From:	[redacted]
To:	Aquind Interconnector
Cc:	[redacted]
Subject:	AQUIND (EN020022) – Mr. Geoffrey Carpenter and Mr. Peter Carpenter (ID: 20025030) [BMG-Legal.FID44973420]
Date:	01 October 2021 22:33:49
Attachments:	image737130.png image950119.png image116367.png Aquind - Blake Morgan Submissions to SoS on behalf of Carpenters - 1 October 2021 - SUBMISSION VERSION.pdf

Dear Sirs

Application by AQUIND Limited for an Order granting Development Consent for the AQUIND Interconnector Project (PINS reference: EN020022)

Mr. Geoffrey Carpenter and Mr. Peter Carpenter (Registration Identification Number: 20025030)

We act for Mr Geoffrey Carpenter and Mr Peter Carpenter ("our **Clients**") who are the freehold interest owners of Little Denmead Farm (and are Interested Parties).

We refer to the email invitation from the Secretary of State for the Department for Business, Energy & Industrial Strategy dated 17 September 2021, for comments to be submitted by Interested Parties on the Applicant's responses to his consultation of 2 September 2021. We also note the Secretary of State requires those comments to be submitted by today (1 October).

Accordingly, we enclose our Clients' Response.

Kind regards
Anita

Anita Kasseean
Partner
For and on behalf of Blake Morgan LLP

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Date: 1 October 2021

Application by Aquind Limited for a Development Consent Order for the 'Aquind Interconnector' electricity line between Great Britain and France (PINS reference: EN020022)

Submissions in relation to the Applicant's response to the Secretary of State's Second Information Request on 2nd September 2021

For the Secretary of State

On behalf of

Mr. Geoffrey Carpenter & Mr. Peter Carpenter

Registration Identification Number: 20025030

Submitted on 1st October 2021 in relation to the Secretary of State's request for comments dated 2nd September 2021

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Ref: 584927-6

SECTION A – INTRODUCTION

1. On the 2nd September 2021, the Secretary of State ("SoS") requested Further Information in the form of questions of the Applicant and has given landowners affected by the Converter Station and its construction the opportunity to comment on the Applicant's responses and new material including on the following terms: (Emphasis added)

> *Without prejudice to the Secretary of State's decision on the proposed development, the Applicant is asked to provide further information to justify the need for the extent of compulsory acquisition powers (both permanent and temporary) sought in relation to those plots of land that would be affected were those elements of the Application related to commercial telecommunications use be excluded from the Development Consent Order. In particular, the Applicant should provide:*
>
> - *Justification for the extent of the compulsory acquisition powers sought at the plots of land associated with the proposed optical regeneration site. This should include a revised plan that shows the land required for the optical regeneration buildings with any commercial telecommunications removed, the siting of those buildings, and any revised Order limits. In particular the Secretary of State notes that the Applicant has advised that the optical regeneration site will reduce in size by approximately two thirds should the equipment required for commercial telecommunications be removed. The Applicant should therefore confirm how many (if any) optical regeneration stations are required in those circumstances. The Applicant should also confirm if the impact on the Fort Cumberland car park is anticipated to change if the commercial telecommunications elements of the proposal were removed.*
> - *Justification for the extent of compulsory acquisition powers sought at the plots of land associated with the commercial telecommunications buildings on the site of the converter station. The Secretary of State notes that the Applicant has advised that these buildings would not be required should the equipment required for commercial telecommunications be removed. The Applicant should confirm the reasons as to why the full extent of land will still be required if those telecommunications buildings are removed from the development consent order.*

2. In response to two, apparently simple, questions (and its own evidence confirming the absence of a requirement for the extent of land for the commercial telecommunications building and its associated car park), relating to the extent of land take relating to plots associated with the commercial telecommunications buildings, the Applicant has submitted an extensive Applicant's Response to Second Information Request ("ARSIR") of c.50 pages that includes wide ranging submissions and plans including on drainage, ponds, and an Access Road and new evidence in Appendix 5 about alternative pond locations not previously submitted.
3. The Applicant also has taken the opportunity to respond to other matters in Section 5 of its Response that include additional representations (at paragraph 5.3 and following) to the Carpenters', and also submissions on commercial telecommunications.
4. Because our Clients are threatened by Aquind Limited ("the Company/Applicant") seeking to take their land against their will, and since that private Company has previously mischaracterised our Clients' case and then sought to meet their own mischaracterisation instead of directly addressing our Clients' case, we have carefully considered the ARSIR and contextualised them, whilst recognising the "onus" (in law) remains exclusively on the Company.

SECTION B – LEGAL FRAMEWORK

5. We have made extensive submissions on the correct legal framework where the taking of land from a private individual is envisaged and do not repeat that detail here. Instead we summarise the position and the protections required to be applied to our Clients' interest by the law that result to require the SoS to consider the Application within certain constraints not applicable to a DCO where there is no land taking. The common law protections apply to *all* of the statutory provisions here (including the dDCO). See below.

