the compulsory purchase of land. See the Application dDCO and the Land Plans showing the extent of land applied to be subject to such compulsory purchase powers. Therefore, sections 123(1) and (2) were then satisfied.

109. The Affected Party does not consent to the inclusion of their land within the Application dDCO nor to the recent proposal for an increased extent of their land to be subject to rights of landscaping and related access. That additional land is the last resting place of their father (by his ashes).

110. Therefore, section 123(4) requires to be satisfied and the “prescribed procedure” to be followed “in relation to the land other which Change Request 2, Part 2, is sought now to relate.

111. The Infrastructure Planning (Compulsory Acquisition) Regulations 2010 provide for changes to the extent of land that may be affected by compulsory acquisition. Regulation 2(1) defines an “additional affected person” as a person who is notified in accordance with Regulation 9(a) as having an interest in land; and “additional land” means “land which it is proposed shall be subject to compulsory acquisition and which was not identified in the book of reference submitted with the application as land”. “Land” is defined by reference to section 159 of the PA 2008. “Registration form” is defined by reference to the Infrastructure Planning (Interested Party) Regulations 2010. “Written representations” is defined to mean “the full particulars of the case which a person puts forward in respect of an application or the proposed provision and includes any supporting evidence or documents”.

112. Regulation 4 applies a procedure for the purposes of the condition in section 123(4) of the PA 2008 and engages Regulations 5 to 19 “where (a) it is proposed to include in a [dDCO] a provision authorising the compulsory acquisition of additional land; and b) a person with an interest in the additional land does not consent to the inclusion of the provision.

113. Regulation 5 requires Aquind Limited to have done certain things in relation to the “proposed provision”. “Proposed provision” is a defined term under Regulation 2(1).

114. The things required to be done are prescribed in Regulation 5(b)(i) and (ii): (Emphasis added)

(i) a land plan identifying the land required as additional land, or affected by the proposed provision; and

(ii) a statement of reasons as to why the additional land is required and a statement to indicate how an order that contains the authorisation of the compulsory acquisition of the additional land is proposed to be funded.

115. Regulation 6 requires the Secretary of State to "decide whether or not to accept the proposed provision as part of the application" by the end of 28 days beginning with the day after it "receives details of the proposed provision". However, the regulation further states that he "may only accept a proposed provision if [he] is satisfied that it complies with the requirements of regulation 5".

116. The Secretary of State has published "Planning Act 2008: Guidance for the examination of applications for development consent (March 2015)". Paragraphs 28-31 include guidance concerning "Affected Parties" and cross-refer to his Guidance on compulsory acquisition for the purposes of that Act. Paragraph 35 explains that "it is for the [ExA] to decide how the application is to be examined, in compliance with the Procedure Rules". Paragraphs 71-77, in particular 71 and 73, provide for Written Representations and the detailed case and reasons why they "support or oppose" the application. Paragraphs 109-115 provide guidance on "Changing an application post-acceptance". Paragraph 109 includes that there may be occasions where "previously unknown factors arising" result in a proposal for a "material change".

117. Here, Mr Brice has described in his evidence to CAH 3 that Aquind Limited considered, but then refused (when asked by the Affected Party as to the scope of envisaged land take and in light of their father's ashes resting in that place) to seek to acquire the land known as "Stoneacre Copse" and, in particular, because Aquind Limited did not want to bear any management costs for that small wood. It was known to it at that time, or ought to have been known to it, that the wood was subject to Ash Die Back disease .

118. Paragraph 110 explains that it remains the Applicant's choice as to how to proceed. Paragraph 112 explains that, before proposing a change, applicants should consider carefully the impact that it will have on non-planning permits.

119. Paragraphs 113-115 provides guidance on how the Secretary of State expects the ExA to consider whether or not to accept a "proposed material change to the application and before making a procedural decision about how best to examine it". See paragraph 113. This requires the ExA to "need to ensure it is able to act reasonably and fairly, in accordance with the principles of natural justice[9] and in doing so, there will be a number of factors to consider such as:

- *Whether the application (as changed) is still of a sufficient standard for examination;*
- *Whether sufficient consultation on the changed application can be undertaken to allow for the examination to be completed within the statutory timetable of 6 months; and*
- *Whether any other procedural requirements can still be met.*

120. Paragraph 114 continues:

It is expected that applicants will discuss the implications of any changes they wish to make with relevant statutory consultees and notify the Examining Authority at the earliest opportunity. This should allow the Examining Authority to accommodate any appropriate consultation on the change within the six month examination period.

121. Paragraph 115 concludes:

> *If an applicant seeks to introduce a material change during the final stages of the examination period, it is unlikely to be accepted on the basis that the application cannot be examined within the statutory timetable without breaching the principles of fairness and reasonableness.*

122. The Affected Party notes footnote 9 refers alone to the *Wheatcroft* case (1982) 43 P&CR 233 (not to *Kent* nor to another case) and states: (Emphasis added)

> *See Bernard Wheatcroft Ltd V Secretary of State for the Environment (1982) 43 p & CR 233 where it was held that anyone affected by amended proposals should be provided with a fair opportunity to have their views on these amendments heard and properly taken into account.*

123. The Affected Party attaches that case herein at **Appendix 3** for convenience. Importantly, the Secretary of State has drawn his own guidance by reference to case law that concerned a reduction in the scope of the development envisaged and not an increase in its extent. In summary, planning permission can be granted for a development smaller than that applied for where the development *is not different in substance from that for which permission is applied for*. BW applied to the local planning authority for planning permission for a housing development of 420 dwellings on 35 acres. They were refused permission, and an inquiry was held. Before the inquiry, BW indicated an alternative proposal for 250 dwellings on 25 acres, this alternative to be considered only if the issue of the scale of the development was deemed to be critical to the determination of the appeal.

124. In summary, the Court held that there was no principle of law that prevented the imposition of conditions that would have the effect of reducing the permitted development below that for which permission had been applied for except where the application was severable. The true test was whether the effect of the conditional planning permission would be to allow development that was in substance not that for which permission had been applied for, and accordingly the Secretary of State's decision must be quashed. The development would be different in substance if it is so changed that to grant it would be to deprive those who should have been consulted on the development the opportunity of consultation.

125. The Court held:

> *The true test is, I feel sure, that accepted by both counsel: is the effect of the conditional planning permission to allow development that is in substance not that which was applied for? Of course, in deciding whether or not there is a substantial difference the local planning authority or the Secretary of State will be exercising a judgment, and a judgment with which the courts will not ordinarily interfere unless it is manifestly unreasonably exercised. The main, but not the only, criterion on which that judgment should be exercised is whether the development is so changed that to grant it would be to deprive those who should have been consulted on the changed development of the opportunity of such consultation..*

126. In *Kent County Council v Secretary of State for the Environment* (1977) 33 P&CR 70, the High Court held that the scope of jurisdiction of the Secretary of State was confined to the scope of the original application and that, “as a matter of common sense”, he was entitled to grant “as much of the development for which permission had been applied for”: (Emphasis added)

In my judgment the correct approach to this matter is to ascertain the powers under section 29 of the Act by reference to the purposes of Part III , in which it appears. It seems to me that everything in Part III flows from and is consequential on the provision in section 23 that planning permission is required for the carrying out of any development of land …It further seems to me that, as a matter of common sense, the determining authority can grant as much of the development applied for as they think should be permitted.

127. The Affected Party attaches that case herein at **Appendix 4** for convenience. It was applied in *Johnson v Secretary of State for Communities and Local Government* [2007] EWHC 1839 (Admin) where Ouseley J. held that the extent of development applied for was a matter of the scope of jurisdiction for what was sought and that an application could be sub-divided into smaller parts by "severability" if it could be severed.

128. Further, the Secretary of State's Planning Inspectorate has drafted Guidance in Advice Note 16 that concerns "How to Request a change which may be material (March 2018)". It directs the reader to the Secretary of State's Guidance "paragraphs 109 to 115" after having set out in paragraph 2.1 "what constitutes a material change". Of the two categories of "material" change, the second relates to "development now being proposed that is not in substance that which was originally applied for" qualifying as "a different project for which a new application would be required". That phraseology also reflects the *Wheatcroft* language. Paragraph 2.1 also notes that, "Similarly", evaluation of whether a change request involves an extension of the Order land (as opposed to an extension of the Order limits) particularly where this would require additional acquisition powers, may result in a different project than that applied for.

129. Here, no *new* acquisition powers would be sought but additional land *outside* of the extent of that in the original Application (when first made) would be sought and it is envisaged that the dDCO Part V acquisition powers already in the dDCO would be *extended over* that additional land.

130. The fundamental difficulty faced by Aquind Limited, is, as in *Kent*, that it is a matter of "common sense" that the scope of jurisdiction to grant development consent flows from the original application for development consent and, as in *Kent*, it cannot be made wider ("as much of . It can only be reduced:

"the determining authority can grant as much of the development applied for as they think should be permitted".

131. Because in this Application, there is in fact no available area between the edge of the application Order limit and the edge of the Order land envisaged to be subject to acquisition powers, there can be in fact no room for "additional land". All candidate land is taken up already. There can be no "additional land" in this Application, whether in this Change 2 Request or in any earlier Change Request seeking an extension of the area of the Order limits wider than the original Application area.

132. Because the trigger ("where") in Regulation 4 of 2010/104 goes to jurisdiction ("can"), the *subsequent* procedures of 2010/104 after consideration of Regulation 4 cannot be relevant in law nor apply here after the facts reveal that there has been, and is, no actual area of "additional land"

inside of the Application Order Limits area (as originally made) that can qualify in fact as “Additional Land” under Regulation 4 to which that Regulation can apply.

133. There is no jurisdiction under the PA 2008 nor any regulation to *increase* the Order Limit area of the Application as made to the Secretary of State.

134. In further particular, the Affected Party notes that:

a) the Secretary of State has drawn his Examination Guidance, paragraphs 113-115, on the basis of the “principles of natural justice” derived from the case of *Wheatcroft* that exclusively concerned a reduction in the extent of land envisaged to be development;

b) the phraseology of the Secretary of State in paragraph 113, bullet one (the reference to “sufficient standard” reflects the terms of section 37(1) of the PA 2008 – that is, the original jurisdiction as determined by the original Application first made) reflects the *Kent* “common sense” position that everything flows from the original application and bullet 2 (fairness reflecting the 6 month period that starts at the outset) because, for example, only;

c) the Secretary of State’s guidance contemplates only a change by way of a reduction in the extent of an application’s extent and applies the “principles of natural justice” exclusively by way of a reduction and not by way of an increase in the extent of the Order land over and above that originally applied for;

d) as a matter of common sense, the Secretary of State is entitled to grant development consent “for as much as the development” *applied* for in its original Land plans, but no more. See *Kent*;

e) no regulations provide for an increase in the extent of land over and above that originally applied to be subject to the dDCO when an application is made to the Secretary of State;

f) Regulations provide for changes to DCOs after they have been made and granted;

g) Regulations provide for changes to the extent – not of the application land area but – of the land envisaged to be also made subject to compulsory acquisition powers;

h) The original application land in (g) assumes that the acquisition powers may cover an extent of land that can be no grated than the original application land. If the original application land results in there being no further area within that original application area for any further land to be subject to acquisition powers, then Regulation 4 of the CA Regulations (which includes the term “where”) cannot be satisfied so as to itself engage Regulations 5 to 19;

i) “where” the original application area includes a lesser area of land envisaged to be subject to acquisition powers, then, and only then, can Regulation 4 be satisfied (“where”) by the potential inclusion of farther land (“additional land”) up to the extent of the logically prior original application land area of the application for a DCO;

j) The same logic applies to any other changes previously made by Aquind Limited to its Application whereby it purports to extend the area of the Application land outside of the geographical extent of the area that it originally applied for.

135. The Affected Party, therefore, submits that it is clear in law that:

a) Regulation 6 of 2010/104 (28 day time limit) cannot apply here because, having evaluated ("where") under Regulation 4 whether there can be any extent of land inside of the extent for which the original Application was made, there can be none outside of that extent because there is a match between the coverage of Part V of the dDCO and the Order limits. Consequently, no farther regulations (i.e. 5 to 19) can apply to the facts here nor fall to be required to be adhered to;

b) In circumstances where as here there is an existing match between the original area of land sought in the Application and the extent of land over which acquisition powers are sought, there can be no actual room for any "additional land";

c) The ExA and the Secretary of State has no jurisdiction in this Application to consider a "proposed provision" for "Additional Land" because there is no theoretical area of "additional land" for acquisition powers within the extent of the area applied for in the original Application to be applied to. There is only land outside of the original Application area. As in *Kent*, the scope of the power to grant a DCO in relation to land is defined and confined by the scope of the original application and everything flows from that. As a matter of common sense, the Secretary of State can grant as much of that development as was applied for as he considers appropriate, but no more.

136. It follows that, the Regulation 6 obligation to determine whether to accept a proposed provision is not relevant because it is not engaged here at all, there being no potential "additional land" that can lawfully qualify within Regulation 4 of 2010/104.

APPENDIX 1 - Change Request 2 Extracts, Gap in the Applicant's environmental statement

137. In this matter, the Applicant provided an ES. The ES included Chapter 15, Landscape and Visual Assessment. On the 11th December 2020, the Applicant provided to the ExA on behalf of the Secretary of State document **[AS-054]**, a "Request for Changes to the Order Limits".

138. Table 2.1 of **[AS-054]** included reference to land of the Affected Party known as Stoneacre Copse. See page 2-8: (Emphasis added)

Stoneacre Copse is proposed to be included within the Order limits to enable the Applicant to obtain the right to plant and manage trees in order to mitigate the impact of ash dieback disease on the visual screening of the converter station in future. …
Ash dieback threatens the effectiveness of this woodland to provide visual screening.
The Applicant is attempting to secure the rights required via voluntary agreement but cannot confirm this will be possible. By including this woodland within the Order limits, the Applicant can secure the necessary rights to plant and manage it such that it continues to act as a visual screen despite the effects of ash dieback.

139. Reasons for the Changes, Expansion of the Order Limits, includes:

1.2.2.1 Both expansions to the Order Limits are proposed in order to address the impact of ash-die back and the consequential effect on the landscape and visual impacts of the convertor station …
1.2.2.2 In response to concerns … the Applicant has surveyed the woods [including Stoneacre Copse] on which the future baseline relies for visual screening and has identified a number of mitigation measures which may be put in place to address the loss of trees as a consequence of ash die back so that the future baseline does not change …
1.2.2.3 In addition to the adoption of active woodland management practices and additional planning within the current Order limits, the Ash Dieback Survey Findings recommend the Applicant actively manages two woodlands not currently within the Order limits:
- *Proposed Change 1: …*
- *Proposed Change 2: Stoneacre Copse … and assigned plot number 1-02a in the Updated Land Plans and Supplemental to the Book of Reference …*

1.2.2.4 … [l]n order to ensure that these rights are secured and do not pose an impediment to delivery of the proposed development, the Applicant wishes to acquire the "New Landscaping Rights" (as defined in the Book of Reference) over these plots through the Order powers.…

140. Table 4.1 said this:

The following documents have been reviewed in the context of the Order: Ÿ Chapter 15 (Landscape and Visual Amenity) of the ES (APP-130); Ÿ Appendix 15.8 Assessment of Landscape and Visual Effects (APP-406); Ÿ Updated Outline Landscape and Biodiversity Strategy (OLBS) (REP1-034 and 035); Ÿ Indicative landscape mitigation plans Figure 15.48 and 15.49 (REP1-036 and 037 respectively) Option B(i); and Ÿ Indicative landscape mitigation plans for Option B(ii) (REP5-032). The assessment set out in this Table also takes into account the principles of ash dieback management which will be committed to in updated versions of the documents to be submitted at Deadline 6 as set out in Chapter 3…
A review of the Proposed Changes to the Order limits in relation to Chapter 15 (Landscape and Visual Amenity) of the ES (APP-130) has been undertaken and is set out below and (in relation to Proposed Changes 1 and 2) in Appendix 2.
Proposed Changes 1 and 2
The future baseline will change as a consequence of the identified ash dieback. The two woodland blocks included in the extended Order limits are areas that help screen the converter station. Losses to woodland as a result of ash dieback would erode the future baseline considered in the ES as the disease will cause the deterioration and loss of trees that provide a screening function. The proposed extension of the Order limits to include these woodlands would allow: Ÿ Areas of additional screening planting (suitable non-ash native species) to be planted; and Ÿ Management of the decline of ash trees and replacement planting within the woodland blocks…

Conclusion

In summary, the increased rate of ash dieback confirmed by the Ash Dieback Survey Findings means that the visual effect as assessed in the ES would change from non-significant to significant, in respect of recreational users of footpath DC19 / HC28 to the south of the converter station site. The adverse visual effect here at year 10 only would change from Minor to moderate (not significant) to Moderate (significant).

In summary, provided Proposed Changes 1 and 2 are allowed by the ExA, the increased rate of ash dieback confirmed by the Ash Dieback Survey Findings would lead to one change in the visual effect as assessed in the ES: would change from non-significant to significant, in respect of recreational users of footpath DC19 / HC28 to the south of the converter station site. The adverse visual effect here at year 10 only would change from Minor to moderate (not significant) to Moderate (significant). Elsewhere, again ***provided*** *that Proposed Changes 1 and 2 are accepted by the ExA* ***and*** *those woods are managed in accordance with the OBLS, there would be only small differences in the magnitude of change from that predicted in the ES, none of which would lead to a change in significance of effect from that set out in the ES.*

141. Section 5.4.2 was entitled: "Would the change generate new or different likely significant environmental effects?" (Emphasis added)

5.4.2.2 The impact of ash dieback (as identified in the Ash Dieback Survey Findings at Appendix 3) will have one effect which is more adverse than identified in the original ES, but only in relation to one receptor. In the short term the effectiveness of screening would be reduced as a consequence of ash dieback progression and the resultant loss of leaves from the diseased trees. This will continue until such time as the new planting becomes established. However, as set out in Appendix 2, there will be no increase in the level of significance as set out in the ES for relevant recreational and residential receptors, save for an increase in the significance of the effect experienced by recreational users of the public right of way to the south of the site (footpath DC19 / HC28) at year 10 (which would change from Minor to moderate (not significant) to Moderate (significant)…

5.4.2.4 The woodland management arrangements that the Applicant proposes to put in place would achieve beneficial effects for landscape character through the maintenance of existing woodland blocks that would otherwise be likely to degrade. They would also achieve beneficial effects on ecological resources at both woods, of which Stoneacre Copse is ancient woodland. However, neither the landscape character or ecological beneficial effects of management would be significant and would not change the conclusions of the ES…

5.4.2.5 Accordingly, the changes to the Order limits and rights sought do not generate new or different likely significant environmental effects, they simply avoid the occurrence of worse landscape and visual effects than those set out in the original ES (due to ash dieback changing the future baseline from that set out in the original ES). It is considered that this supports the position put forward by the Applicant that from a perspective of the assessment of environmental effects, the Proposed Changes are not material.

142. Appendix 3 (6th November 2020) includes a plan of the extent of Ash Dieback within Stoneacre Copse that shows (by percentage reduction) the "remaining leaf cover" and says this:

A proportion of the canopy cover forming part of Stoneacre Copse and which serves a visual screening function is expected to be lost as a consequence of ash dieback. From this PRoW (DC19/HC28) the magnitude of impact would be greater than that predicted in the 2019 ES until such time as the planting to the south of Stoneacre Copse and hedgerow tree planting edging the southern side of the Access Road has become well established. During construction and at year 0 this increase would not be sufficient to alter the significance of effect, but it would delay the point at which existing vegetation and the maturing mitigation planting would combine to reduce the effect to non-significant, as was predicted in the 2019 ES. This is reflected in the comparison table below where, due to the effect of ash dieback (even taking into account the Proposed Changes and mitigation measures put forward in this Change Request), the effect at year 10 has increased from Minor to Moderate, to Moderate[3] . However, by year 20 the combination of existing vegetation and mitigation planting would provide screening to the level predicted in the ES.

ES LVIA 2019	Change to ES 2019
Construction: Minor to moderate (significant)	No change
Year 0: Moderate (significant)	No change
Year 10: Minor to Moderate (significant)	Year 10: Moderate (significant)
Year 20: Minor to negligible (not significant)	No change

[Footnote 3. Note that this change in the magnitude of effect is not caused by the Proposed Changes, but caused by the ash dieback despite the Proposed Changes which would mitigate the effects of this disease].

143. Appendix 3 further includes:

1.3.7 Woodland F – Stoneacre Copse – Ancient Woodland

1.3.7.1 This woodland is outside the Order limits. Without management, losing ash in this woodland would have a significant impact on visual amenity as assessed in the LVIA.

1.3.7.2 *It provides important visual screening from residential properties off Broadway Lane and Broadway Lane (south) as well as recreational receptors to the east, south east and south. The woodland serves a secondary function in providing a layering of woodland partially screening views from more elevated positions and screening the existing Lovedean substation:*

- *This ancient woodland demonstrates many of the features to be expected within such a feature. Ancient coppice of ash in some areas are indicative of former management as are the long-established hazel coppice stools found throughout the wood. Although the woodland has received little or no proactive management in recent decades, dilapidated pens were found throughout the wood and are clear indications that the wood has in the past been worked as part of a pheasant shoot. Notwithstanding ash dieback disease the woodland is in good condition but would benefit from more proactive management;*
- *The woodland consists of approximately 80% ash in the southern half with oak taking dominance in the northern end up to the access track where the population of ash is approximately 40%;*
- *Of the ash present 25-50% of leaf cover remains;*
- *The proportion of canopy cover affected and the consequences as a result of ash dieback is 70% canopy over the whole woodland;*
- *The woodland supports some ancient coppice stools and very old crab apple species and may have been managed as coppice for a number of decades; and*
- *Ash dieback is present within this woodland and the infection rate varies from 50% remaining leaf cover to full leaf cover. The disease is likely to spread and cause the loss of mature trees over the next six to eight years…*

1.4 MITIGATION / MANAGEMENT MEASURES TO ADDRESS ASH DIEBACK IN ORDER TO MAINTAIN LVIA FUTURE BASELINE

1.4.1.1 In light of the findings of the ash dieback survey of 29 September set out above, a number of measures are proposed to provide suitable mitigation and to maximise the visual screening function of Mill Copse (Woodland A) and Stoneacre Copse (Woodland F), in order to ensure the assumptions for the future baseline and LVIA conclusions contained in the Environmental Statement continue to be robust…

1.4.1.4 Woodland management measures proposed in respect of Mill Copse (Woodland A), Stoneacre Copse (Woodland F) and Woodland B are, in broad terms: Ÿ Planting outside of the woodland to provide additional screening value; Ÿ Including a programme of natural regeneration of specific areas of woodland; Ÿ Selective felling of the affected ash trees and planting of new trees; and Ÿ Managing the affected ash and planting to minimise the porosity of screening.

APPENDIX 2 – *PEARCE* CASE

Neutral Citation Number: [2021] EWHC 326 (Admin)

Case No: CO/2836/2020

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 18/02/2021

Before :

THE HON. MR JUSTICE HOLGATE

- -

Between :

Claimant

Defendant

Interested Party

RAYMOND STEPHEN PEARCE
-and -
SECRETARY OF STATE FOR BUSINESS ENERGY AND INDUSTRIAL STRATEGY
-and-
NORFOLK VANGUARD LIMITED

- -
- -

Ned Westaway and Michael Brett (instructed by **Thrings LLP**) for the **Claimant**
Richard Moules (instructed by **Government Legal Department**) for the **Defendant**
Hereward Phillpot QC (instructed by **Womble Bond Dickinson (UK) LLP)** for the **Interested Party**

Hearing dates: 19 and 20 January 2021

- -

Approved Judgment

Mr Justice Holgate

Introduction

1. The Claimant, Mr Raymond Pearce, makes this application for judicial review under s.118 of the Planning Act 2008 ("PA 2008") to challenge the decision of the Defendant, the Secretary of State for Business, Energy and Industrial Strategy, on 1 July 2020 to make the North Vanguard Offshore Wind Farm Order (SI 2020 No. 706) ("the Order"). The Order grants development consent to the Interested Party, Norfolk Vanguard Limited ("NVL") for what is said to be one of the largest offshore wind projects in the world. This development ("Vanguard") is closely related to a second wind farm project Norfolk Boreas ("Boreas"), lying immediately to the north-east of the offshore Vanguard array. Together they would have an export capacity of 3.6 GW.

2. On 8 June 2018 NVL submitted its application for a development consent order ("DCO") under s.37 of PA 2008 in respect of Vanguard. The examination of that application began on 10 December 2018 and ended on 10 June 2019. The Examining Authority submitted its report to the Defendant ("ExAR") on 19 September 2019. The application for development consent in respect of Boreas was made on 11 June 2019. The examination of that second application began on 12 November 2019 and closed on 12 October 2020. The court was informed that a decision by the Defendant on the Boreas application is anticipated to be made in April 2021.

3. NVL proposed that the onshore infrastructure of the two projects be co-located. This involved a cable route carrying high voltage direct current for 60 km from the landfall at Happisburgh to a substation site near the village of Necton. There the power would be converted to alternating current and fed into the National Grid.

4. The Environmental Statement ("ES") prepared by NVL for Vanguard assessed cumulative impacts arising from both projects, including landscape and visual impacts from the infrastructure proposed at Necton.

5. The development proposed at Necton for both the Vanguard and Boreas projects has attracted substantial objections, including objections from the Claimant who lives near the planned cable route. They concern both the impacts of the Necton infrastructure for Vanguard in isolation and also the cumulative impacts which would occur if infrastructure for Boreas were to be added at Necton.

6. In their assessment of landscape and visual impacts for the Vanguard application, both the Examining Authority and the Defendant decided that consideration of cumulative impacts from Vanguard and Boreas should be deferred to any subsequent examination of the Boreas proposal.

7. This challenge raises three issues: -

   (1) Whether the Defendant was obliged to take the cumulative impacts at Necton into account when determining the Vanguard application and acted unlawfully by deferring consideration of that subject to any examination of an application for a DCO in respect of the Boreas project;

(2) Whether the reasons given by the Defendant for not taking those cumulative impacts into account when determining the Vanguard application were legally inadequate;

(3) In the event of the court deciding that the Defendant erred in law in either of those two respects, whether it should refuse to grant relief in the exercise of its discretion.

8. The remainder of this judgment is set out under the following headings:

The Statutory Framework

Planning Act 2008

9. The framework laid down by the PA 2008 has been summarised in a number of cases, for example, *R (Friends of the Earth Limited) v Heathrow Airport Limited* [2020] UKSC 52 at [19] to [38]; *R (ClientEarth) v Secretary of State for Business, Energy and Industrial Strategy* [2021] EWCA Civ 43 at [6] to [8] and [104] to [105] and *R (Spurrier) v Secretary of State for Transport* [2020] PTSR 240 at [21] to [39] and [98] to [109]. There is no need for that analysis to be repeated here.

10. In so far as is material, s.104 of the PA 2008 provides:

> "(1) This section applies in relation to an application for an order granting development consent if a national policy statement has effect in relation to development of the description to which the application relates.
> (2) In deciding the application, the Secretary of State must have regard to –
>
> (a) any national policy statement which has effect in relation to development of description to which the application relates (a "relevant national policy statement"),
>
> (aa) ….. ,
>
> (b) any local impact report (within the meaning given by section 60(3)) submitted to the Secretary of State before the deadline specified in a notice under section 60(2),
>
> (c) any matters prescribed in relation to development of the description to which the application relates, and
>
> (d) any other matters which the Secretary of State thinks are both important and relevant to the Secretary of State's decision.
>
> (3) The Secretary of State must decide the application in accordance with any relevant national policy statement, except to the extent that one or more of subsections (4) to (8) applies.

> (4) This subsection applies if the Secretary of State is satisfied that deciding the application in accordance with any relevant national policy statement would lead to the United Kingdom being in breach of any of its international obligations.
>
> (5) This subsection applies if the Secretary of State is satisfied that deciding the application in accordance with any relevant national policy statement would lead to the Secretary of State being in breach of any duty imposed on the Secretary of State by or under any enactment.
>
> (6) This subsection applies if the Secretary of State is satisfied that deciding the application in accordance with any relevant national policy statement would be unlawful by virtue of any enactment.
>
> (7) This subsection applies if the Secretary of State is satisfied that the adverse impact of the proposed development would outweigh its benefits.
>
> (8) This subsection applies if the Secretary of State is satisfied that any condition prescribed for deciding an application otherwise than in accordance with a national policy statement is met.
>
> (9) For the avoidance of doubt, the fact that any relevant national policy statement identifies a location as suitable (or potentially suitable) for a particular description of development does not prevent one or more of subsections (4) to (8) from applying."

11. Section 104(2)(d), allows the Secretary of State to exercise a judgment on whether he should take into account any matters which are relevant, but not mandatory, material considerations. This reflects the well-established line of authority which includes *CREEDNZ v Governor General* [1981] NZLR 172, 183; *In Re Findlay* [1985] AC 318, 333-334; *Oxton Farm v Harrogate Borough Council* [2020] EWCA Civ 805 at [8]; and *Friends of the Earth* [2020] UKSC 52 at [116] to [120].

12. When determining an application for development consent, section 114 requires the Secretary of State either to make a DCO or to refuse such consent. Section 116 requires the Secretary of State to prepare and publish a statement of the reasons for his decision.

13. Section 115 enables a DCO to be granted not only for development of the defined categories of nationally significant infrastructure projects ("NSIPs") requiring development consent (Part 3 and s.31 of PA 2008), but also for "associated development" as defined in s.115(2) to (4).

14. A decision to grant a DCO is liable to be challenged by way of judicial review under s.118(1) of PA 2008. The general principles upon which a legal challenge may be

brought were summarised by the High Court in *ClientEarth* at [2020] PTSR [98] to [100].

Environmental Impact Assessment

15. The relevant legislation on environmental impact assessment ("EIA") for the determination of the Vanguard application was Directive 2011/92/EU, which, in relation to DCO procedures, was transposed by the Infrastructure Planning (Environmental Impact Assessment) Regulations 2009 (SI 2009 No. 2263) as amended ("the 2009 Regulations"). The 2011 Directive was amended by Directive 2014/52/EU, but the latter does not apply to a project for which a screening opinion was sought before 16 May 2017 (article 3(2) of the 2014 Directive). The 2014 Directive was transposed by the Infrastructure Planning (Environmental Impact Assessment) Regulations 2017 (SI 2017 No. 572) ("the 2017 Regulations"), regulation 37(2) of which gave effect to the transitional provisions of the 2014 Directive. In the present case NVL sought a scoping opinion on 3 October 2016 and so it is common ground that the 2009 Regulations governed the EIA process in this case.

16. Paragraph 1.5.4 of the ExAR records that NVL decided voluntarily to prepare the ES in accordance with the 2017 Regulations and the statement submitted was examined in accordance with those regulations. The Defendant's decision letter appears to have proceeded on that basis (see e.g. DL 14.1). Nevertheless, no authority has been cited to show that the subsequent regulations can be treated as applying on a consensual basis for the purposes of determining a judicial review under s. 118. This judgment therefore refers to the 2009 Regulations. Fortunately, it is common ground that there are no relevant differences between the 2009 and 2017 Regulations affecting the merits of the grounds of challenge.

17. Regulation 3(2) provides: -

> "Where this regulation applies, the Secretary of State or relevant authority (as the case maybe) 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 it has first taken the environmental information into consideration, and it must state in its decision that it has done so."

18. "Environmental information" is defined in regulation 2(1) as follows: -

> *"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,"

"Environmental information" therefore covers all information which is obtained through the overall EIA process, which includes the ES and representations in response to the statutory publicity and consultation procedures.

19. "Environmental statement" is defined in regulation 2(1) as follows: -

> *"environmental statement"* means a statement—
>
> (a) that includes such of the information referred to in Part 1 of Schedule 4 as is reasonably required to assess the environmental effects of the development and of any associated development and which the applicant can, having regard in particular to current knowledge and methods of assessment, reasonably be required to compile; but
>
> (b) that includes at least the information referred to in Part 2 of Schedule 4."

20. Schedule 4 defines information for inclusion in the ES. Part 1 includes the following: -

> "17. Description of the development, including in particular—
>
> (a) a description of the physical characteristics of the whole development and the land-use requirements during the construction and operational phases;
>
> (b) a description of the main characteristics of the production processes, for instance, nature and quantity of the materials used;
>
> (c) an estimate, by type and quantity, of expected residues and emissions (water, air and soil pollution, noise, vibration, light, heat, radiation, etc) resulting from the operation of the proposed development.
>
> 18. An outline of the main alternatives studied by the applicant and an indication of the main reasons for the applicant's choice, taking into account the environmental effects.
>
> 19. A description of the aspects of the environment likely to be significantly affected by the development, including, in particular, population, fauna, flora, soil, water, air, climatic factors, material assets, including the architectural and archaeological heritage, landscape and the inter-relationship between the above factors.
>
> 20. A description of the likely significant effects of the development on the environment, which should cover the direct effects in any indirect, secondary, cumulative, short, medium and long-term, permanent and temporary, positive and negative effects of the development, resulting from:

(a) The existence of the development;

(b) The use of natural resources;

(c) The emission of pollutants, the creation of nuisances and the elimination of waste,

and the description by the application of the forecasting methods used to assess the effects on the environment.

21. A description of the measures envisaged to prevent, reduce and where possible offset any significant adverse effects on the environment."

21. Part 2 of schedule 4 lists the following information which must be provided: -

"24. A description of the development comprising information on the site, design and size of the development.

25. A description of the measures envisaged in order to avoid, reduce and, if possible, remedy significant adverse effects.

26. The data required to identify and assess the main effects which the development is likely to have on the environment.

27. An outline of the main alternatives studied by the applicant and an indication of the main reasons for the applicant's choice, taking into account the environmental effects.

28. A non-technical summary of the information provided under paragraphs 1 to 4 of this Part."

22. Under regulation 17(2), where the Examining Authority or the Secretary of State consider that the ES ought to contain further information they must, under regulation 17(1), issue a statement giving clearly and precisely the full reasons for that conclusion and suspend consideration of the application for a DCO until the applicant has provided the further information and the requirements in regulation 17(3) are satisfied. Those requirements include further consultation with the designated consultation bodies and other parties and publicity to enable representations to be made.

23. Alternatively, where the Examining Authority does not consider that additional information ought to be included in the ES, it may request an "interested party" to supply that material under rule 17 of the Infrastructure Planning (Examination Procedure) Rules 2010 (SI 2010 No. 103) ("the 2010 Rules"). By rule 2(1) an "interested party" refers to a person who is an "interested party" for the purposes of Chapter 4 of Part 6 of the PA 2008. By s. 102(1) of that Act an "interested party" includes the applicant for the DCO. Rule 17(2) requires the examining authority to consider whether an opportunity should be given to all interested parties to comment in writing on the further information received.

24. Regulation 23 of the 2009 Regulations sets out a number of requirements for the notification of the decision on the application for a DCO. Regulation 23(2)(d), requires

a statement to be made publicly available which sets out (inter alia) the main reasons and considerations on which the decision has been based and a description of the main measures to avoid, reduce and offset, the "major adverse effects" of the development.

National Policy Statements

25. Three National Policy Statements were relevant to the application: NPS EN-1 (Overarching National Policy Statement for Energy), NPS EN-3 (Renewable Electricity Generation) and NPS EN-5 (Electricity Networks Infrastructure). NPS EN-1 applies in combination with the relevant technology-specific NPSs.

26. Part 3 of NPS 1 establishes the need for new energy NSIPs. Applications for energy infrastructure falling within its scope are to be assessed on the basis that "the Government has demonstrated that there is a need for these types of infrastructure and that the scale and urgency of that need is as described for each of them in this part" (Paragraph 3.1.3). Substantial weight should be given to the contribution which a project would make towards satisfying that need (paragraph 3.1.4).

27. There is an established urgent need for new, and particularly low carbon, energy NSIPs to be brought forward as soon as possible (paragraph 3.3.15 of EN-1). Section 3.4 of EN-1 sets out the importance of the large-scale deployment of renewable sources of energy for tackling climate change. Offshore wind projects are expected to make the single largest contribution towards renewable energy generation targets (paragraph 3.4.3). The need for such projects is "urgent" (paragraph 3.4.5).

28. Part 4 of EN-1 sets out certain "Assessment Principles" for DCO applications. Paragraph 4.1.2 refers to a presumption in favour of granting consent "unless any more specific and relevant policies set out in the relevant NPSs clearly indicate that consent should be refused" and subject also to s.104 of the PA 2008 (paragraph 4.1.2).

29. Section 4.2 of EN-1 deals with the 2009 Regulations. Paragraphs 4.2.5 to 4.2.8 deal with cumulative effects and cases where details of certain aspects of a project have yet to be finalised: -

> "4.2.5 When considering cumulative effects, the ES should provide information on how the effects of the applicant's proposal would combine and interact with the effects of other development (including projects for which consent has been sought or granted, as well as those already in existence). The IPC may also have other evidence before it, for example from appraisals of sustainability of any relevant NPSs or development plans, on such effects and potential interactions. Any such information may assist the IPC in reaching decisions on proposals and on mitigation measures that may be required.
>
> 4.2.6 The IPC should consider how the accumulation of, and interrelationship between, effects might affect the environment, economy and or community as a whole, even though they may be acceptable when considered on an individual basis with mitigation measures in place.

> 4.2.7 In some instances it may not be possible at the time of the application for development consent for all aspects of the proposal to have been settled in precise detail. Where this is the case, the applicant should explain in its application which elements of the proposal have yet to be finalised, and the reasons why this is the case.
>
> 4.2.8 Where some details are still be to be finalised, the ES should set out, to the best of the applicant's knowledge, what the maximum extent of the proposed development may be in terms of site and plant specifications, and assess on that basis, the effects which the project could have to ensure that the impacts of the project as it may be constructed have been properly assessed."

Following the changes made by the Localism Act 2011, references to the Infrastructure Planning Commission ("IPC") now relate to the Secretary of State.

30. Paragraph 4.2.8 of EN-1 accords with well-known principles set out in *R v Rochdale Metropolitan Borough Council ex parte Milne* [2001] Env. L.R. 406. In the present case NVL's application proposals for the Vanguard infrastructure at Necton were presented as a "Rochdale envelope". That is, because certain design details remained to be determined subsequently, the DCO application defined the parameters within which the buildings would be constructed, and the ES assessed the environmental effects of the proposals by reference to those parameters and any flexibility they involved. The DCO granted by the Defendant authorised the "Works" within those parameters (see [41] below).

31. Section 4.4 of EN-1 deals with alternatives to an applicant's proposal. Paragraph 4.4.3 states that alternatives which are vague or inchoate may be discounted.

32. Part 5 of EN-1 addresses impacts which are common to all types of energy infrastructure, that is "generic impacts", including landscape and visual impacts (section 5.9). Paragraph 5.9.14 states: -

> "Outside nationally designated areas, there are local landscapes that may be highly valued locally and protected by local designation. Where a local development document in England or a local development plan in Wales has policies based on landscape character assessment, these should be paid particular attention. However, local landscape designations should not be used in themselves to refuse consent, as this may unduly restrict acceptable development."

33. On the subject of infrastructure for connections to the National Grid, paragraph 2.6.36 of EN-3 states: -

> "When considering grid connection issues, the IPC should be mindful of the constraints of the regulatory regime for offshore transmission networks. At the time of the application, the applicant may or may not have secured a connection with the

> network operator into the onshore transmission network and is unlikely to know who will own and manage the offshore transmission assets required for the wind farm."

The Proposals

34. The Vanguard wind array would be located in two areas approximately 47 km from the shore. The export capacity of the generating station would be 1.8 GW providing for up to 1.3m UK households or the equivalent of 2% of the UK's annual energy demand. The initial proposal was for a maximum of 200 turbines, with a maximum hub height of 200m and a maximum blade tip height of 350m. During the course of the examination the number of turbines was reduced to 158.

35. The buried onshore cable would run between the landfall at Happisburgh to Necton, some 60 km away. The Vanguard substation would be located to the east of an existing National Grid Substation (ExAR paragraph 2.1.4).

36. Paragraph 2.1.8 of the ExAR noted that NVL's parent company, Vattenfall Wind Power Limited, was also developing Boreas, which would share with Vanguard a grid connection location as well as much of the offshore and onshore cable corridors. The Vanguard DCO would also include some enabling works for Boreas, including installation of ducts along the entirety of the onshore cable route from Happisburgh to the Necton National Grid connection and overhead line modifications.

37. Chapter 4 of the ES addressed NVL's site selection process. This was summarised in paragraphs 4.4.5 to 4.4.8 of the ExAR. The offshore location was limited to areas within the East Anglia Zone which formed part of the Crown Estate's Round 3 Offshore Wind Farm development process. The developer adopted a strategic approach to Vanguard and Boreas, which included site selection based on the co-location of both projects. An iterative process resulted in the identification of the most suitable locations, having regard to technical constraints and environmental impacts. Following the identification of the offshore areas for Vanguard and Boreas, site selection addressed offshore cable corridor routes and a landfall with the aim of avoiding "high level designations". Three potential landfall sites were identified, from which the one at Happisburgh was selected. Then, National Grid Electricity Transmission plc and NVL worked on the identification of a National Grid connection point. This led to a grid connection offer being made by National Grid plc which NVL accepted in November 2016. Following that exercise, the offshore cable corridor was further refined, and the landfall site was finally selected.

38. The design work on Vanguard and Boreas sought to achieve synergies between the two projects. So, ducts for both projects would be installed along the onshore cable route as part of the Vanguard works, reducing construction times and avoiding the need to reopen land at a later date to install ducts for Boreas.

39. All search areas for a National Grid connection point were identified on the basis that they should be capable of accommodating infrastructure for connections by *both* Vanguard and Boreas (Chapter 4 of the ES paragraphs 4 and 47 and table 4.1). The working width of the cable corridor during construction is up to 45m. A width of 20m is required permanently for the majority of that route. Land acquisition under the Vanguard DCO includes land needed for works to connect Boreas cables to the

National Grid (see paragraphs 7.7.6, 7.7.9 and 7.7.37 of NVL's Statement of Reasons for compulsory purchase powers in the DCO).

40. NVL further explained their approach in a document entitled "A strategic approach to selecting a grid connection point for Norfolk Vanguard and Norfolk Boreas" (October 2018). Paragraph 11 stated: -

> "From the outset of development, it was clear to VWPL that it would be more efficient to take a strategic approach to developing the projects. Geographically the projects are close to each other and therefore, the co-location of both projects offers opportunities to explore synergies that might reduce development and operations costs and reduce both regional and local impacts"

Paragraph 18 added that NVL elected to seek common connection points to the National Grid for both Vanguard and Boreas. Paragraph 12 explained that the development programmes for the two projects were only a year apart.

41. Schedule 1 to the DCO defines the works authorised by the Order. They include the two Vanguard substation buildings (Work No. 8A) and the Vanguard extension to the existing National Grid substation at Necton (Work No. 10A). Part 3 of the schedule sets out the "requirements" (which are analogous to conditions imposed on a planning permission) subject to which consent is granted by article 3. Requirement 16 sets out design parameters for onshore works. The area of the fenced compound for Work No. 8A must not exceed 250m by 300m. The total footprint of each of the two buildings in Work 8A must not exceed 110m by 70m and their height must not exceed 19m. The area of the fenced compound for Work No. 10A must not exceed 200m by 150m. The height of the external electrical equipment in Work No 10A may be up to 15m.

42. There was no dispute at the hearing that if Boreas were to be connected to the National Grid at Necton, it would require its own dedicated substation and an extension to the existing National Grid substation, both on a similar scale to the works proposed for Vanguard, along with the associated external electrical equipment. In broad terms the scale of development outside Necton would be doubled. On any view, the development proposed at Necton would be substantial.

Assessment of Cumulative Impacts

43. In November 2016 the Planning Inspectorate issued a Scoping Opinion for the ES that was to be submitted. It stated that, in the assessment of cumulative impacts, other major developments should be identified through consultation with relevant authorities, including projects in the National Infrastructure programme. Boreas was specifically identified in relation to the substation proposals at Necton. Although some cumulative landscape impacts were scoped out of the ES (e.g. offshore infrastructure), those relating to co-located substation development at Necton were not.

44. By the time the ES for the Vanguard project was submitted in June 2018, substantial progress had already been made on Boreas. Grid connection agreements at Necton had been entered into for Vanguard in July 2016 and Boreas in November 2016. The site selection process had already identified preferred substation footprints for both

Vanguard and Boreas. The decision had been taken to use HVDC technology for both developments, determining the nature and scale of onshore infrastructure, including substations at Necton. The Boreas team had a pre-application meeting with the Planning Inspectorate on 24 January 2017, a request for a scoping opinion in respect of Boreas was made in May 2017 and the opinion issued in June 2017.

45. Indeed, paragraph 30 of chapter 33 of the Vanguard ES stated that in view of the request for a scoping opinion for Boreas, the "sister project" to Vanguard, Boreas was included in the cumulative impact assessment, adding: -

> "These projects have been considered for CIA only in those chapters where it is considered that the Scoping Reports contain sufficient detail with which to undertake a meaningful assessment."

Accordingly, where the Vanguard ES assessed cumulative impacts for that project together with Boreas, NVL considered that there was sufficient information available for that assessment to be carried out.

46. Table 33.3, dealing with projects included for cumulative impact assessment of onshore elements, stated that the "status" of the project data for Boreas in relation to landscape and visual impacts was "high". Paragraph 158 of chapter 29 of the ES, dealing with landscape and visual impact, stated:-

> "The development most relevant to the CIA for the Norfolk Vanguard onshore project substation and National Grid substation is the Norfolk Boreas onshore project substation and National Grid substation extension. The cumulative scenario considered in the assessment comprises these developments in the context of the existing Necton National Grid substation and Dudgeon substation."

47. Paragraph 23 of schedule 4 of the 2009 Regulations enables a developer to indicate in the ES any difficulties encountered in compiling the required information. Here there was no suggestion in the ES, or elsewhere, that NVL had found any difficulties in providing information on cumulative visual and landscape impacts from the Vanguard and Boreas developments at Necton. That issue was never raised during the examination. NVL's position did not change on this point during the DCO process.

48. Chapter 29 of the ES followed a conventional approach for EIA. The objective was to identify any "significant effects" of the project on "the landscape and visual resource" (paragraph 22). This approach reflects recital (7) and Article 2(1) of Directive 2011/92/EU and regulations 2(1) and 3(2), together with schedule 4, of the 2009 Regulations. Paragraph 32 in chapter 29 of the ES stated that the guiding principle in preparing the cumulative impact assessment had been to focus on the likely significant impacts and, in particular, those likely to influence the outcome of the DCO process.

49. The ES explained that the significance of effects was assessed as a combination of (i) the sensitivity of the landscape or visual receptor and (ii) the magnitude of the change resulting from the project. To count as a "significant" effect, either the sensitivity or magnitude of change had to be assessed as being at least "high" or "medium/high". If

both factors were assessed as "medium/low", "low", or "negligible", the effect was not treated as "significant".

50. The assessments of cumulative impacts were presented in table 29.17 of the ES and summarised in paragraph 174 of chapter 29: -

> "Table 29.17 shows the detail of the assessment for each receptor. In summary, the onshore project substation and National Grid substation extension for Norfolk Vanguard in conjunction with the onshore project substation and National Grid substation extension for Norfolk Boreas would have a significant cumulative effect on landscape character in the localised parts of the Settled Tributary Farmland LCT – River Wissey Tributary Farmland LCU and Plateau Farmland LCT – Beeston Plateau LCU and Pickenham Plateau LCU but would not have significant effects on the remaining parts and all other LCUs. In respect of the representative viewpoints, significant cumulative effects would arise from Lodge Lane to the immediate south of the site and a very localised section of Ivy Todd Road to the south-west. These effects would all occur within 1.2 km of the onshore project substation, making them localised."

It is to be noted that the term "localised" was simply used to describe effects occurring within 1.2 km of the substation development.

51. Mr Phillpot QC pointed out that language very similar to that in paragraph 174 was also used in another part of the ES to describe the effects of the Vanguard substation development. In my judgment that point is of little, if any, significance for two reasons. First, the term "significant" covers a range of effects involving varying degrees of harm. Thus, the broad categorisation of an effect as "significant" does not mean that solus and cumulative effects so classified are in fact equivalent. Second, the more detailed comments in the ES on cumulative impacts recognised, for example, the effects of the proposed "concentration of these large-scale energy developments" in a rural area. In any event, it should be noted that several objectors made representations during the examination that the cumulative impacts would be more harmful than had been assessed in the ES.

52. It became common ground during the hearing before me that the ES presented the same type and level of detail on the Vanguard and Boreas projects in order to assess the impacts on landscape and visual receptors, whether considering Vanguard in isolation or in combination with Boreas. In both cases the details provided were consistent with a "Rochdale envelope" approach.

53. The ES presented proposals for strategic landscape mitigation, including "embedded mitigation", for both the Vanguard substation development as a solus project and the Vanguard and Boreas schemes together (see e.g. section 4.5.14 in chapter 4, paragraph 175 and table 29.17 in chapter 29).

The Examination

54. Both the Claimant and other parties in the examination raised objections to the cumulative landscape and visual impacts of the Vanguard and Boreas projects.

55. The local planning authority, Breckland Council, submitted a Local Impact Report under s.60(3) of the PA 2008. When taking his decision, the Defendant was obliged to take this document into account (s.104(2)). Although it appears to have been supportive of the principle of the Vanguard project, the Council did express substantial concerns about the substation development near Necton: -

> "The predicted change in the form of development is of considerable magnitude and size. It is considered that the proposed extension to the existing National Grid substation in Necton would appear as a disproportionate additional development in the countryside. By more than doubling the size of the floor area to cover 51,000 square metres supporting a built height of up to 15 metres would not usually be allowed by the Local Planning Authority except in very special circumstances. Adding to this the 75,000 square metre new substation for the 19 metre tall HVDC convertor station with higher lightning masts, (potentially together with the Boreas development), then land coverage comparable with the core centre of Necton itself, with structures extending much further into the air, would be the outcome.
>
> It is appreciated that the Applicant has gone to considerable lengths in assessing visibility and the photomontages produced are helpful. However, on the ground it would be extremely difficult to screen a development of this huge scale. This is defined as a national infrastructure project for a reason and it will appear disproportionately dominant against the landscape which is remote from Necton. The new structures would be of such a size that the perceived distance from the A47 would appear relatively short. This would be a prominent and obtrusive feature against the skyline.
>
> The cumulative landscape and visual effects of the development would create negative disbenefits in planning terms. The Secretary of State for Energy must therefore balance the advantages of this major renewable energy project with these negative effects."

Plainly these observations were directed at both solus and cumulative effects on what was described as a "sensitive landscape and visual resource."

56. A number of the parties made representations about the dominant and disproportionate effects of the proposed substation development for Vanguard and, even more so, the cumulative effects of both schemes. They included the Necton Substation Action Group, Necton Parish Council and individual objectors. They took issue with the impact assessment in the ES and they asked that the DCO be rejected because of the unacceptable impact of the substation development. For example, the Parish Council referred to the "huge magnitude" of the change to the area and objected to the

development of the "largest substation in Europe" "beside a small village in a rural environment." Some objectors put forward alternatives for a connection to the National Grid away from Necton.

57. In its report the Examining Authority accepted that there is a strong need for the Vanguard project, supported by the NPSs. Vanguard would be one of "the biggest offshore-wind projects in the world" and together with Boreas could prevent more than 4m tCO_2 from entering the atmosphere (paragraphs 4.2.13 to 4.2.15).

58. The Examining Authority reviewed alternative locations for onshore infrastructure, notably the connection point to the National Grid (ExAR paragraphs 4.4.9 to 4.4.33). It found that NVL had made reasonable decisions on alternatives after following an appropriate process. NVL had narrowed down the choice to three locations, Necton, Norwich Main and Eye. It appears that a connection at Eye was unlikely to be achievable "within the required time-frames". Necton was then preferred because of the greater "environmental and other implications" for Norwich Main.

59. The Examining Authority noted the strongly held view of several participants that in view of the number of offshore wind farm projects coming forward in the region, there should be a strategic approach requiring contributions to an offshore ring main to avoid or reduce onshore environmental impacts. The Authority considered that because that would require co-ordination between projects, it was not an alternative which could be considered within the remit of an examination of a single offshore wind farm project. Although it is not apparent how well that reasoning sits with the requirements of the 2009 Regulations, particularly as the Examining Authority did consider elsewhere cumulative impacts resulting from a project being undertaken by an independent developer, no such argument was raised in the grounds of challenge. That is understandable in view of the way in which the Defendant discounted this particular alternative on the merits in his decision letter (see [71] below).

60. The Examining Authority summarised objections to landscape and visual impacts at Necton (paragraph 4.5.18 to 4.5.23 of the ExAR). It accepted that the Vanguard development could not be completely screened and would result in a material change to the landscape character and visual characteristics of the locality (paragraph 4.5.35). It noted that the substation location is not subject to any national or local landscape designations denoting a special sensitivity (paragraph 4.5.46). The Authority set out its assessments of the effects of the Vanguard substation development as a solus project at paragraphs 4.5.46 to 4.5.60 of the ExAR. It accepted that the impacts would be "localised" in that they would only occur within 1.2 km of the Vanguard substations (paragraphs 4.5.54 and 4.5.60). There would be no significant effects on the views of residents in Necton. The Examining Authority addressed the cumulative impacts of the proposed Vanguard buildings and came to the view that although members of the public "would be conscious of two large-scale energy plants in the locality", those "views would be localised and there would not be other views of the totality of the project" (paragraph 4.5.62 of the ExAR). It is common ground that these findings did not address the cumulative impacts of substation development at Necton for both Vanguard and Boreas.

61. Paragraphs 4.5.97 to 4.5.101 of the ExAR assessed cumulative impacts of Vanguard and another offshore wind farm project, Hornsea Project Three, ("Hornsea") located in the vicinity of the two Vattenfall projects. Hornsea was being brought forward

simultaneously with Vanguard but by a different developer. The cable corridor for Hornsea linking to the National Grid at Norwich Main would cross the cable corridor for the Vattenfall projects at Reepham near the Claimant's home. On 1 July 2020 (the day on which the DCO for Vanguard was granted) the Defendant issued a decision letter stating that he was minded to grant a DCO for Hornsea, subject to the resolution of certain matters. The DCO was in in fact granted on 31 December 2020.

62. However, in paragraph 4.5.102 of ExAR the Examining Authority took a different approach to the assessment of the cumulative landscape and visual impacts of Vanguard and Boreas :-

> "Finally, whilst the Norfolk Boreas Offshore wind farm has been included in the Applicant's LVIA cumulative impact assessment, the ExA have not considered it in this part of the assessment due to the limited amount of details available. The ExA considers it would most appropriate for cumulative impacts to be considered in any future examination into Norfolk Boreas." (sic)

63. At paragraph 4.5.114 of the ExAR the Examining Authority said:-

> "The impacts of the development in landscape terms would be generally acceptable save for the localised harm to visual amenity in relation to the substation and associated works. In this respect the proposal would not be in full conformity with Breckland Core Strategy DP11 and DC15. Given the localised nature of the permanent harm the ExA ascribes limited weight to it in the overall planning balance."

This passage related solely to the effects of Vanguard in isolation and not the cumulative effects of Vanguard and Boreas. Nevertheless, it is plain that the solus effects were not regarded as being "acceptable". But purely because of the "localised effect" of the permanent harm that would be caused, the Examining Authority gave limited weight to this factor in the overall planning balance. Plainly, they left unresolved the issue as to how much harm would be caused (including harm within a radius of 1.2km) if both the Vanguard and the Boreas substation developments were to proceed and development on that scale were to take place in the vicinity of Necton.

64. The Examining Authority set out its analysis and conclusions on the Habitats Regulations Assessment under The Conservation of Habitats and Species Regulations 2017 (SI 2017 No. 1012) in chapter 6 of its report. It dealt with cumulative effects with the Boreas project, for example at paragraphs 6.7.167 to 6.7.181 of the ExAR. NVL had agreed with Natural England that these effects had to be considered so as to ensure that mitigation solutions would be compatible for both projects.

65. The Examining Authority set out its overall conclusion on the case for granting development consent in chapter 7 of its report. In relation to landscape and visual impacts the Authority concluded at paragraph 7.3.9: -

> "In terms of landscape effects there would be no significant effects upon landscape character or visual amenity other than

> for limited localised effects on visual amenity in the vicinity of the substation. Significant localised landscape character effects, as a result of the new substation and substation extension, would reduce to moderate after 10 years. Along the onshore cable route and at landfall any effects would be temporary and localised. Subject to the mitigation measures to be secured through the Requirements, the ExA concludes that proposal would accord with the policy requirements of NPS EN-1 and EN-3 and would not cause material harm to key characteristics protected by relevant development plan policies."

66. The Examining Authority struck the overall balance in paragraph 7.3.26:-

> "Many of the principal issues have been resolved to the satisfaction of the ExA or are capable of resolution subject to the recommended changes to the DCO. Excepting the offshore ecology matters, the ExA concludes that, in relation to all other matters, the Proposed Development would be in accordance with NPSs and national policy objectives. When these matters are taken into account the ExA concludes that, in a general planning balance the benefits of the scheme in terms of the large-scale generation of renewable energy and its contribution to sustainable development objectives substantially outweigh the limited harms which have been set out above."

67. In chapter 10 of its report, the Examining Authority summarised its conclusions for the purposes of applying the provisions in s.104 of the PA 2008. They were in line with their conclusions in chapter 7.

The Decision Letter

68. The Defendant's decision letter mainly summarised and accepted the conclusions of the Examining Authority.

69. The Defendant regarded the contribution which would be made to the decarbonisation of the electricity generation sector as a significant benefit (DL 3.5). DL 4.3 referred to the policy in EN-1 that the assessment should begin with a presumption in favour of granting development consent for electricity generating stations in general and offshore wind farms in particular (DL 4.3 and 4.4). The Defendant added: -

> " granting development consent for the Development would be consistent with government policy and will contribute to the delivery of low-carbon and renewable energy, ensuring a secure, diverse and affordable energy supply in line with legal commitments to "net zero" and the need to address climate change. "

70. The Defendant assessed alternatives at DL 4.5 to 4.11. He agreed with the Examining Authority that NVL had undertaken a reasonable process for considering alternatives when finalising its site options (DL 4.10).

71. As to the suggestion that an offshore ring main be considered, the Defendant concluded at DL 4.11: -

> "Whilst discussions are taking place in respect of the future shape of the offshore transmission network, such discussions are at the preliminary stage. The Secretary of State considers that he must assess the Development in line with current policy as set out in the National Policy Statements. He does not consider that the decision should be delayed to await the outcome of the discussions on the offshore transmission network given the urgent need for offshore wind development as identified in the National Policy Statements."

72. The Defendant summarised the views of the Examining Authority on landscape and visual impacts at DL 4.12 to 4.49. He noted that the substation location is not within any designated landscape area (DL 4.27). In DL 4.46 the Defendant referred to the Authority's conclusions on cumulative impact in ExAR 4.5.102:-

> "The ExA notes that, while the Applicant's Landscape and Visual Impact Assessment cumulative assessment included the proposed Norfolk Boreas offshore wind farm, it was not considered by the ExA because of the limited information available on that project. The ExA concluded, therefore, that this matter should be considered in the future as part of the examination of the development consent application for the Norfolk Boreas offshore wind farm."

73. In DL 7.4 the Defendant stated: -

> "The Secretary of State notes that there were a range of views about the potential impacts of the Development with strong concerns expressed about the impacts on, among other things, the landscape around the substation, traffic and transport impacts and potential contamination effects at the site of the F-16 plane crash. However, he has had regard to the ExA's consideration of these matters and to the mitigation measures that would be put in place to minimise those impacts wherever possible. The Secretary of State considers that findings in the ExA's Report and the conclusions of the HRA together with the strong endorsement of offshore wind electricity generation in NPS EN-1 and NPS EN-3 mean that, on balance, the benefits of the proposed Development outweigh its adverse impacts. He, therefore, concludes that development consent should be granted in respect of the Development."

74. In DL 8.4 the Defendant dealt with a post-examination representation from a member of the public proposing an alternative location for the Vanguard substations: -

> "A member of the public wrote to suggest that the Secretary of State should seek to move the site of the Necton substations to a new site in the vicinity to lower its visual impact. However,

> the proposed location would need to be subject to a new application for consent (as it does not form part of the Application submitted by the Applicant) and the ExA considered that the locations of the substations proposed by the Applicant were acceptable (while acknowledging that there would be localised visual impacts). In this situation, the Secretary of State does not believe that there is any need to consider an alternative location where an existing proposal is acceptable."

The grounds of challenge: a summary of the parties' submissions

75. I am grateful to all counsel for their clear and helpful written and oral submissions. In this section I simply give a brief summary of those submissions to provide context for the conclusions I reach.

76. Mr Westaway submitted that the Defendant had unlawfully excluded from consideration the cumulative landscape and visual impacts of Vanguard and Boreas in the Necton area. He expressed this initially as a breach of regulation 3(2) of the 2009 Regulations, alternatively a failure to determine the application in accordance with policies in the NPSs (see s.104(3) of the PA 2008), or a failure to take into account an obviously material consideration (see the *CREEDNZ* line of authority). He pointed out that the ES itself had treated Boreas as a relevant project for the purposes of assessing the environmental impact of Vanguard, not least because of co-located and shared infrastructure, notably the 60 km cable corridor from Happisburgh to Necton and the National Grid connection points there. The ES assessed the cumulative landscape and visual impacts on the basis that there was sufficient information available on Boreas to enable that exercise to be carried out. It had arrived at the conclusion that the impacts were significant.

77. Mr Moules submitted for the Defendant (and Mr Phillpot QC adopted his submissions on behalf of NVL) that in this case the Defendant did take into account the material on cumulative impacts, but, because of the limited information available on Boreas, he deferred his decision on how those impacts should be evaluated and weighed to the DCO process on Boreas.

78. The Claimant submits that that decision was irrational. The same type and amount of information was available for Boreas as for Vanguard and yet the solus effects of the latter were assessed by the Defendant in his decision. The lack of information is the sole reason given for the decision to defer, but this was not raised by the Examining Authority during the examination, nor by any participant. So, it is not possible to identify any other explanation from that process. NVL plainly did not consider that the material they had provided on cumulative impacts was inadequate so that those impacts could not be assessed in the decision on the Vanguard DCO. The shared infrastructure and co-location aspects (including combined mitigation) of the two "sister" projects made it necessary for cumulative impacts to be assessed in the decision on the Vanguard DCO. Any deficiencies in the material provided should have been identified by the Examining Authority so that additional information could be requested under regulation 17 of the 2009 Regulations or rule 17 of the 2010 Rules.

79. Mr Westaway reinforces his submission by drawing attention to the effect of the decision to grant the Vanguard DCO on decision-making on the Boreas proposal. By the time the examination of the Boreas application began, the Vanguard DCO had become part of the baseline for the assessment of the environmental impacts of Boreas. Moreover, it would be said in the examination of Boreas, that that proposal should be judged on the basis that Vanguard had already been found to be acceptable. In other words, the decision on Vanguard has a "precedent" effect. He points to a Vattenfall document in the Boreas examination entitled "Implications of the Norfolk Vanguard Decision and Hornsea Three Letter on Norfolk Boreas," where the promoter relies on the similarities of its two projects and says that the Defendant would need to give very clear reasons for departing from his decision on Vanguard. At paragraph 2.2 the promoter relies upon the "consistency" principle established in the line of authorities beginning with *North Wiltshire District Council v Secretary of State for the Environment* (1993) 65 P & CR 137. The document relies upon "principles" which are common to both Vanguard and Boreas, including the sharing of the same cable corridor and the similarity of the substation development at Necton to achieve a connection to the National Grid. Mr Westaway says that the cumulative effects of both projects upon landscape and visual receptors in the Necton area were not evaluated and weighed by the Defendant before he granted consent for the first project, which decision has a significant "precedent" effect in the determination of the Boreas DCO application.

80. Under ground 2, the Claimant relies essentially upon the same arguments and submits that the reasons given by the Examining Authority and the Defendant on the cumulative impact issue were legally inadequate. Nothing was said as to why the information provided was insufficient, so that any inadequacy could be remedied, whether in the examination of Vanguard or of Boreas. Nothing was said as to why it was thought appropriate to defer the cumulative assessment, other than the unexplained "limited information" on Boreas. This is a case where the inadequacy of the reasoning creates a substantial doubt as to whether the decision-maker has erred in law (*South Bucks District Council v Porter (No. 2)* [2004] 1 WLR 1953 at [36]).

81. Mr Moules submitted that the Defendant has complied with regulation 3(2) of the 2009 Regulations. He did take into account the environmental information on the cumulative impacts, but he decided that it was unnecessary to evaluate that material in reaching a decision on whether the application for the Vanguard DCO should be granted, because only limited information on Boreas was available at that stage and because he judged that such cumulative effects would most appropriately be considered as part of the Boreas examination (paragraphs 46-47 of skeleton). Regulation 3(2) allows a decision-maker to note the existence of certain environmental information but to decide that it need not be an input into the determination of the application. There is no obligation to take into account or weigh every piece of environmental information when reaching that decision.

82. Mr Moules sought to support those submissions by relying upon the context for the decision on the Vanguard DCO. It was important for projects such as Vanguard to be approved without delay, and that decision should not be held up to enable cumulative effects to be assessed, particularly where the solus impacts of the Vanguard proposal did not affect any designated landscape area and were judged to have "limited weight", albeit they had been categorised as "significant effects." Mr Moules submitted that a

deferral of the cumulative assessment to the Boreas examination would also enable the overall benefits of the two projects to be properly weighed in the balance against any disbenefits.

83. Mr Phillpot QC submitted that the extent of the "Rochdale envelope" and mitigation for the Boreas application would be matters for the examination of that project. By contrast the material put forward in the Vanguard application on Boreas involved the making of assumptions about that project.

84. On the issue of whether the Defendant's judgment to defer consideration of cumulative impacts was irrational, Mr Phillpot QC asked the court to compare how the assessment of those impacts would differ in the separate examinations of the two projects. It is only the subsequent Boreas examination which could result in the authorisation of any cumulative impacts arising from the two projects after having determined their acceptability. If those impacts are unacceptable Boreas would be refused. If, however, they could be made acceptable by additional mitigation, that would be dealt with by imposing a "requirement" in the DCO granted for Boreas. The circumstances of the examination of Vanguard were different. That process could not have authorised cumulative impacts arising from both projects, irrespective of whether they were judged to be acceptable or unacceptable.

85. Mr Phillpot QC laid emphasis on the fact that the Defendant found the Vanguard proposal to be acceptable, leaving only to one side the cumulative impacts on landscape and visual resources at Necton. He submitted that, if instead those cumulative impacts had been taken into account and resulted in the refusal of consent for Vanguard, that would have been nonsensical if subsequently Boreas were to be refused on other grounds. Furthermore, if the solus effects of Vanguard were judged to be acceptable, but cumulative impacts with Boreas found to be unacceptable, that could not justify restricting the "Rochdale envelope" for the Vanguard project when granting development consent.

86. Mr Moules adopted those submissions to explain why it had been considered "most appropriate" to defer consideration of cumulative impact to the Boreas examination. But both he and Mr Phillpot QC accepted that this analysis could not be treated as a set of principles of general application. Instead, the analysis is sensitive to the circumstances of each case. He accepted that no such reasoning had been set out in the ExAR or in the decision letter, but submitted that the court should draw the inference that it had been in the mind of the Examining Authority and also the decision-maker. He relied upon the findings on the national need for Vanguard, the urgency of that need, the express rejection of alternatives and the acceptability of the solus impact of Vanguard.

Discussion

Introduction

87. Many challenges concerned with EIA allege a failure to address a particular subject in the ES. It is well-established that the judgment of the decision-maker on the adequacy of an ES may only be challenged on *Wednesbury* grounds (*Friends of the Earth* [2020] UKSC 52 at [142] to [143]). In the present case there is no such dispute. The ES did deal with the subject at the heart of this challenge. Moreover, NVL did not suggest that

they had encountered any difficulties in compiling information on cumulative impacts (paragraph 23 of schedule 4 to the 2009 Regulations). It did not ask for the consideration of cumulative impacts to be deferred to the subsequent examination of the Boreas application, whether that would be the "most appropriate" course of action, or because there was a limited amount of information available on Boreas, or for any other reason. Nor did any other participant in the examination raise any such matters.

88. The court was told that the first time that the view contained in paragraph 4.5.102 of the ExAR was revealed was when that report was published along with the decision letter on 1 July 2020. Up until then, participants in the examination had no reason to think that cumulative landscape and visual impacts would not be addressed in the ExAR and the decision letter, just as other cumulative impacts were. I am in no doubt that, in terms of the legal obligation on the Secretary of State to give reasons for his decision, the evaluation of cumulative landscape and visual impacts in the Necton area resulting from the Vanguard and Boreas grid connections was one of the important, controversial issues which had to be addressed in the decision on the Vanguard DCO, applying the test in *South Bucks District Council* at [27] and [36].

89. I note that the Claimant has not argued that the process followed was unfair because what emerged as paragraph 4.5.102 of the ExAR had not been raised beforehand. On the other hand, the fact that the points made by the Examining Authority were not raised before their report was published along with the decision letter means that their reasoning cannot be explained by what took place during the examination. Neither the Defendant nor NVL suggested otherwise. The Defendant has not filed any evidence to explain (in so far as might have been admissible) how paragraph 4.5.102 of the ExAR, or indeed DL 4.46, came about.

90. A number of points are common ground between the parties. First, in his decision letter the Defendant relied upon the conclusions of the Examining Authority in paragraph 4.5.102 of the ExAR without having the benefit of any further explanation from that Authority. Second, the Defendant did not find that the cumulative impacts at Necton, which the ES had identified as significant adverse effects, were of no significance and therefore could be set to one side for that reason. This stands in stark contrast, for example, to the combined visual effects of the offshore arrays proposed for Vanguard and Boreas which were screened out of the ES because they were judged not to be significant. Third, the Defendant has accepted that the cumulative effects at Necton do need to be assessed and weighed in a decision on consenting under the PA 2008, but has deferred that evaluation entirely to the decision on the application for the Boreas DCO.

The issues

91. It is convenient to deal with grounds 1 and 2 together. They give rise to three issues which I will address in the following order: -

    (i) Did the Defendant's decision not to evaluate the cumulative impacts at Necton when determining the application for the Vanguard DCO breach the 2009 Regulations?

    (ii) In any event, was the Defendant's decision not to do so irrational?

(iii) In any event, did the Defendant fail to give legally adequate reasons in relation to this issue?

Neither the Defendant nor NVL disputed that if the Claimant should succeed on any one of these issues, the Defendant's decision to grant the Vanguard DCO was unlawful. But they submitted that in those circumstances it would be necessary for the court to consider a further issue, namely whether the quashing order sought by the Claimant should be granted or refused.

92. Mr Westaway accepted that his alternative arguments under ground 1, that the Defendant had been obliged to assess the cumulative impacts by virtue of NPS policy and s.104(3) of the PA 2008, or because they were "obviously material" added nothing to the legal merits of the Claimant's argument. This is because they each depend upon the Claimant establishing that the Defendant's decision on this aspect was irrational.

93. Before going on to address the issues, it is necessary to deal with the difference between the reasoning of the Examining Authority and the Defendant. As Mr Moules said, there were two strands to the reasoning of the Authority. First, they considered the amount of detail available to be limited. Second, they thought it would be "most appropriate" for those impacts to be considered in the Boreas examination. However, they did not give any explanation of either factor to assist the Defendant in coming to a view on whether he should accept their judgment.

94. Ultimately, however, it is the Defendant's reasoning which matters for the purposes of determining this legal challenge. The Defendant only dealt with the deferral point in DL 4.46. The court has nothing else to go on, the topic not having been discussed during the examination. The Defendant has not simply said that he agreed with the Examining Authority. Instead, he has relied upon his own formulation as expressed in DL 4.46. The Defendant merely stated that the cumulative impacts should be considered in the Boreas examination because of the limited information available on that project. The Defendant's use of the word "therefore" makes it plain that the information on Boreas is the only reason he gave as to why the evaluation of the cumulative impacts should be deferred. But like the Authority, he has not given any clue as to why he considered the information available on Boreas to be "limited".

Was there a breach of the 2009 Regulations?

95. I accept the Defendant's submission that the 2009 Regulations did not require him to weigh every single piece of "environmental information" when deciding whether or not to grant development consent. But the material on cumulative impacts at Necton was not just any piece of environmental information. NVL's position was that they amounted to significant adverse environmental impacts falling within schedule 4. The Defendant did not disagree with that view. Furthermore, this information concerned an important controversial issue during the examination which had to be addressed by the Defendant through legally adequate reasoning as part of the reasons for his decision.

96. It is necessary to consider whether a decision to defer an evaluation and weighing of such impacts may in itself amount to a breach of the 2009 Regulations, in particular regulation 3(2).

97. I return to Directive 2011/92/EU. Recital (7) states: -

> "Development consent for public and private projects which are likely to have significant effects on the environment should be granted only after an assessment of the likely significant environmental effects of those projects has been carried out. That assessment should be conducted on the basis of the appropriate information supplied by the developer, which may be supplemented by the authorities and by the public likely to be concerned by the project in question."

98. Article 1 of the Directive provides: -

> "This directive shall apply to the assessment of the environmental effects of those public and private projects which are likely to have significant effects on the environment."

99. Article 2 of the Directive provides (inter alia): -

> "1. Member States shall adopt all measures necessary to ensure that before consent is given, projects likely to have significant effects on the environment by virtue, inter alia, of their nature, size or location are made subject to a requirement for development consent and an assessment with regard to their effects. Those projects are defined in Article 4.
>
> 2. The environmental impact assessment may be integrated into the existing procedure for consent to projects in the Member States, or, failing this, into other procedures or into procedures to be established to comply with the aims of this Directive. "

100. Article 3 requires the EIA to "identify, describe and assess in an appropriate manner in the light of each individual case, and in accordance with Articles 4 to 12, the direct and indirect effects of a project" on a number of features including "the landscape."

101. Article 5(1) sets out requirements linked to Annex IV for the content of an ES to be provided by a developer: -

> "In the case of projects which pursuant to Article 4, are to be made subject to an environmental impact assessment in accordance with this Article and Article 6 to 10, Member States shall adopt the necessary measures to ensure that the developer supplies in an appropriate form the information specified in Annex IV in as much as:
>
> (a) the Member States consider that the information is relevant to a given stage of the consent procedure and to the specific characteristics of a particular project or type of project and of the environmental features likely to be affected;

> (b) the Member States consider that a developer may reasonably be required to compile this information having regard, inter alia, to current knowledge and methods of assessment."

102. It will be noted that paragraphs (a) and (b) provide criteria for making a judgment in each individual case as to the extent to which the items listed in Annex IV should be provided in an ES.

103. However, Article 5(3) of the Directive sets out minimum requirements for the content of an ES: -

> "The information to be provided by the developer in accordance with paragraph 1 shall include at least:
>
> (a) a description of the project comprising information on the site, design and size of the project;
>
> (b) a description of the measures envisaged in order to avoid, reduce and, if possible, remedy significant adverse effects;
>
> (c) the data required to identify and assess the main effects which the project is likely to have on the environment;
>
> (d) an outline of the main alternatives studied by the developer and an indication of the main reasons for his choice, taking into account the environmental effects;
>
> (e) a non-technical summary of the information referred to in points (a) to (d)."

104. That distinction between the obligatory and discretionary contents of an ES has been reflected in the definition of "environmental statement" in regulation 2(1) of the 2009 Regulations (see [19] above) and the two parts of schedule 4 to those regulations (see [20] to [21] above). The judgment as to *whether* a topic falling within part 1 of schedule 4 should be addressed in an ES is a matter for the authority responsible for deciding whether development consent should be granted. The *extent* to which the ES should contain information on any of the topics listed in either part 1 or part 2 of schedule 4 is also a matter for the judgment of that same authority. The authority has the power to require additional information to be provided by the developer (Article 6(2) of the Directive and regulation 17 of the 2009 Regulations).

105. Article 8 of Directive 2011/92/EU requires the information gathered and the results of consultation under articles 5, 6 and 7 to be taken into consideration in the development consent procedure. That is an obligation imposed on the decision-maker. That is how regulation 3(2) of the 2009 Regulations has transposed article 8 (see [17] above).

106. Article 9 of the Directive has been transposed by regulation 23 of the 2009 Regulations (see [24] above). The decision-maker is required to make available to the public a description of (inter alia) the "main measures" to mitigate "the major adverse

effects of the development". That requirement cannot be satisfied without the decision-maker evaluating those effects in his decision. This analysis aligns with the developer's obligation in Article 5(3) of the Directive and part 2 of Schedule 4 to the 2009 Regulations to include in the ES "the data required to identify and assess the main effects which the development is likely to have on the environment."

107. The parties agree that in this area of the law, Directive 2014/52/EU is substantially to the same effect as Directive 2011/92/EU. Recital (34) of the 2014 Directive does not indicate any intention to alter the law on decision-making significantly. The 2011 Directive is amended by the insertion of Article 8a. This has been transposed by regulations 21 and 30 of the 2017 Regulations. The decision-maker must (inter alia) reach a "reasoned conclusion" on "the significant effects of the project on the environment", taking into account his examination of the environmental information, and describe any measures to mitigate "likely significant adverse effects" on the environment. Those matters must be published (regulation 31). In my judgment, these parts of the 2017 Regulations simply express more clearly that which was already necessarily implicit in the 2009 Regulations. The drafting alteration from "main effects" to "significant effects" does not involve any significant alteration of the law. It only confirms that the rules on decision-making are aligned with the requirement that the process of EIA includes an assessment by the decision-maker of the likely significant effects of a project on the environment and the measures to mitigate those effects. In this way the legislation gives effect to the objective set out in recital (7) and the requirements in articles 1, 2 and 8 of Directive 2011/92/EU (see [98] to [100] and [105] above). Sullivan J (as he then was) adopted essentially the same approach in *ex parte Milne* at [104] and [113] when commenting on schedule 3 to SI 1988 No. 1189.

108. Although it is a matter of judgment for the decision-maker as to what are the environmental effects of a proposed project and whether they are significant, EIA legislation proceeds on the basis that he is required to evaluate and weigh those effects he considers to be significant (and any related mitigation) in the decision on whether to grant development consent (see e.g. *Commission v Ireland* [2011] Env. L.R. 478). It follows that if the decision-maker considers that a particular effect is not significant, he is not obliged to weigh that matter in his decision on whether or not development consent should be granted. Whether he need explicitly state that conclusion or give reasons for it will depend on the circumstances. For example, the matter may have been treated in the ES and by the parties as a significant environmental effect and become an important controversial issue in the examination. Subject to complying with any obligation to give reasons that may arise, a decision-maker's conclusion that an effect is not significant may only be challenged in the courts on *Wednesbury* grounds.

109. The next issue is whether consideration of an environmental effect can be deferred to a subsequent consenting process. If, for example, the decision-maker has judged that a particular environmental effect is not significant, but further information and a subsequent approval is required, a decision to defer consideration and control of that matter, for example, under a condition imposed on a planning permission, would not breach EIA legislation (see *R v Rochdale Metropolitan Borough Council ex parte Milne* [2001] Env. L.R. 406).

110. But the real question in the present case is whether the evaluation of an environmental effect can be deferred if the decision-maker treats the effect as being

significant, or does not disagree with the "environmental information" before him that it is significant? A range, or spectrum, of situations may arise, which I will not attempt to describe exhaustively.

111. In some cases, the decision-maker may be dealing with the environmental implications of a single project. In *R v Cornwall County Council ex parte Hardy* [2001] Env. L.R. 473 the court held that the local planning authority had not been entitled to grant planning permission subject to a condition which deferred a requirement for surveys to be carried out to identify whether a European species would be adversely affected by the development. The authority could only have decided that it was necessary for the surveys to be carried out and additional data obtained because they had thought that the species might be present and harmed. It was possible that that might turn out to be the case and so, in granting planning permission, the authority could not rationally have concluded that there would be no significant adverse effects in the absence of that data. Consequently, they were not entitled to defer that decision ([61] to [62]).

112. In other cases, it may be necessary to decide whether associated works form part of a single project. Once that decision is made, it may be obvious that consideration of the environmental effects of the associated works cannot be deferred. In *R (Brown) v Carlisle City Council* [2011] Env. L.R. 71 the Court of Appeal held that where the acceptability in planning terms of a proposal for a freight distribution centre was contingent upon the provision of improvements to the runway and terminal at Carlisle Airport (which was reflected in a planning obligation under s. 106 of the Town and Country Planning Act 1990), the airport improvements formed part of the overall project comprising the distribution centre. Consequently, the EIA was required to assess the cumulative environmental effects of that overall project and not just the distribution centre. That was the only rational conclusion ([25]). The fact that the airport improvements were to be dealt with in a separate planning application was nothing to the point. As Lindblom LJ explained in *Preston New Road Action Group v Secretary of State for Communities and Local Government* [2018] Env. L.R. 440, the airport works formed an integral part of the overall project which included the distribution centre. The environmental assessment of the airport works could not be deferred to a subsequent consenting procedure because they were intrinsic to the decision as to whether any part of the project should go ahead.

113. In some cases where the decision-maker is dealing with a single project, the issue of whether the evaluation of significant environmental effects may be deferred has not been so straightforward. For example, a project for the laying out of a residential or business estate may evolve over a number of years in a series of phases, led by changing market demand. At the outset planning permission may be sought in outline. In such cases there is a risk that if outline planning permission is granted for a proposal lacking in detail, significant adverse environmental impacts may only be identified at the reserved matters stage when the authority is powerless to go back on the principle of the development already approved and so cannot prevent it from taking place. A decision to defer the evaluation of a significant adverse effect and any mitigation thereof to a later stage may therefore be unlawful *(R v Rochdale Metropolitan Borough Council ex parte Tew* [2000] Env. L.R. 1, 28-31).

114. In order to comply with the principle identified in *Commission v Ireland*, and illustrated by *Tew* and *Hardy*, consideration of the details of a project defined in an

outline consent may be deferred to a subsequent process of approval, provided that (1) the likely significant effects of that project are evaluated at the outset by adequate environmental information encompassing (a) the parameters within which the proposed development would be constructed and operated (a "Rochdale envelope"), and (b) the flexibility to be allowed by that consent and (2) the ambit of the consent granted is defined by those parameters (see *ex parte Milne* at [90] and [93] to [95]). Although in *Milne* the local planning authority had deferred a decision on some matters of detail, it had not deferred a decision on any matter which was likely to have a significant effect (see Sullivan J at [126]), a test upon which the Court of Appeal lay emphasis when refusing permission to appeal (C/2000/2851 on 21 December 2000 at [38]). Those matters which were likely to have such an effect had been adequately evaluated at the outline stage.

115. Sullivan J also held in *ex parte Milne* that EIA legislation plainly envisages that the decision-maker on an application for development consent will consider the adequacy of the environmental information, including the ES. He held that what became regulation 3(2) of the 2009 Regulations imposes an obligation on the decision-maker to have regard to a "particularly material consideration", namely the "environmental information". Accordingly, if the decision-maker considers that the information about significant environmental effects is too uncertain or is inadequate, he can either require more detail or refuse consent ([94] to [95] and [106] to [111]). I would simply add that the issue of whether such information is truly inadequate in a particular case may be affected by the definition of "environmental statement", which has regard to the information which the applicant can "reasonably be required to compile" (regulation 2(1) of the 2009 Regulations - see [19] above).

116. The principle underlying *Tew*, *Milne* and *Hardy* can also be seen in *R (Larkfleet Limited) v South Kesteven District Council* [2016] Env. L.R. 76 when dealing with significant cumulative impacts. There, the Court of Appeal held that the local planning authority had been entitled to grant planning permission for a link road on the basis that it did not form part of a single project comprising an urban extension development. The court held:-

(i) What is in substance and reality a single project cannot be "salami-sliced" into smaller projects which fall below the relevant threshold so as to avoid EIA scrutiny ([35]);

(ii) But the mere fact that two sets of proposed works may have a cumulative effect on the environment does not make them a single project for the purposes of EIA. They may instead constitute two projects the cumulative effects of which must be assessed ([36]);

(iii) Because the scrutiny of the cumulative effects of two projects may involve less information than if they had been treated as one (e.g. where one project is brought forward before another), a planning authority should be astute to see that the developer has not sliced up a single project in order to make it easier to obtain planning permission for the first project and to get a foot in the door for the second ([37]);

(iv) Where two or more linked sets of works are properly regarded as separate projects, the objective of environmental protection is sufficiently secured by

consideration of their cumulative effects in the EIA scrutiny of the first project, so far as that is reasonably possible, combined with subsequent EIA scrutiny of those impacts for the second and any subsequent projects ([38]);

(v) The ES for the first project should contain appropriate data on likely significant cumulative impacts arising from the first and second projects to the level which an applicant could reasonably be required to provide, having regard to current knowledge and methods of assessment ([29]-[30], [34] and [56]).

117. However, in some cases these principles may allow a decision-maker properly to defer the assessment of cumulative impacts arising from the subsequent development of a separate site not forming part of the same project. In *R (Littlewood) v Bassetlaw District Council* [2009] Env. L.R. 407 the court held that it had not been irrational for the local authority to grant consent for a freestanding project, without assessing cumulative impacts arising from future development of the remaining part of the site, where that development was inchoate, no proposals had been formulated and there was not any, or any adequate, information available on which a cumulative assessment could have been based (pp. 413-5 in particular [32]).

118. I agree with Mr Westaway that the circumstances of the present case are clearly distinguishable from *Littlewood*. Here, the two projects are closely linked, site selection was based on a strategy of co-location and the second project has followed on from the first after a relatively short interval. They share a considerable amount of infrastructure, they have a common location for connection to the National Grid at Necton (the cumulative impacts of which are required to be evaluated) and the DCO for the first project authorises enabling works for the second. In the present case, proposals for the second project have been formulated and the promoter of the first project has put forward what it considered to be sufficient information on the second to enable cumulative impacts to be evaluated in the DCO decision on the first. This information was before the Defendant. I reject the attempt by NVL to draw any analogy with the circumstances in *Littlewood* (at [32]) or with those in *Preston New Road* (at [75]). In any event, the decision-maker in the present case, unsurprisingly, did not rely upon any reasoning of that kind in his decision letter (nor did the Examining Authority in the ExAR).

119. Instead, this case bears many similarities with the circumstances in *Larkfleet*. If anything, the ability to assess cumulative impacts from the two projects in the decision on the first project was much more straightforward here and the legal requirement to make an evaluation of those impacts decidedly stronger. First, the promoter carried out an assessment identifying significant cumulative effects at Necton and it is common ground that, for this purpose, essentially the same information was provided on the two projects (see e.g. [52] to [53] above). Second, there were strong links between the two projects which were directly relevant to this subject (see [118] above).

120. The effect of Directive 2011/92/EU, the 2009 Regulations and the case law is that, as a matter of general principle, a decision-maker may not grant a development consent without, firstly, being satisfied that he has sufficient information to enable him to evaluate and weigh the likely significant environmental effects of the proposal (having regard to any constraints on what an applicant could reasonably be required to provide) and secondly, making that evaluation. These decisions are matters of judgment for the decision-maker, subject to review on *Wednesbury* grounds. Properly

understood, the decision in *Littlewood* was no more than an application of this principle.

121. In the Vanguard ES NVL assessed the cumulative landscape and visual impacts as being "significant". Neither the Examining Authority nor the Defendant disagreed with that judgment. Accordingly, this was not a case where deferral of the consideration of those impacts to a subsequent consenting procedure could have been lawful on the basis that the decision-maker considered these impacts to be insignificant (see *ex parte Milne*). The conclusion reached by the Examining Authority and the Defendant on the solus impacts of Vanguard cannot be used to support any such conclusion. Neither Mr. Moules nor Mr. Phillpot QC suggested otherwise. Thus, the court must proceed on the basis that the Defendant considered the cumulative impacts to be significant effects which still need to be evaluated in a decision on whether or not to grant development consent, albeit not in the decision granting the Vanguard DCO.

122. In the circumstances of this case, I am in no doubt that the Defendant did act in breach of the 2009 Regulations by failing to evaluate the information before him on the cumulative impacts of the Vanguard and Boreas substation development, which had been assessed by NVL as likely to be significant adverse environmental effects. The Defendant unlawfully deferred his evaluation of those effects simply because he considered the information on the development for connecting Boreas to the National Grid was "limited". The Defendant did not go so far as to conclude that an evaluation of cumulative impacts could not be made on the information available, or that it was "inadequate" for that purpose. He did not give any properly reasoned conclusion on that aspect. I would add that because he did not address those matters, the Defendant also failed to consider requiring NVL to provide any details he considered to be lacking, or whether NVL could not reasonably be required to provide them under the 2009 Regulations as part of the ES for Vanguard. It follows the Defendant could not have lawfully decided not to evaluate the cumulative impacts at Necton in the decision he took on the application for the Vanguard DCO. For these reasons, as well as those given previously, the present circumstances are wholly unlike those in *Littlewood*.

123. For the reasons set out above, ground 1 must be upheld.

124. I have referred to the Defendant's submissions on the importance of avoiding delay to an urgently needed project of national importance. For completeness, I should add that the court was not shown any provision which would enable that factor to overcome any requirement under regulation 17 to obtain additional information, where a decision-maker considers that the details in the ES are inadequate for assessing likely significant adverse environmental effects. In any event, the Defendant's decision letter did not purport to approach the matter on that basis.

125. It is also necessary for the court to deal with irrationality and the legal adequacy of the reasoning in the decision letter. All of these issues are closely inter-related.

Rationality

126. If, contrary to my view, a decision-maker may, in the exercise of his judgment, depart from the general principle set out in [120] above, by deferring the evaluation of a significant adverse environment effect to a subsequent consenting procedure, he may only do so on grounds which:-

(i) are rational in the circumstances of the case; and

(ii) satisfy the objectives and requirements of EIA legislation.

127. Irrationality is not confined to decisions which simply defy comprehension, or which are beyond the range of reasonable responses to a given set of information. It also embraces decisions which proceed by flawed logic *(R v North and East Devon Health Authority ex parte Coughlan* [2001] QB 213 at [65]).

128. There is no dispute that Vanguard and Boreas are separate projects. They did not fall to be treated as a single project for the purposes of EIA legislation. This is not a case where, for example, the developer has sought to define the development for which he seeks permission so as to avoid EIA scrutiny. I also accept the submission of the Defendant and NVL that the proposals for Vanguard and Boreas have been made on the basis that the implementation of the Vanguard DCO is not dependent upon the approval or implementation of a DCO for Boreas. Accordingly, the present case should be distinguished from *Brown v Carlisle City Council.* But none of these points address the true circumstances of this case (see e.g. [118] to [119] above) and so do not assist the Defendant and NVL in resisting this challenge to the DCO.

129. NVL included in the ES an assessment of cumulative landscape and visual impacts at Necton. They considered the information available on the two projects to be adequate for this purpose and they concluded that there were likely to be significant environmental impacts. No complaint has been made about the adequacy of the ES or of the environmental information subsequently gathered. The legal challenge in this case has simply arisen because, first the Examining Authority, and then the Defendant, decided to defer *any* evaluation of those cumulative impacts to the decision on the Boreas project. They did so without the point being discussed publicly during the examination process. They did so on the basis of reasoning which, even on a generous view, could only be described as cursory, despite the importance of the decision being taken and the substantial concerns which had been raised about the selection of Necton for co-located grid connections. A departure from the general principle set out in [120] required proper justification by the Defendant directed to the environmental information and the issues before him, *a fortiori* given the somewhat unusual circumstances of this case as described above.

130. The ES for Boreas was submitted in June 2019. Vattenfall's report on the interrelationship between the two projects explained that the Boreas ES considered two "scenarios" according to whether Vanguard either would or would not receive consent. In the former scenario, Boreas would rely upon the authorisation by the Vanguard DCO of the cable corridor and provisions at Necton (including land acquisition). In the latter scenario, the Boreas DCO was promoted on the basis that it would authorise all the works needed for that project. However, the legality of the decision letter dealing with the Vanguard DCO must be assessed in the context that it authorised shared infrastructure for both projects and, as Mr. Westaway demonstrated (and was not challenged), compulsory acquisition of land at Necton needed solely for the Boreas project. In these circumstances, the general principles in *Larkfleet* for linked projects are applicable. Absent any rational justification, cumulative impacts of both projects had to be evaluated by the decision-maker when considering whether to grant a DCO in each case, even accepting that in some cases less information about the second project may be available when deciding whether to approve the first.

131. It is inescapable that the only reason given by the Defendant for deferring *all* consideration of cumulative landscape and visual impacts to the Boreas examination was that the information available on Boreas was "limited". I am in no doubt that this bare statement was, in the circumstances of this case, illogical or irrational. It was common ground in the hearing before this court that the nature and level of information on the two projects for the purposes of assessing landscape and visual impacts of the substation development at Necton was essentially the same. Plainly, the Defendant must have proceeded on the basis that the information on the solus impacts of the Vanguard project was sufficient for him to be able to evaluate and weigh that matter. No basis has been advanced in these proceedings by either the Defendant or NVL for either (a) treating the adequacy of the environmental information on Boreas differently for an evaluation of the cumulative landscape and visual impacts or (b) not making *any* such evaluation *at all* in the Vanguard decision. The Defendant's decision is flawed by an obvious internal inconsistency. The decision was all the more perverse because, in accordance with *ex parte Milne*, NVL's approach employed a "Rochdale envelope" in order to cater for the absence of more detailed information, for the evaluation of (a) the Vanguard solus impacts and (b) the cumulative impacts of both projects in the Necton area. The decision was also irrational in other respects.

132. There were a number of features which plainly required the cumulative impacts of the substations for both projects to be assessed as part of the Vanguard decision and not simply left over to the Boreas decision. The two projects had been based on a strategy of co-location. Necton and alternative locations for the essential connection to the National Grid were assessed for their ability to accommodate the substations and infrastructure needed for both Vanguard and Boreas. That was important, if not critical, to the decision to select Necton for the grid connection and to include in the Vanguard DCO authority for the provision of a 60 km cable corridor between Happisburgh and Necton to serve both projects and compulsory acquisition of some land at Necton for Boreas (which would need to satisfy a "compelling public interest" test). Consequently, consistency required the cumulative impacts of the substation development at Necton to be evaluated in the Vanguard decision. In the circumstances of this case, it was irrational for the Defendant to defer that evaluation.

133. If the cumulative impacts in the Necton area had been evaluated when considering the application for the Vanguard DCO, one possible outcome is that they would have been found to be unacceptable. That could have led the Defendant to decide that Necton was not an appropriate location to provide a grid connection for both projects, as intended by the developer, which would also call into question the appropriateness of the co-located cable corridor leading to that connection point. Even assuming that the Defendant would still have decided all the other issues in favour of the Vanguard proposal, it would have been permissible for him to refuse to grant the DCO on the basis that the location of a grid connection at Necton to serve both Vanguard and Boreas (and the related cable corridor) needed to be reconsidered by the developer. Plainly, that ought to be determined before granting consent for the first project. In that way the promoter could reapply or modify or even abandon its strategic co-locational approach before proceeding with either project. Here, the decision to leave that issue over to consideration of the DCO for the second project prevented that course from being taken.

134. Accordingly, there is nothing "nonsensical" in requiring cumulative impacts at Necton to have been evaluated in the Vanguard decision, even if that resulted in the refusal of a DCO for that project (see NVL's submission at [85] above). Any such outcome would simply be the corollary of NVL having chosen to rely upon a co-locational strategy and the common infrastructure involved. Such a choice may have advantages and disadvantages for the promoter, depending upon which of the two projects it decides to promote first and ultimately the Defendant's assessment of their respective merits. Even if DCO consent for a second project were to be refused on other grounds, that would not render absurd the rejection of a co-location strategy advanced in a DCO application for a first project on the grounds of cumulative impact. At the very least, it would remain open to the promoter to submit a further DCO application for that first project. Unlike the situation discussed in [133] above, that outcome would not be prejudiced or pre-empted. Given that NVL itself assessed cumulative impacts in the Vanguard ES, the submission it now makes against those impacts forming a basis for refusal of the Vanguard application which the ES accompanied is, to say the least, surprising.

135. The Defendant has decided that the cumulative impacts at Necton should be assessed solely in the Boreas examination and decision and not also in the Vanguard process, despite (1) the availability of information to enable him to make an evaluation of those impacts and (2) the Court of Appeal's judgment in *Larkfleet*. The Defendant's approach has had the effect, absent consideration of those cumulative effects, of making it easier to obtain consent for Vanguard, and providing a "foot in the door" making it easier to obtain consent for Boreas. Although there is no evidence that NVL sought those outcomes, the Vanguard DCO decision has had a "precedent effect" for decision-making in relation to Boreas upon which, understandably, NVL has relied heavily in the Boreas examination. In view of the familiar *North Wiltshire* line of authority on consistency in decision-making, these were highly likely, if not inevitable, consequences of the Defendant's decision to approve the DCO for Vanguard. These were obviously material considerations which went directly to the rationality of the decision.

136. These considerations underscore the absence of any rational justification in the Vanguard decision letter for refusing to make *any* evaluation of the cumulative impact issue at that stage. The single, perfunctory reason given for deferral, the limited amount of information available on Boreas, could not, in the circumstances of this case, justify by itself leaving the issue entirely to the second examination, particularly where the information was in front of the Defendant, NVL considered it to be adequate and no one suggested the contrary.

137. In any event, the Examining Authority and the Defendant had powers to obtain further information. Indeed, if the Authority had considered the application of regulation 17 of the 2009 Regulations and decided that additional material should have been included in the ES, they would have been obliged to require that information to be provided and suspend the examination in the meantime.

138. Even putting that regulation to one side, and looking at the matter more broadly in the context of rule 17 of the 2010 Rules, the Defendant's decision was unlawful. A bare, unexplained statement that the information on Boreas was "limited", without any attention being given to an obvious solution, namely to ask for more material, or at the very least to consider the pros and cons of taking that step, could not rationally justify

departing from the requirement that the significant adverse cumulative impacts at Necton should be evaluated and weighed before deciding whether to grant a DCO for the first of the two linked projects.

139. The submissions by Mr. Moules and Mr. Phillpot QC in [82] to [83] above do not lend any support to their contention that the Defendant's decision to defer the cumulative impact issue was rational. They suffer from a number of flaws. First, there is no evidence that the points advanced by counsel were in the minds of the Examining Authority or of the Defendant, or that any of these matters had been raised during the examination and, therefore might have been taken into account by the decision-maker even tacitly. With respect, these submissions amounted to no more than an *ex post facto* justification of the decision, or, to put it more directly, an impermissible attempt to rewrite the ExAR and the decision letter. Second, even if those matters had been taken into account by the decision-maker, they do not overcome the points set out above as to why the decision to defer in this case was irrational. For example, it is common ground that the information on both projects was of the same nature and level of detail and so it was illogical, in any event, to treat the information on Boreas as inadequate when the decision-maker was content to rely upon that supplied on Vanguard.

140. The analysis by Mr Phillpot QC and Mr Moules of the differences between an assessment of cumulative impacts in the Vanguard examination as opposed to the Boreas examination (see [84] to [86] above) proves too much. The same approach could be applied to the consideration of the cumulative visual impacts of any two projects where the consenting of one is determined before the other. In other words, the analysis would amount to a set of legal principles. However, Mr. Phillpot QC and Mr Moules rightly eschewed that outcome. It would conflict with the 2009 Regulations and established case law (e.g. *Larkfleet*). But, as they accepted, the only way of avoiding that problem is to treat the points they made as depending upon the application of judgment to the circumstances of each case. But, of course, that judgment has to be made by the decision-maker and there is no evidence whatsoever, whether in the decision letter or elsewhere, that the Defendant had any of these considerations in mind, let alone that he decided how much weight to give to any of them. In any event, I am not persuaded that the analysis by counsel overcomes the various aspects of irrationality in the decision to defer as explained above.

141. For these additional reasons, ground 1 must be upheld.

Adequacy of reasons

142. From the discussion of the issues arising under ground 1, it is apparent that the reasons given for the decision to defer evaluation of cumulative impacts to the Boreas examination were legally inadequate. Having regard to the various matters discussed under ground 1 above, there must be, at the very least, a substantial doubt as to whether the decision was tainted by an error of public law, namely a breach of the 2009 Regulations and/or irrationality. For that reason alone, ground 2 must be upheld.

143. Furthermore, even if it be assumed that it was legally permissible to defer the evaluation of the cumulative impacts at Necton to the examination of the Boreas DCO application, any such decision had to be adequately reasoned. The bare statement in this case that the information on Boreas was "limited" did not come anywhere near

discharging that requirement, particularly as the Boreas information did not differ materially from that available on Vanguard and no party had raised this suggestion during the examination. There was no explanation as to why an evaluation could not have been made by the Defendant in accordance with regulation 3(2) of the 2009 Regulations.

144. Furthermore, the decision letter gave no indication as to what was meant by "limited information" so that the issue could be addressed properly in the Boreas examination. As Mr. Moules rightly accepted, if the Vanguard application for a DCO had been refused because information for assessing cumulative impacts at Necton was thought to be "limited", without more, NVL would have been entitled to have that decision quashed. There is no reason why that flaw should be treated any differently by the court when the party prejudiced by the lack of reasons is an objector to the proposal (see e.g. *South Bucks District Council* at 30-32). None has been suggested. The objector has no real idea as to why the EIA process has not been completed in accordance with the 2009 Regulations. The Claimant and other objectors, especially those concerned about the cumulative impacts of substation development at Necton, cannot be adequately assured that the decision on deferral was taken on relevant and material grounds (see Lord Bridge in *Save Britain's Heritage v Number 1 Poultry Limited* [1991] 1 WLR 153, 170G).

145. For all these reasons, ground 2 must also be upheld.

Whether relief should be granted or refused

146. The Claimant is entitled to an order quashing the decision to grant the DCO unless there is any proper legal basis for the court to withhold that relief. The Defendant and NVL rely upon s.31(2A) of the Senior Courts Act 1981: -

> "The High Court—
>
> (a) must refuse to grant relief on an application for judicial review, and
>
> (b) may not make an award under subsection (4) on such an application,
>
> if it appears to the court to be highly likely that the outcome for the applicant would not have been substantially different if the conduct complained of had not occurred."

147. Where a decision is flawed on a point of EU law, the bar for the withholding of relief is set higher than under s.31(2A) (see e.g. *R (Champion) v North Norfolk District Council* [2015] 1 WLR 3710 at [57] to [58]). Two recent cases have raised the issue whether section 31(2A) is overridden or disapplied by the EU legal test where the latter is applicable, without finding it necessary to decide the point *(R (XSWFX) v London Borough of Ealing* [2020] EWHC 1485 (Admin) and *Gathercole v Suffolk Country Council* [2020] EWCA Civ 1179).

148. I am grateful to Mr Moules for producing a very helpful note on these issues and the implications of the European Union (Withdrawal) Act 2018 and the European

Union (Withdrawal) Act 2018 (Relevant Court) (Retained EU Case Law) Regulations 2020 (SI 2020 No. 1525). Counsel for the Claimant and for NVL agreed with the note. In a nutshell, their agreed position is that the High Court is bound by EU retained case law to apply the more exacting EU law test where a challenge succeeds on an EU point of law.

149. Here the Claimant has succeeded in establishing a breach of the 2009 Regulations, as well as a domestic error of public law (irrationality) and a breach of the duty to give reasons (which straddles both EU and domestic law, the 2009 Regulations and the PA 2008).

150. Because I have reached the firm conclusion that, applying the test in s.31(2A) of the Senior Courts Act 1981, there is no justification for withholding the quashing order the Claimant seeks, the same would follow if I were to apply the EU law test.

151. The central issue under s. 31(2A) is whether, if the error identified by the court had not occurred, it is highly likely that the decision on whether or not to grant the DCO would not have been substantially different; in other words, the DCO would still have been granted. The arguments for the Defendant and NVL proceeded on the basis that the court should consider what would be "highly likely" to have happened if, in his decision on the Vanguard DCO, the Defendant had evaluated cumulative impacts from the Necton infrastructure for both projects.

152. The Court of Appeal has laid down principles for the application of s.31(2A) in a number of cases, including *R (Williams) v Powys County Council* [2018] 1WLR 439; *R (Goring-on-Thames Parish Council) v South Oxfordshire District Council* [2018] 1 WLR 5161; and *Gathercole*. The issue here involves matters of fact and planning judgment, and so the court should be very careful to avoid trespassing into the Defendant's domain as the decision-maker, sometimes referred to as "forbidden territory" (see e.g. *R (Smith) v North Eastern Derbyshire PCT* [2006] 1 WLR 3315 at [10]). Instead, the court must make its own objective assessment of the decision-making process which took place. In this case it was common ground that the Court should consider whether the Defendant's decision would still have been the same by reference to untainted parts of the Defendant's decision (as in *Goodman Logistics Developments (UK) Limited v Secretary of State for Communities and Local Government* [2017] J.P.L. 1115).

153. Although the test in s.31(2A) is less strict than that which applies in the case of statutory reviews (see *Simplex GE (Holdings) Limited v Secretary of State for the Environment* [2017] PTSR 1041), it nevertheless still sets a high threshold. In *R (Plan B Earth) v Secretary of State for Transport* [2020] PTSR 1446 the Court of Appeal held at [273]: -

> "It would not be appropriate to give any exhaustive guidance on how these provisions should be applied. Much will depend on particular facts of the case before the court. Nevertheless, it seems to us that the court should still bear in mind that Parliament has not altered the fundamental relationship between the courts and the executive. In particular, courts should still be cautious about straying, even subconsciously, into the forbidden territory of assessing the merits of a public

> decision under challenge by way of judicial review. If there has been an error of law, for example in the approach the executive has taken to its decision-making progress, it will often be difficult or impossible for a court to conclude that it is "highly likely" that the outcome would not have been "substantially different" if the executive had gone about the decision-making process in accordance with the law. Courts should also not lose sight of their fundamental function, which is to maintain the rule of law. Furthermore. although there is undoubtedly a difference between the old *Simplex* test and the new statutory test, "the threshold remains a high one" (see the judgment of Sales LJ as he then was, in *R (Public and Commercial Services Union) v Minister for the Cabinet Office* [2018] ICR 269, para 89)."

154. Both the Defendant and NVL submitted that the decision was taken to grant the DCO for Vanguard after taking into account all material considerations, other than cumulative impacts at Necton, and after striking the balance in s.104(7) of the PA 2008. Accordingly, the question is whether if those cumulative impacts had been taken into account, the court is satisfied that it is highly likely that the Defendant would still have granted the DCO.

155. In support of their contention that the answer to that question is yes, the Defendant and NVL emphasised a number of conclusions in the decision letter, including the strength and urgency of the need for the development as set out in the NPSs, the benefits which would flow from the development, the rejection of alternatives, and the assessment that the solus impacts of the Vanguard substations on landscape and visual receptors would be localised (i.e. within a 1.2m radius) and attracted only limited weight.

156. However, the consequence of the legal errors made by the Defendant is that the court does not have any notion as to what the evaluation of cumulative impacts by the Defendant would have been if he had considered the matter. The court does not even have an idea as to how the Examining Authority evaluated the cumulative impacts, because they too decided not to do so. It would be impermissible for the court to make findings on that issue for itself. To do that would involve entering forbidden territory.

157. So instead, the court is being asked to deduce from the Defendant's conclusions on the solus impacts of the Vanguard development at Necton and the way in which the overall balance was struck that it is highly likely that the outcome would have been the same if the cumulative impacts had been evaluated as well.

158. In my judgment, there is a fundamental flaw in the argument relying upon s.31(2A) which cannot be overcome. It flies in the face of the conclusion which the Defendant actually reached, namely that he would not assess cumulative impacts at Necton because the information on Boreas was "limited". This criticism by the Defendant makes it impossible to deduce what his conclusion would have been if he had evaluated those impacts. But even if that point is put to one side, there are other flaws.

159. First, I note that when the Defendant struck the overall balance in DL 7.4, he said that "on balance" the benefits of the Vanguard development outweighed its adverse impacts, looking at the proposal as a whole. No indication was given as to how far those findings tilted the balance in favour of granting the DCO, not even in broad terms.

160. More importantly, the Defendant and NVL are inviting the court effectively to infer that because the ES assessed the cumulative impacts at Necton as falling within a radius of 1.2 km from the proposed substation, that impact would have been treated in the decision as "localised" and would therefore have attracted only "limited weight", just as the Examining Authority and the Defendant had evaluated the solus impacts of the Vanguard substations.

161. However attractively these submissions were presented, they cannot disguise the reality that the court is being asked to take on an inappropriate fact-finding role to supply conclusions which, unlawfully, are missing from the decision letter. This would conflict with the separation of powers between the courts and the executive, the "fundamental relationship" referred to in *Plan B Earth*.

162. This is illustrated by Mr. Westaway's submission, which I endorse, that if more development is concentrated within the 1.2 km radius (which itself is only an assessment tool), it does not follow that any so-called "localised effect" would attract only "limited weight". That argument could be repeated if the additional development within that area was substantially greater than even the doubling of the Vanguard substations which the Boreas project would entail. That would be nonsensical. Instead, the evaluation of the cumulative impacts is a matter for proper fact-finding by the person responsible for taking the decision on the DCO, and not something capable of being deduced by a judge from the decision letter in this case.

163. The addition of further substation development is to some extent a matter of degree, but it also involves other considerations, such as the effect of the nature and scale of the development on the character of the rural area, including the village of Necton. In part, this comes back to the straightforward points made by Breckland Council in its Local Impact Report (which the Defendant was obliged to take into account under s.104(2) of the PA 2008) that the scale of the Vanguard and Boreas substation developments would be disproportionate in relation to the village of Necton and this rural area. These were important concerns for members of the public objecting to the Vanguard scheme, which they were entitled to have evaluated by the Defendant as the decision-maker responsible, before he decided whether or not to grant the DCO for that project.

Conclusions

164. For the above reasons I uphold grounds 1 and 2 of the challenge. There is no justification for the court to withhold the relief sought by the Claimant and so the Defendant's decision letter dated 1 July 2020 to grant a development consent order for the Norfolk Vanguard Offshore Wind Farm together with SI 2020 No. 706 must be quashed.

165. The court's order is being made at a time when the application for a DCO in respect of Norfolk Boreas remains to be determined. The Defendant will need to give

careful consideration as to how the evaluation of cumulative impacts relating to development at Necton for both projects should be approached in each decision and whether, and if so, to what extent, the examination of the Vanguard project needs to be re-opened. The court was not asked during the hearing to express its opinion on those matters.

Addendum: the Court's order

166. The Claimant has submitted that the court's order should contain specific directions on how the implications of this judgment should be handled procedurally in both the Vanguard and Boreas DCO applications. The Defendant and VNL oppose that suggestion. I conclude that the court's order should not include any formal directions of that kind. I will explain my reasons in relation to the submissions which have been made.

167. First, the Boreas application has not yet been determined and is not currently the subject of any proceedings in this court. Second, the Defendant states through counsel that, in accordance with well-established convention, he can be expected to comply with the terms of this judgment without the need for any mandatory order. That is an important consideration. Third, there may be more than one way in which the defendant can properly give effect to the law stated in this judgment, and any other relevant legal principles or requirements, and so it would be inappropriate now for the court to prescribe how such matters should be handled.

168. The Defendant and NVL also rely upon rule 20 of the 2010 Rules which provides:-

> "Where a decision of the Secretary of State in respect of an application is quashed in proceedings before any court, the Secretary of State—
>
> (a) shall send to all interested parties a written statement of the matters with respect to which further representations in writing are invited for the purposes of the Secretary of State's further consideration of the application;
>
> (b) shall give all interested parties the opportunity of making representations in writing to the Secretary of State in respect of those matters."

169. The Defendant submits that "unusually, and unlike the situation in respect of "ordinary" planning applications, Parliament has addressed its mind to the redetermination of DCO applications and prescribed a procedure". It is submitted that rule 20 provides a complete statement of the steps required for a fair redetermination of the application.

170. In deciding not to grant the additional relief sought by the Claimant, it should be clearly understood that I do not accept these additional submissions.

171. First, it has been well-established for many years that procedural rules such as the 2010 Rules are generally *not* exhaustive of the requirements of procedural fairness or

other public law requirements (see e.g. *Lake District Special Planning Board v Secretary of State for the Environment* 1st January 1975 and noted at [1975] JPL 220; *Bank Mellat v HM Treasury (No. 2*) [2014] AC 700 at [35]; *Hopkins Developments v Secretary of State for Communities and Local Government* [2014] PTSR 1145 at [62]; De Smith's Judicial review (8th edition) at paras. 7-012 to 7-016).

172. Rule 20 imposes *minimum* procedural requirements. The language of rule 20 should not be misread as laying down an exclusionary rule in relation to any additional steps that might be required in order to satisfy the duty to act fairly in a particular case. Furthermore, the court has not been shown any statutory provision indicating that Parliament intended the 2010 Rules to be an exhaustive code which excludes, or is incompatible with, additional requirements arising from that duty.

173. Second, the 2010 Rules are not unusual. Rules of this kind have existed for some time. They deal with *some* of the consequences of the quashing of decisions in the planning sphere. For example, the Town and Country Planning (Inquiries Procedure) (England) Rules 2000 (SI 2000 No. 1624) applies to certain planning appeals and called-in planning applications. I note that rule 19 expressly provides for the re-opening of a public inquiry as well as for written representations. However, it cannot be inferred that, simply because the 2010 Rules only mention the making of written representations, the re-opening of an examination is excluded where any quashing order is made under s. 118 of the PA 2008. The requirements of natural justice, which are often fact-sensitive, may require additional procedural steps to be taken beyond those contained in such rules.

174. The procedural consequences of a quashing order will normally depend upon the nature of the legal error or errors which have led to it being made. It is not too difficult to think of a fundamental error affecting the application process from the outset, which would therefore require the matter to be rewound to the beginning, notwithstanding rule 20 of the 2010 Rules.

175. In view of the submissions which have been made it is necessary to refer here to some of the issues arising from this judgment which need to be addressed. There may be others which the parties would wish to raise.

176. First, part of the problem has been the failure of both the Examining Authority and the Defendant to explain in what respects the information on Boreas was thought to be "limited", so that the parties involved in either examination process could address that point. That calls for an explanation from the Defendant, including any implications for the operation of regulation 17 of the 2009 Regulations, before any representations could sensibly be made by interested parties on matters of either procedure or substance.

177. Second, there are procedural implications arising from the failure of both the Examining Authority and the Defendant to evaluate the cumulative impacts in the Necton area. Likewise, the obviously material considerations referred to in [132] to [136] above, were not addressed by either the Authority or the Defendant. Consequently, the findings and the recommendation in the report which the Authority was required to make under s. 74 of PA 2008 (and rule 19 of the 2010 Rules), and which the Defendant is required to take into account, have not been based upon those factors.

178. Furthermore, the points in [132] to [136] above, which go to the relationship between the two projects, may have implications for the timing of the decisions on both projects.

179. In these circumstances, it is very doubtful whether the Defendant could properly proceed to re-determine the Vanguard application, or to determine the Boreas application, without at least giving a reasonable opportunity for representations to be made by interested parties on the implications of this judgment for the procedures now to be followed in each application, considering those representations, and then deciding and explaining what course will be followed.

180. Paragraph 11c of NVL's submissions relies upon "the importance in the public interest of determining applications for nationally significant infrastructure projects such as this without undue delay" as a factor influencing the timing of the Defendant's decision. That does indeed reflect one of the purposes of the PA 2008 and the procedural timetables it contains (see also the case law cited in [9] above). But that consideration does not override the need for compliance with EIA legislation and with principles of public law and procedural fairness. It is most unfortunate that there has been a failure to grapple with an important issue in the Vanguard decision (and before the Boreas decision) and that this has resulted in delay to the determination of an important application. But that only serves to underscore the need for care now to be taken to avoid future procedural steps in relation to either project being impugned.

APPENDIX 3 – *WHEATCROFT* CASE

Bernard Wheatcroft Ltd. v. Secretary of State for the Environment and Another

QUEEN'S BENCH DIVISION

FORBES J.

October 21 and 24, 1980

Town and country planning—Planning permission—Whether power in local planning authority or Secretary of State to grant planning permission for smaller development than that for which permission applied for—Whether proper test whether development proposed in application for planning permission severable or whether to allow development subject to condition that size of development should be reduced would be to allow development in substance not that for which planning permission applied for—Planning judgment—Matters to be taken into account—Whether those who should have been consulted on changed development deprived of opportunity of consultation

The applicants applied to the local planning authority for planning permission for a housing development comprising approximately 420 dwellings on 35 acres. The local planning authority refused permission, and the applicants appealed to the Secretary of State. Prior to the opening of the inquiry, the applicants indicated to the local planning authority that they were proposing to put forward at the inquiry an alternative proposal for 250 dwellings on 25 acres, that alternative proposal to be considered only if the issue of scale of development was deemed to be critical to the determination of the appeal. That alternative proposal was duly put forward at the inquiry. The local planning authority contended that the Secretary of State could not legitimately reduce the area of the appeal site by 10 acres and only had power to deal with the application as submitted. The inspector in his report concluded that if the appeal was restricted to consideration of 420 dwellings on 35 acres it should, on the planning merits, be dismissed but that if it was permissible to reduce the area to 25 acres and for the number of dwellings to be reduced such development would not be objectionable and planning permission should be granted accordingly. The Secretary of State in his decision letter said:

> Having regard to the inspector's conclusions concerning a smaller site than that proposed in the application under appeal, whilst it is accepted that there are circumstances where a split decision would be appropriate, the opinion is held that where an appeal results from an application for permission to erect a specified number of dwellings without any indication at all of their sizes or of the individual plots, the proposed development is not severable and it would be improper to purport to grant permission in respect of part of the site or for a lesser number of houses.

He accordingly dismissed the appeal. The applicants applied under section 245 of the Town and Country Planning Act 1971 for his decision to be quashed.

Held, allowing the application, that there was no principle of law that prevented the imposition on a planning permission of conditions that would have the effect of reducing the permitted development below that for which permission had been applied for except where the application was severable; that the true test was not whether the development proposed in the application was severable but whether the effect of the conditional planning permission would be to allow development that was in substance not that for which

permission had been applied for; and that, accordingly, the Secretary of State having misdirected himself in law, his decision must be quashed.

Kent County Council v. *Secretary of State for the Environment* (1976) 33 P. & C.R. 70 considered.

Per curiam. The main, but not the only, criterion on which the judgment of the local planning authority or the Secretary of State should be exercised on the question whether the effect of such a conditional planning permission would be to allow development that is in substance not that for which permission has been applied for is whether the development is so changed thereby that to grant it would be to deprive those who should have been consulted on the changed development of the opportunity of such consultation, those words being used to cover all the matters of the kind with which Part III of the Act of 1971 deals. Where a proposed development has been the subject of such consultation and has produced a root-and-branch opposition to any development at all, it is difficult to believe that it should be necessary to go again through the process of consultation about a smaller development.

MOTION.

The facts are stated by Forbes J.

Joseph Harper for the applicants, Bernard Wheatcroft Ltd.

The first respondent, the Secretary of State, was not represented.

Jeremy Sullivan for the second respondents, the Harborough District Council.

Cur. adv. vult.

October 24. **Forbes J.** In this case Mr. Harper moves to quash an order of the Secretary of State for the Environment whereby he dismissed an appeal against refusal of planning permission by the second respondents, the Harborough District Council. Despite the fact that it is concerned solely with the extent of his powers, the Secretary of State is not represented.

The facts may be set out briefly as follows. The applicants own a large area of agricultural land at Bitterswell Road, Lutterworth, in the district of Harborough. The site with which we are concerned is a 35-acre portion of that land lying to the north of Lutterworth and immediately adjacent to a developed area of that town, a large portion of which in fact is a previously developed estate of the applicants. The applicants also own a still further area of seven acres of land that was not included in the application. In 1972, despite objection by the local planning authority, the Secretary of State decided that 25 acres of the 35 for which planning permission was now applied for were suitable for development if two problems could be overcome. The first was surface water disposal, and the second was access to Bitterswell Road. The Secretary of State said, as I understand it, that the access problem alone would not have been sufficient to prevent planning permission being granted. After that appeal, and encouraged by the Secretary of State's decision, the applicants purchased some further land that enabled, in their view, the access problem to be overcome, and that land was included in the current application. The 35 acres included, however, further land, beyond

the original 25 and not included in the access land, that extended into open meadow with no particular natural boundaries. The application was made on the appropriate form on April 3, 1978. After giving the address of the site and identifying the 35 acres on a plan, the applicants went on to answer an invitation on the form to state the number of dwelling units proposed by filling in " approximately 420 dwellings." It is pointed out that that is the mathematical result of taking a density of 12 houses to the acre over the whole of the 35 acre site. That application was refused by the local planning authority on July 12, 1978, for a variety of reasons, including amenity, population, access, traffic and surface water disposal. The applicants appealed to the Secretary of State on December 22, 1978, and a public inquiry was held on January 22 to 24, 1980. On January 4, that is, less than three weeks before the inquiry was due to be held, the applicants wrote to the local planning authority indicating that they were proposing to put forward another proposal and submitted what they described as a schematic layout showing about 250 dwellings on a reduced area of 25 acres. The letter emphasised that the applicants " would wish the schematic lay-out to be considered as a viable alternative proposal to the application as originally submitted only if the issue of scale of development is deemed to be critical to the determination of the appeal and without prejudice to the proposals contained in the original application."

On January 11, 1980, the local planning authority wrote back: " My council is of the opinion that this is a new application and should be considered in the normal way, that is, determined by the council after consultation with interested parties," etc. At the inquiry, the applicants called a planning consultant who said that he could not support the development of 420 units on the 35-acre site, and he produced three alternative plans. Two of them provided for 250 dwellings on 25 acres and differed only in their proposals for access and internal roads. The third included another six acres, making 31 in all, and provided for 330 to 350 dwellings. The local planning authority's case was almost wholly concerned to argue that any development on this site would have undesirable consequences, although it is clear that the impact of the development reduced to 250 houses had been examined by the traffic experts of the county council, who appear to have given evidence that even this reduced number was unacceptable on traffic grounds. The local planning authority maintained at the inquiry that the Secretary of State could not legally reduce the area of the appeal site by 10 acres and that he only had power to deal with the application as submitted. It was accepted that the surface water objection could be adequately resolved by using a balancing reservoir scheme, and that reason for refusal was abandoned.

Various other parties appeared at the inquiry. A fair reading of their evidence and arguments recorded in the inspector's report is that they objected to any development on the site. One of them

clearly stated that even 250 houses would be objectionable. The inspector reported on March 6, 1980. It is unnecessary to refer to his report other than to summarise his conclusions and recommendations. His conclusions were, first, that it was a legal matter for the Secretary of State to determine whether it was possible to restrict any planning permission granted on that appeal to an area smaller than 35 acres and to fewer than 420 dwellings, secondly, that if the appeal was restricted to consideration of 420 dwellings on 35 acres he felt that it should be dismissed, thirdly, that, if it was permissible to restrict the area to 25 acres and for the number of dwellings to be reduced, then such development would not be objectionable. He recommended that, on the assumption that there was no legal bar to such action, permission should be granted for the erection of dwellings on 25 acres at a density of 10 to the acre.

The Secretary of State gave his decision by a letter dated April 24, 1980. After setting out the inspector's conclusions and recommendations, he went on in paragraphs 4 and 5:

> 4. Having regard to the inspector's conclusions concerning a smaller site than that proposed in the application under appeal, whilst it is accepted that there are circumstances where a split decision would be appropriate, the opinion is held that where an appeal results from an application for permission to erect a specified number of dwellings without any indication at all of their sizes or of the individual plots, the proposed development is not severable and it would be improper to purport to grant permission in respect of part of the site or for a lesser number of houses. In this particular case it must be noted that although plans D, E and F illustrate a possible lay-out and a reduced approximately 25-acre area of the appeal site for about 250 dwellings which your clients agree would be an acceptable alternative development, it was clearly indicated at the inquiry that these plans, which were submitted after the appeal had been made, were not provided as replacements for the original appeal proposals. Consequently the view is held that it would not be appropriate for the appeal proposal to be severed or reduced, and the Secretary of State has therefore considered the appeal on the basis of the original application before him. 5. The Secretary of State agrees with the inspector's conclusions regarding the proposal on this appeal and concurs with his opinion that the appeal should be dismissed. Any proposal for a smaller development would have to be the subject of a further application which would lead to consideration by the local planning authority in the first instance. In the circumstances the Secretary of State does not propose to comment on any of the inspector's conclusions regarding a reduced development. For the reasons given he does not accept the inspector's recommendations and thereby dismisses the appeal.

The real question in this case is whether the Secretary of State was right in considering that he had no power to grant planning permission for development on a smaller site and with houses at a lower

density than were indicated on the application form originally submitted to the local planning authority.

Mr. Sullivan, however, had an argument that, on a true reading of the decision, the Secretary of State was in fact exercising his planning discretion. It will be convenient to deal with this argument first. The inspector in his conclusions and recommendations clearly poses a legal question. I have no doubt that in paragraph 4 the Secretary of State was attempting to answer it. When he uses the term " improper " in the first sentence of this paragraph, he refers, it seems to me, to an improper—that is, an illegal—use of powers. This first sentence sets out in general terms the legal proposition to which the Secretary of State commits himself. One can expand it in the context of the appeal in this way. If the application indicates a number of sites for development, each with a single house, then it can be severed by, as it were, lopping off individual sites. In such a way, permission can be granted for a reduced area or for a lesser number of houses. If, however, all that one has is an area covered by the application and a number of houses proposed to be built on it, such severance is impossible and therefore reduction in the area or the number of houses is improper, because no power is given to achieve a reduction by this means. Put simply, the Secretary of State is saying: " The only way in which I can properly exercise my powers and achieve a reduction in the area or the number of houses is if the application can be regarded as severable. If it cannot be so regarded, I have no power to achieve this end." The second sentence in paragraph 4 does no more than set out those circumstances in the current appeal that led the Secretary of State to say that, despite the other proposals put forward, what he was dealing with was a non-severable application. The last sentence is the conclusion to the other two. The three sentences of this paragraph, properly read, amount to my mind to a logically unimpeachable syllogism: only severable applications can result in planning permission for a reduced area; this is not a severable application; therefore it cannot result in planning permission for a reduced area. As with all syllogisms, the conclusion is only valid if the premises are sound. It remains to be seen whether the major premise here is a valid statement of the law.

The powers of the Secretary of State are derived from section 36 (3) of the Town and Country Planning Act 1971. They are well-known, but I should refer to them:

> Where an appeal is brought under this section from a decision of a local planning authority, the Secretary of State, subject to the following provisions of this section, may allow or dismiss the appeal, or may reverse or vary any part of the decision of the local planning authority, whether the appeal relates to that part thereof or not, and may deal with the application as if it had been made to him in the first instance.

What can be done when the application is made in the first instance is to be found in section 29 (1):

> Subject to the provisions of sections 26 and 28 of this Act, and to the following provisions of this Act, where an application is made to a local planning authority for planning permission, that authority, in dealing with the application, shall have regard to the provisions of the development plan, so far as material to the application, and to any other material considerations, and—
> (*a*) [subject to certain sections of the Act] may grant planning permission, either unconditionally or subject to such conditions as they think fit; . . .

At this point, I can, I think, go straight to the judgment of Lord Widgery C.J. in *Kingston-upon-Thames Royal London Borough Council* v. *Secretary of State for the Environment*[1]:

> . . . one has got to look at the learning on the question of what conditions can properly be attached to planning permissions. The attachment of conditions to planning permissions is as old as the planning legislation itself, and is now to be found in section 30 (1) of the Town and Country Planning Act 1971: " Without prejudice to the generality of section 29 (1) of this Act, conditions may be imposed on the grant of planning permission thereunder —(*a*) for regulating the development or use of any land under the control of the applicant (whether or not it is land in respect of which the application was made) or requiring the carrying out of of works on any such land, so far as appears to the local planning authority to be expedient for the purposes of or in connection with the development authorised by the permission; . . ." Those are wide words; they clearly on their face entitle the local planning authority to impose conditions which affect land not the subject of the application itself, and which go to the restriction of the past user or the removal of existing works. Although they are wide it has been recognised for a very long time that they are subject to certain restrictions. The two principal restrictions which the courts have placed on those words are first that a condition is invalid as being contrary to law unless it is reasonably related to the development in the planning permission which has been granted. It must not be used for an ulterior purpose, and must, in the well-known words of Lord Denning M.R. in *Pyx Granite Co. Ltd.* v. *Minister of Housing and Local Government,*[2] " fairly and reasonably relate to the permitted development." The second restriction on those words which the courts have adopted in recent years is that a condition which is so clearly unreasonable that no reasonable planning authority could have imposed it may be regarded as *ultra vires* and contrary to law and treated as such in proceedings in this court. But as far as I know those are the only two general limitations on the wide powers in section 30 of the Town and Country Planning Act 1971, . . .

Mr. Sullivan initially argued that the Secretary of State was right

[1] [1973] 1 W.L.R. 1549, 1552–1553; [1974] 1 All E.R. 193; 26 P. & C.R. 480, 483–484; 72 L.G.R. 206, D.C.
[2] [1958] 1 Q.B. 554, 572; [1958] 2 W.L.R. 371; [1958] 1 All E.R. 625; 9 P. & C.R. 204, 217; 56 L.G.R. 171, C.A.

and that severability was the only test. In his subsequent submissions, however, he seemed to have abandoned that stance, because they proceeded on the basis that the proper test was whether the development permitted was in substance different from that applied for. The extent to which this latter formulation is incompatible with the former I shall deal with in a moment. Although, therefore, Mr. Harper and Mr. Sullivan put forward a number of propositions, in the end I do not think that they differ markedly from each other on the essential principles governing the question of when conditions can be regarded as *intra vires*. Both, I think, accept as a starting point the passage in Lord Widgery C.J.'s judgment that I have just quoted. In the context of that passage, the question here is whether it is permissible to grant a planning permission subject to a condition that only what I may call a " reduced development " is carried out. Both counsel, I think, accept that it is permissible to grant planning permission subject to such a condition; both, I think, would seek to limit such conditions to those that do not alter the substance of the application; and both agree that in considering whether it is right to grant planning permission subject to such a condition the planning authority should, among other things, have regard to one of the underlying purposes of Part III of the Act of 1971, which is to ensure that before planning permission is granted there should be adequate consultation with the appropriate authorities and a proper opportunity for public comment and participation. The broad proposition, therefore, as I see it, to which both counsel would give assent is that a condition the effect of which is to allow the development but which amounts to a reduction on that proposed in the application can legitimately be imposed so long as it does not alter the substance of the development for which permission was applied for. If it does alter the substance, the argument goes on, it cannot legitimately be imposed, because there has been no opportunity for consultation and so on about what would be a substantially different proposal. Parliament cannot have intended conditional planning permission to be used to circumvent the provisions for consultation and public participation contained in this Part of the Act.

Now, the test of substantial difference is not at all the same thing as the test of severability. It is possible to imagine an application for two related developments on the same piece of land, say a major and a minor development, that is clearly severable into these two portions. To give planning permission subject to a condition that the minor development was not carried out might well not alter the substance of the application. On the other hand, if the condition prevented the major development being carried out, that might well amount to a permission substantially different from the application. Thus, the application of the severability test alone could result in planning permission being given for development that was substantially different from that applied for. The proposition that conditions can only be used to reduce the development below that proposed in the

application where the application is severable is derived from a decision of Sir Douglas Frank, Q.C., sitting as a deputy High Court judge, in *Kent County Council* v. *Secretary of State for the Environment.*[3] That decision itself clearly arose from the argument put forward by counsel for the Secretary of State, which was in these terms, as recorded in Sir Douglas Frank's judgment[4]:

> . . . (1) where an application contained a number of separate and divisible elements it was lawful for them to be separately dealt with, (2), alternatively, that if the elements were not divisible there was power to modify the application providing that (a) the scope of the development was not enlarged; (b) the essential nature of the development was not altered; and (c) any persons affected were given a chance to make representations.

It can be seen that the second alternative formulation looks remarkably like the proposition to which I have just referred and to which both counsel would assent. In giving judgment, Sir Douglas Frank acceded to the first part of this argument and presumably thought it in consequence unnecessary to deal with the second. The Secretary of State, in the case with which I am dealing, has clearly directed himself that it is only if the application is severable that he can by condition reduce the ambit of the planning permission granted. He has had no regard to the question whether the planning permission, if granted subject to a condition, would be substantially different from that applied for.

For my part, I cannot accept that the proper test is whether the development proposed in the application was severable or not. Unless coupled with a requirement that the result must not be substantially different from the development applied for, it would be possible, as I have just indicated, for local planning authorities to grant planning permission for developments that were in fact substantially different and thus defeat the consultative objects of Part III of the Act of 1971. The severability test, therefore, could only be a proper one if combined with a test of substantial difference. I can, however, see no justification for the severability test at all. It should be remembered that we are dealing here with applications for outline planning permission. Many of these applications are, no doubt, for multiple purposes, some of them severable, some of them perhaps not. Many applications, however, as here, are for single purposes, for instance, residential development. Why should it be impossible for the local planning authority to say, on an application for outline planning permission: " we think 35 acres is too much but 25 will be all right," and similarly with a reduction in density? So long as the reduction passes the test of not altering the substance of the application, what vice is there in that? It is clearly a condition fairly and reasonably related to the permitted development (see *Pyx Granite Co. Ltd.* v. *Minister of*

[3] (1976) 33 P. & C.R. 70.
[4] *Ibid.* at p. 75.

Housing and Local Goverment[5]), and it is not unreasonable under the *Associated Provincial Picture Houses Ltd.* v. *Wednesbury Corporation*[6] doctrine. To give permission for a substantially different development would, on the other hand, be unreasonable as that word is understood in these cases (see, for instance, a passage from the judgment of Diplock L.J. in *Mixnam's Properties* v. *Chertsey Urban District Council*[7]), because it would not be what Parliament intended a consultation process to comprehend. The test of substantial difference is thus firmly based on the broad principles of *Associated Provincial Picture Houses Ltd.* v. *Wednesbury Corporation*[8]. The severability test, on the other hand, seems to me to have no particular validity. To grant a planning permission for part only of an application that is not severable does not appear, merely by that fact, to run counter to either of the two general limitations referred to by Lord Widgery C.J. in *Kingston-upon-Thames Royal London Borough Council* v. *Secretary of State for the Environment.*[9] Perhaps the argument on severability put forward by the Secretary of State in *Kent County Council* v. *Secretary of State for the Environment*[10] and accepted by Sir Douglas Frank had its origin in the fact that the application in that case clearly was severable. That does not, however, seem to me to justify its elevation into a matter of general principle.

I conclude, for my part, that there is no principle of law that prevents the Secretary of State from imposing conditions that have the effect of reducing the permitted development below the development applied for except where the application is severable. The Secretary of State clearly directed himself that there was such a principle and thus fell into error, and his decision must be quashed.

I should add a rider. The true test is, I feel sure, that accepted by both counsel: is the effect of the conditional planning permission to allow development that is in substance not that which was applied for? Of course, in deciding whether or not there is a substantial difference the local planning authority or the Secretary of State will be exercising a judgment, and a judgment with which the courts will not ordinarily interfere unless it is manifestly unreasonably exercised. The main, but not the only, criterion on which that judgment should be exercised is whether the development is so changed that to grant it would be to deprive those who should have been consulted on the changed development of the opportunity of such consultation, and I use these words to cover all the matters of this kind with which Part III of the Act of 1971 deals.

There may, of course, be, in addition, purely planning reasons for concluding that a change makes a substantial difference, but I find it

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[5] [1958] 1 Q.B. 554; 9 P. & C.R. 204.
[6] [1948] 1 K.B. 223; [1947] 2 All E.R. 680, C.A.
[7] [1965] A.C. 735; [1964] 2 W.L.R. 1210; [1964] 2 All E.R. 627; 15 P. & C.R. 331; 62 L.G.R. 528, H.L.
[8] [1948] 1 K.B. 223.
[9] [1973] 1 W.L.R. 1549, 1553; 26 P. & C.R. 480, 483–484.
[10] (1976) 33 P. & C.R. 70, 75.

difficult to believe that, where a proposed development has been the subject of such consultation and has produced a root-and-branch opposition to any development at all, whether larger or smaller, it should be necessary in all cases to go again through the process of consultation about the smaller development. It is clear that, in this case, the processes of consultation had resulted in such root-and-branch opposition that further consultation could not have resulted in more opposition but only, if there was any change in public attitudes, in less. In those circumstances, Mr. Harper invites me to say that only an unreasonable Secretary of State could have concluded that the course recommended by the inspector would result in a development substantially different from that contained in the application. In consequence, he says, I should make an order the effect of which would be to substitute for the dismissal of his client's appeal planning permission as recommended by the inspector. As I understand it, however, all that I have power to do under section 245 of the Act of 1971 is to quash the order, and that is all, in fact, that Mr. Harper's notice of motion asks me to do. The court cannot grant planning permission. I must decline his invitation and merely order that the Secretary of State's decision should be quashed.

I might add that I have come to my general conclusion with a certain feeling of satisfaction, as it seems to me to permit a welcome degree of flexibility in the conduct of planning applications and appeals while at the same time maintaining adequate safeguards for the interests of those in whose favour the provisions for consultation were enacted.

Application allowed. Decision of Secretary of State quashed.

Secretary of State to pay such costs of applicants as would have been incurred by them if Secretary of State had submitted to judgment. Additional costs to be borne by second respondents.

Solicitors—R. G. Frisby & Small, Leicester; Solicitor, Harborough District Council.

[*Reported by Michael Gardner, Barrister.*]

APPENDIX 4 – *KENT* CASE

Kent County Council v. Secretary of State for the Environment and Another

QUEEN'S BENCH DIVISION

SIR DOUGLAS FRANK, Q.C. (sitting as a deputy judge)

July 6, 7, 9 and 29, 1976

Town and Country Planning—Planning permission—Application referred to Secretary of State—Application for permission for construction of oil refinery, provision of road and rail terminal, construction of pipeline and construction of access road—Decision of Secretary of State to grant permission for construction of refinery, etc., but to refuse permission for construction of access road—Condition imposed restricting use of existing road network—View of Secretary of State for Energy that additional oil refinery capacity desirable taken into account—Whether permission lawful—Whether determining authority entitled to grant permission for part only of development sought—Whether necessary for application to be amended—Whether consent of applicant necessary before amendment—Whether local planning authority must be party to amendment—Whether failure of Secretary of State to state that application amended entitled local planning authority to have permission quashed ex debito justitiae—Whether "or" in section 29 (1) *of Act of* 1971 *to be construed disjunctively or conjunctively—Whether taking into account of view of Secretary of State for Energy breach of rules of natural justice—Whether condition restricting use of existing road network invalid as being unworkable or as taking away substance of permission—Town and Country Planning Act* 1971 (*c.* 78), *s.* 29 (1)[1]*—Town and Country Planning (Inquiries Procedure) Rules* 1974 (*S.I.* 1974 *No.* 419), *rr.* 8 (5), 12 (2) (*b*).[2]

In 1971, the second respondents applied to the applicants, the local planning authority, for planning permission to construct an oil refinery.

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[1] Town and Country Planning Act 1971, s. 29: " (1) Subject to the provisions of sections 26 to 28 of this Act, and to the following provisions of this Act, where an application is made to a local planning authority for planning permission, that authority, in dealing with the application, shall have regard to the provisions of the development plan, so far as material to the application, and to any other material considerations, and—(*a*) subject to sections 41, 42, 70 and 77 to 80 of this Act, may grant planning permission, either unconditionally or subject to such conditions as they think fit; or (*b*) may refuse planning permission. . . ."

[2] Town and Country Planning (Inquiries Procedure) Rules 1974, r. 8: ". . . (5) Nothing in either of the last two foregoing paragraphs shall require a representative of a government department to answer any question which in the opinion of the appointed person is directed to the merits of government policy and the appointed person shall disallow any such question."

R. 12: ". . . (2) Where the Secretary of State—(*a*) differs from the appointed person on a finding of fact, or (*b*) after the close of the inquiry takes into consideration any new evidence (including expert opinion on a matter of fact) or any new issue of fact (not being a matter of government policy) which was not raised at the inquiry, and by reason thereof is disposed to disagree with a recommendation made by the appointed person, he shall not come to a decision which is at variance with any such recommendation without first notifying the applicant, the local planning authority and any section 29 party who appeared at the inquiry of his disagreement and the reasons for it and affording them an opportunity of making representations in writing within 21 days or (if the Secretary of State has taken into consideration any new evidence or any new issue of fact, not being a matter of government policy) of asking within 21 days for the reopening of the inquiry. . . ."

The first respondent, the Secretary of State for the Environment, called in the application under section 22 of the Town and Country Planning Act 1962. An inquiry was held, and the inspector recommended on environmental grounds and because of the inadequacy of the surrounding road network to take the traffic involved that the application be refused. The Secretary of State, however, decided that it was in the national interest that the additional refinery capacity should be made available. He recognised that the road system was inadequate and said that he had it in mind to refuse permission for the construction of the access road as proposed and to grant outline permission for the refinery, a jetty, rail terminal facilities and the pipelines between the refinery and the terminal subject to a condition, *inter alia*, that, save as should be agreed from time to time with the local planning authority or, in default of agreement, determined by himself, no deliveries of oil or oil products or by-products should be made to or from the refinery or terminal except by sea, pipeline or rail transport. He said that, since a permission as indicated would result in development significantly different from that for which permission had been sought, he should afford all parties concerned an opportunity to make further representations to him. Further representations were made, particularly by the local planning authority. The second respondents informed the Secretary of State that the condition eliminating the use of the road was acceptable to them. On December 6, 1974, in the House of Commons, the Secretary of State for Energy made a statement indicating that if projects under consideration, including the one in question, went ahead refinery capacity in the 1980s would be sufficient. The inquiry was reopened in April 1975, and on December 31, 1975, the Secretary of State for the Environment granted permission on the lines which he had previously indicated subject to certain further conditions. The local planning authority applied under section 245 of the Town and Country Planning Act 1971 for an order that the Secretary of State's decision be quashed, contending (1) that the Secretary of State had erred in law and acted *ultra vires* in granting permission for part only of the development the subject of the application for permission, (2) that he had acted in breach of the rules of natural justice in taking into account the views of the Secretary of State for Energy, which they had had no opportunity of testing, (3) that the condition imposed by the Secretary of State was invalid because it was unworkable and because it took away a substantial part of the benefit of the planning permission.

Held, dismissing the application, (1) that, on the true construction of section 29 of the Act of 1971 in the context of Part III of that Act, in particular section 23, the determining authority could grant permission for as much of the development for which permission had been applied for as they thought should be permitted; and that where, as in the present case, an application consisted of a number of separate and divisible elements (*viz.*, the construction of the refinery, the provision of road and rail terminals, the construction of a pipeline and the construction of an access road) it was lawful for them to be dealt with separately, whether the decision of the Secretary of State was to be regarded as a decision on an amended application or as a part-refusal.

Per curiam. (i) The word " or " in section 29 of the Act of 1971 can be construed conjunctively having regard to its context, *i.e.* Part III of the Act, including section 38.

Mersey Docks and Harbour Board v. *Henderson Brothers* (1888) 13 App. Cas. 595, H.L.(E.), applied.

(ii) There is no reason why the local planning authority had to be a party to any formal amendment of the second respondents' application for planning permission consequent on the granting of permission for part only of the development proposed.

Quaere, whether such formal amendment was necessary, and whether an

applicant's consent has to be obtained before permission for part only of development is granted.

(2) That the statement of the Secretary of State for Energy in the House of Commons had been a statement of policy which had not in fact dealt with the question of the siting of the necessary refineries apart from the need for them; that under rule 8 (5) of the Town and Country Planning (Inquiries Procedure) Rules 1974 his policy could not have been questioned at the inquiry; that under rule 12 (2) (*b*) of the Rules of 1974 the Secretary of State for the Environment could have taken that statement of policy into account even if it had not been raised at the inquiry; that apart from the rules the Secretary of State for the Environment had been entitled to take the views of the Secretary of State for Energy into account even without giving the parties an opportunity to comment on them; that no rule of natural justice could have required the Secretary of State for Energy to give evidence at the inquiry; and that in any event the parties had been able to comment at the inquiry, and had commented, on the statement of the Secretary of State for Energy and the local planning authority had themselves stated in evidence that there would be a regional deficit and that had been part of the evidence relied on by the Secretary of State for the Environment in his decision.

Miller v. *Minister of Health* [1946] K.B. 626; 44 L.G.R. 370; *Re City of Plymouth (City Centre) Declaration Order* i.e. 1946, *Robinson* v. *Minister of Town and Country Planning* [1947] K.B. 702; [1947] 1 All E.R. 851; 45 L.G.R. 497, C.A.; *Summers* v. *Minister of Health* [1947] 1 All E.R. 184; 45 L.G.R. 105; *B. Johnson & Co. (Builders) Ltd.* v. *Minister of Health* [1947] 2 All E.R. 395; 45 L.G.R. 617, C.A.; and *Darlassis* v. *Minister of Education* (1954) 4 P. & C.R. 281; 52 L.G.R. 304 applied.

(3) That the fact that there might be practical difficulties in enforcing the condition concerning deliveries by road, for example, in distinguishing the second respondents' traffic from other traffic, did not go to the validity of the condition; that it must always be a question of fact and degree whether a particular condition was such as to take away the substance of the permission; but that in the present case the substance of the permission was the construction of the refinery, to which all else was ancillary, and the second respondents' acceptance of the condition imposed was evidence that it was not such as to make the refinery unworkable; and that, accordingly, the condition was not invalid.

(4) That the refusal of permission for the construction of the road had not been prejudicial to the local planning authority but had come about in order to meet one of their major objections; and that, accordingly, they were not entitled to have the Secretary of State's decision quashed *ex debito justitiae* by reason of any failure of the Secretary of State to state formally that the application was amended to exclude the construction of the road.

Miller and Others v. *Weymouth and Melcombe Regis Corporation and Another* (1974) 27 P. & C.R. 468 applied.

MOTION.

The facts are stated by Sir Douglas Frank, Q.C.

Raymond Sears, Q.C. and *David Lamming* for the applicants, the Kent County Council.

David Widdicombe, Q.C., Harry Woolf and *Lord Colville* for the first respondent, the Secretary of State for the Environment.

Graham Eyre, Q.C. and *Malcolm Spence* for the second respondents, Burmah-Total Refineries Trust Ltd.

Cur. adv. vult.

July 29. **Sir Douglas Frank, Q.C.** This is an application under section 245 of the Town and Country Planning Act 1971 for an order that a planning permission for an oil refinery granted by the first respondent to the second respondents be quashed. On September 23, 1971, the second respondents made two applications for planning permission, one for development described as " oil refinery and jetty with ancillary activities " and the other as " road/rail terminal facilities and ancillary pipelines and roadways." The purpose of the application was to obtain planning permission for a proposed new oil refinery at Cliffe Marshes alongside the Thames in Kent.

It was explained that two applications were made as two separate sites were affected; but the local planning authority was asked to treat the two application forms as constituting one application. On November 29, 1971, the first respondent gave notice that he had decided to exercise his powers under section 22 of the Town and Country Planning Act 1962 and to call in the application for decision by himself. On May 2, 1972, a local inquiry was held by one of the first respondent's inspectors, Mr. H. M. A. Stedham, A.R.I.C.S., F.R.T.P.I., assisted by two assessors. It was completed on May 5, 1972. Mr. Stedham reported at length to the first respondent in September 1972.

Having concluded that there were major objections to the development because of the effect which it would have on the coastal area and because of the inadequacy of the road network to take the traffic involved, he recommended that the application be refused. However, the first respondent decided that it was in the national interest that additional refinery capacity should be made available to meet the expected requirements in south-east England and for that reason was unable to accept his inspector's recommendation. Nevertheless, he recognised that the road system was inadequate and said that he had it in mind to refuse permission for the construction of the access road as proposed in the application and to grant outline planning permission for the oil refinery, the jetty, the rail terminal facilities and the pipelines between the refinery and terminal subject to a condition, *inter alia*, that, save as should be agreed from time to time with the local planning authority (or, in default of agreement, as should be determined by the Secretary of State), no deliveries of oil or oil products or by-products should be made to or from the oil refinery or terminal except by sea, pipeline or rail transport. He also stated that

> since a planning permission along the lines indicated above would result in development significantly different from that for which planning permission was originally sought, the Secretary of State thinks that he should afford all the parties concerned an opportunity to make further representations to him on the matter.

Further representations were made particularly by the applicants, and accordingly on December 10, 1974, the first respondent gave notice that he intended to reopen the inquiry, but limited to hearing

representations relating to his proposed intention to grant permission in the way he had stated and to material considerations which had arisen or come to light since the original inquiry.

The reopened inquiry was held by Mr. Stedham from April 8 to 16, 1975, and he reported in the following month. In his report he said that in his opinion there had been sufficient changes since March 1974, certainly since 1972, to require a fresh assessment as to whether the public interest in securing extra refining capacity in the region was still sufficiently strong to outweigh the siting of a proposed refinery on the Cliffe Marshes, especially with the prospect of either restricted distribution arrangements for a lengthy period or the imposition of tanker traffic on an unsuitable road network. He felt unable to make a recommendation.

On December 31, 1975, the first respondent granted planning permission on the lines previously stated subject to a number of other conditions of which only one will have to be mentioned. The applicants challenge the first respondent's decision on a number of grounds and it will be convenient for me to deal with them under four separate headings.

(1) *Permission for part only of the development.* The contention is that the first respondent erred in law and was acting *ultra vires* in purporting to grant planning permission for part only of the development the subject of the application. Mr. Sears, for the applicants, submitted that the first respondent was in the same position with a called-in application as a local planning authority in dealing with an application, and that his powers were not greater than those set out in section 29 (1) of the Act of 1971. Thus he might grant permission either conditionally or subject to conditions, or might refuse permission, but not both. It was clear from the language of the section that the grant or refusal could relate only to the development proposed in the application and not to a different development, for that, Mr. Sears said, was the scheme of the Act. He asked how it would be possible to appeal under section 36 or section 37 where an application had been granted in part and refused in part, or how sections 41 and 45 could apply to a part-only permission. He contrasted the provisions of section 183 and claimed that had it been intended that part-only permission could be granted under section 29 then words similar to those in section 183 would have been used. He emphasised that the reason why the Secretary of State had reopened the inquiry was that he had said that a planning permission along the lines indicated would result in a development significantly different from that for which planning permission had originally been sought. He referred to *R.* v. *Federal Steam Navigation Co. Ltd.*[3] for authority for the proposition that the word " or " in section 29 should be used disjunctively—that is to say, that planning permission could not be granted and refused on the same application.

[3] [1974] 1 W.L.R. 505; [1974] 2 All E.R. 97, H.L.(E.).

Mr. Widdicombe conceded that the first respondent had no greater power than the local planning authority in dealing with an application but submitted (1) that where an application contained a number of separate and divisible elements it was lawful for them to be separately dealt with, (2), alternatively, that if the elements were not divisible there was power to modify the application provided that (a) the scope of the development was not enlarged; (b) the essential nature of the development was not altered; and (c) any persons affected were given a chance to make representations. He did not think that the agreement of the applicant for permission to the modification was necessary, but that question did not arise in this case as the second respondents had agreed to the modification. As to his first submission, Mr. Widdicombe said that the fact that there was only one application form was not conclusive, for there could be several developments in one application. Here there were four elements expressed in the application and by the Secretary of State, namely, (1) the construction of the refinery, (2) the provision of road and rail terminals, (3) the construction of a pipeline, and (4) the construction of an access road. Each part involved separate land, and a separate and distinct use of any one part could have been carried out without the carrying out of the others save that the construction of the refinery was a development to which all the other elements were ancillary. He denied that any problems could arise under the sections mentioned by Mr.Sears for in each case the provision concerned would apply to the part of the development granted or the part refused as the case might be. He said that a permission related not to the application but to the development applied for because by section 23 planning permission was required for the development.

Mr. Eyre, for the second respondents, adopted Mr. Widdicombe's arguments and conceded that the first respondent had no jurisdiction to grant planning permission for development to which the application did not relate, nor for development which was different in nature. He had power to grant permission for any development included in the application. He argued that section 38 of the Act of 1971 clearly envisaged that the first respondent had power to grant permission in respect of part of the land to which the application related. As to the meaning of the word " or," he contended that it was not to be construed in the sense of mutual exclusivity and that it was not an inviolate disjunctive where the clear intention of the statute was otherwise: *Mersey Docks and Harbour Board* v. *Henderson Brothers.*[4] Dealing with other objections raised by Mr. Sears, he said that the applicants' consent to the amendment was not required as on the application being called in they ceased to have any jurisdiction but merely a right to be heard. He said that the form of a decision could not affect the subject-matter of the grant.

In my judgment the correct approach to this matter is to ascertain

[4] (1888) 13 App. Cas. 595, 603, H.L.(E.).

the powers under section 29 of the Act by reference to the purposes of Part III, in which it appears. It seems to me that everything in Part III flows from and is consequential on the provision in section 23 that planning permission is required for the carrying out of any development of land; hence, when the matters come before the determining authority, in this case the first respondent, what that authority has to do is to decide whether, having regard to the provisions of the development plan and to any other material considerations—that is, planning considerations—permission ought to be granted, and, if so, what, if any, conditions should be imposed. It further seems to me that, as a matter of common sense, the determining authority can grant as much of the development applied for as they think should be permitted. It may be that the applicant's consent should first be obtained, but no question as to that arises in the instant case, as on April 2, 1974, the second respondents told the first respondent that " We confirm the condition proposed by paragraph 5 of your letter is acceptable to our clients." That was the condition eliminating the use of the road. Indeed, as Mr. Sears admitted, it is common practice for applications to be dealt with in this way—for example, where permission for 50 houses is applied for and the local planning authority grants permission for 40. Mr. Sears found that unobjectionable but said that a formal amendment to the application was required and that where the application had been called in, the consent of the local planning authority must have been given.

On the facts of this case the first respondent and the second respondents by their conduct agreed to an amendment. I see no reason why the local planning authority had to be a party to that amendment. Accordingly, I agree with Mr. Widdicombe that where an application consists of a number of separate and divisible elements it is lawful for them to be separately dealt with, as was done in this case. It seems to me to matter not in this case whether the decision of the first respondent was on an amended application or whether it was a part refusal, save that in the latter case it is necessary to construe the word " or " conjunctively. I think, however, that that may be done having regard to the context of the part of the Act in which the word appears. In *Mersey Docks and Harbour Board* v. *Henderson Brothers*[5] Lord Halsbury L.C. said[6]:

> . . . I know of no authority for such a proceeding unless the context makes the necessary meaning of " or " " and," as in some instances it does; but I believe it is wholly unexampled so to read it when doing so will upon one construction entirely alter the meaning of the sentence, unless some other part of the same statute or the clear intention of it requires that to be done, . . .

In my judgment, Part III of the Act of 1961 does require " or "

[5] 13 App.Cas. 595.
[6] *Ibid.*, 603.

to be read as " and," and, apart from the general purpose of Part III, section 38 impliedly recognises that as the correct construction.

There is one further way of looking at the first respondent's decision. Not only did he expressly refuse permission for the construction of the access road but he also imposed a condition which had the same effect in that in the absence of the agreement of the local planning authority deliveries were to be made only by sea pipeline or rail transport. Thus, if the refusal was *ultra vires* then it is arguable that that part of the decision should be disregarded.

Of course, in truth what the first respondent decided was to grant planning permission for the terminal proposed subject to a condition which would restrict the way in which the development was carried out. There would be nothing unusual in that, but whether this particular condition was *ultra vires* I will consider when I come to the last ground of appeal set out in the notice of motion.

(2) *Natural justice.* It is said under this head that the first respondent erred in finding as he did that the proposed oil refinery at Cliffe was needed to meet demand in the south-east of England and that " there is evidence of a deficit in refining capacity " in the south-east. The error alleged is that he had regard to the views of the Secretary of State for Energy when there was no evidence given by that Secretary of State as to the need for the refinery and that the applicants had had no opportunity of testing the assertion of that Secretary of State that the proposed refinery was needed to meet demand in the south-east or the factual basis of the statement made by him and relied on by the first respondent. This allegation arises from paragraph 15 of the decision letter which sets out the first respondent's conclusions in these terms:

> So far as the south-east region is concerned, there is evidence (as indicated in paragraph 13 above) of a deficit in refining capacity and the Secretary of State concludes that this deficit will be increased by the extent to which any North Sea oil refined in the region is exported. Given that it will take a number of years to build the proposed refinery, the Secretary of State does not agree with the argument that reliance for oil supplies can or should be placed on other projects, the implementation of which is not guaranteed. He sees no reason to doubt that additional capacity should be provided in the region, and he also considers that the need to provide for exports strengthens the case for such additional refining capacity. In all the circumstances he has concluded that a need for the refinery proposed in the present application has been established.

The evidence indicated in paragraph 13 was expressed in these words:

> At the reopened inquiry forecasts were submitted by the county council that, assuming no new capacity is created, the regional deficit would be about five m.t.y.; whereas national capacity would be in surplus. Documentary evidence was submitted on

> behalf of your clients that the regional deficit could be in the order of 10 or 12 m.t.y. In his statement of December 6, 1974 (referred to in paragraph 8 above), the Secretary of State for Energy has expressed the view that the proposed refinery at Cliffe is needed to meet the demand in the south-east.

In his statement of December 6, 1974, to the House of Commons, the Secretary of State for Energy had said:

> If projects now under consideration go ahead, including those at Canvey Island and Cliffe, which are needed to meet demand in the south-east, I expect our refinery capacity in the early 1980s to approach 150 million tons a year. This should be enough overall to meet our own needs and provide for some exports.

Mr. Sears, while conceding that the first respondent was entitled to have regard to his own policy and that of any other Government department, said that the applicants were entitled to be provided with the information on which the Secretary of State for Energy's judgment was made and were entitled to cross-examine to test the credibility of that information. He further complained that the decision in this case was made not by the first respondent but by the Secretary of State for Energy, and he referred to *H. Lavender & Son Ltd.* v. *Minister of Housing and Local Government.*[7] Dealing first with that last point, the *ratio decidendi* in the *Lavender* case was that the respondent had delegated the making of his decision to the Minister of Agriculture and had not properly or at all exercised his duty of discretion. In the instant case, although the first respondent had regard to the view expressed by another minister there is no evidence whatsoever that the decision was other than his own. Accordingly, I do not find this complaint well founded, and, indeed, it was abandoned by Mr. Sears.

I think that the short answer to the applicants' first point is that the Secretary of State for Energy's statement in the House of Commons that two more refineries were required in the south-east to meet the expected demand was a statement of policy. He did not say that it was his policy that those refineries should be at Canvey Island and Cliffe but merely said that if those projects went ahead they would meet that particular need. He was thus confining himself to a policy peculiar to his own department leaving the decision as to the siting with the appropriate authority. If that is right I think that it is clear from the Town and Country Planning (Inquiries Procedure) Rules 1974 that, far from the Secretary of State being required to justify that policy in any way, it was a matter which could not have been questioned at the inquiry (see rule 8(5)) in that the first respondent could have taken it into account even if it had not been raised at the inquiry (see rule 12 (2) (*b*)). Apart from the Rules, there is ample authority for the proposition that the first respondent was entitled to take into account the views of another Government department even without giving the parties an opportunity to comment on them

[7] [1970] 1 W.L.R. 1231; [1970] 3 All E.R. 871; 68 L.G.R. 408.

(see, for example, *Miller* v. *Minister of Health*[8]; *Re City of Plymouth (City Centre) Declaratory Order* 1946, *Robinson* v. *Minister of Town and Country Planning*[9]; *Summers* v. *Minister of Health*[10]; *B. Johnson & Co. (Builders) Ltd.* v. *Minister of Health*[11]; *Darlassis* v. *Minister of Education.*[12]

However, it happens that in this case the statement in the House of Commons was made before the 1975 inquiry so that the parties were able to, and did, comment on it at the inquiry. Moreover, the applicants themselves stated that there would be a regional deficit, and that was part of the evidence relied on by the first respondent for his decision. I would add that in any event there is no rule of natural justice which could have required the Secretary of State for Energy to give evidence at the inquiry.

It follows that the applicants' contention under this heading fails.

(3) *Invalidity of condition.* The applicants say that condition 5 (that is, the condition which requires that the delivery shall be made only by sea, pipeline or rail transport) is invalid first because it is unworkable and secondly because it takes away a substantial part of the benefit of the planning permission. Mr. Sears said, however, that this was not the most important part of his case. In my judgment, there are short answers to these two points. First, if the second respondents carried out deliveries by road (say, as stated in the condition) then they would be liable to enforcement procedure under the Act. The fact that there might be practical difficulties as alleged in an affidavit, namely, in distinguishing the second respondents' traffic from other traffic, does not go to the validity of the condition. As to the second point, a conditional permission is almost invariably less beneficial than an unconditional permission. It must always be a question of fact and degree whether a particular condition is such as to take away the substance of the permission, in which event that condition may be invalid. In this case, however, the development sought is the construction of an oil refinery and all else is ancillary to that purpose. Of course, if the condition had been such as to render the oil refinery unworkable that would be a different case, but the second respondents' acceptance of the condition is evidence that it is certainly not this case.

There is one final matter with which I must deal. Mr. Widdicombe submitted that if I concluded that the decision of the first respondent was right in principle and wrong in form then I had a discretion which I should exercise in his favour. He pointed out that under section 245 (4) (*b*) the court, if satisfied that the order or action in question is not within the powers of the Act may quash the order or action. In *Miller*

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[8] [1946] K.B. 626; 44 L.G.R. 370.
[9] [1947] K.B. 702; [1947] 1 All E.R. 851; 45 L.G.R. 497, C.A.
[10] [1947] 1 All E.R. 184; 45 L.G.R. 105.
[11] [1947] 2 All E.R. 395; 45 L.G.R. 617, C.A.
[12] (1954) 4 P. & C.R. 281; 52 L.G.R. 304.

and Others v. *Weymouth and Melcombe Regis Corporation and Another*[13] Kerr J. said[14]:

> In my judgment Mr. Slynn is correct in his submission that both as a matter of history and on the basis of such authority as there is the word " may " is here used in its ordinary permissive sense though it would no doubt only be rarely and in very unusual cases that a court would not exercise its discretion to quash a ministerial order or action which was not within the relevant statutory powers, and it would never do so if a refusal to exercise the discretion to quash would or might be unjust in the circumstances.

Thus, if I am wrong in my view that the first respondents' decision is within the powers of the Act, the question is then whether the applicants would be entitled to have the order quashed *ex debitio justitiae*. The most that can be said against the first respondent is that he failed to state formally that the application was amended to exclude the construction of the road. The parties at the second inquiry were well aware that permission for construction of the road was to be refused. That refusal or amendment, far from being prejudicial to the applicants, came about in order to meet one of their major objections. It cannot, therefore, be said that they are entitled to the order which they seek *ex debito justitiae*. Accordingly, even if I had found that the first respondent had no power to refuse the application in part or that in truth he dealt with it as an amended application, then I would decline to exercise my jurisdiction to grant the order sought by the applicants. In all the circumstances, I accordingly dismiss this application.

Application dismissed with costs.

Solicitors—Sharpe, Pritchard & Co. for W. G. Hopkin, Solicitor, Kent County Council, Maidstone; Treasury Solicitor; Denton, Hall & Burgin.

[*Reported by Michael Gardner, Barrister.*]

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[13] (1974) 27 P. & C.R. 468.
[14] *Ibid.*, 478–479.