6. The first point to recall is that section 122 of the Planning Act 2008 ("PA 2008") is expressly elevated above the provisions of section 120 on its proper reading and interpretation. This ensures statutory protection for a party such as our Client. The practical result of that is that: the test of "required" and of a "compelling" case in section 122 remain elevated *above* the requirements of the provisions of sections 104 and 120; the EN-1 *guidance* presumption in favour of a grant of consent (deriving from section 104(3)) cannot override the *legal* presumption *against* a compulsory land take nor equate to a balance of competing "presumptions". The legal presumption prevails. Thus, as here, the draft DCO *provisions must* be refined or modified under section 120 by the SoS in order to ensure that the section 122 tests can be met and result in least interference with our Clients' land and, if not, the conclusion must be that a DCO may be granted but without CPO "provisions". In this case, a grant *with* our Clients' draft Protective Provisions ("dPPs") (as part of the section 120 provisions drawn *by the SoS*) would ensure a lawful conclusion under section 122(1) whereas not including them and requiring acquisition of our Clients' land would be ultra vires for the reasons previously given (and summarised below).

7. Secondly, the common law also provides detailed requirements on the SoS as to his consideration of the Application in the CPO context. We have provided the *Prest* and *Sainsburys'* cases previously and made submissions on those. A logically prior requirement is that the *Sainsburys'* case is triggered here by the fact of CPO to require the SoS to interpret <u>all</u> statutory provisions against the Applicant as the law's practical application of those protections. For example, whenever the SoS is considering the terms of: the PA 2008; the Infrastructure Planning (Environmental Impact Assessment) Regulations 2017/572; the Compulsory Acquisition Hearing Regulations 2010; and the draft DCO and our Clients' draft Protective Provisions ("dPPs"); the Supreme Court requires the interpretation of the provision that results in least interference with our Clients' land to be chosen. That is why that Court said that such construction "will" be chosen. We have adhered to that approach throughout and at the Examination. It is clear that the Applicant has <u>not</u> followed that legally correct approach (and still does not). Therefore, we invite the SoS to treat the Company's Representations relating to our Client with caution as their legal start point is different and in error. For example, the Company misled the ExA (as also occurred in the recent Stonehenge DCO case resulting in its being quashed in July 2021) into applying EN-1 *guidance* on alternatives applicable in the <u>non-cpo</u> context to the CPO context in this Application resulting to <u>reverse</u> the "onus" (of proving alternatives) from the Applicant onto our Client. The Applicant's assertion discloses a fundamental flaw by it to *its case* for CPO, and the use of CPO as a "last resort" (not as here first resort), and it subverts the role of the Examination to most carefully scrutinize our Clients' evidence instead the evidence of the Applicant. That fundamental error persists in paragraph 5.6 of the ARSIR where the Applicant asserts a test of "suitable" as a test for alternatives and (again) tries to lead the SoS

into error. So far as "suitable" derives from *Prest*, the reference in *Prest* to "suitable land" (as an alternative *site*) was not advanced by the Court of Appeal as a test *for* alternatives but as an *example* of the application of the principle it had just referred in the *previous sentence* that requires a "reasonable doubt" to be resolved in favour of the citizen whose land is being threatened with being taken. In the example, "suitable" is used in the sense of an equivalent situation evidencing where a rational reasonable doubt arose for resolution and is not a *test* for alternatives. See case quote below. In consequence of ARSIR, paragraph 5.6, it is now clear that, if the Applicant has assessed at all our Clients' dPPs, then it has done so unlawfully and its submissions to the ExA (and the ExA evaluation and its conclusions) and to the SoS fall to be treated with caution so as to avoid a Stonehenge situation.

8. We have found no evidence of a published detailed narrative by the Applicant about the dPPs terms, or any tracked changed version of our Clients' dPPs by the Applicant to evidence either their engagement with the terms or their dissent. Nor did the ExA dissent from the same dPPs. It follows that the SoS can properly include the dPPS under section 120, PA 2008, as part of *his* DCO (if he determines to so grant it).

9. Further, the test of "suitable" also appears in paragraph 4.4.3, bullet 8, of EN-1: (Emphasis added)

   - *…it is intended that potential alternatives to a proposed development should, wherever possible, be identified before an application is made to the IPC in respect of it (so as to allow appropriate consultation and the development of a suitable evidence base in relation to any alternatives which are particularly relevant). Therefore where an alternative is first put forward by a third party after an application has been made, the IPC **may place the onus** on the person proposing the alternative to provide the evidence for its suitability as such and the IPC should not necessarily expect the applicant to have assessed it.*

10. However, if the Applicant is relying (not on Prest) in paragraph 5.6 of its ARSIR ("suitable") but on the above paragraph of EN-1, it again seeks to mischaracterise our Clients' case and mislead the SoS as it did the ExA. It could not have been made clearer in our previous Submissions that bullet 8 *only* applies in a non-CPO case whereas paragraph 4.4.3 contains the logically prior test: (Emphasis added)

    4.4.3 Where there is a policy or legal requirement to consider alternatives the applicant should describe the alternatives considered in compliance with these requirements. Given the level and urgency of need for new energy infrastructure, the IPC should, subject to any relevant legal requirements (e.g. under the Habitats Directive) which indicate otherwise, be guided by the following principles when deciding what weight should be given to alternatives: [bullet 8].

11. The (again) underscored provisions provide, as in the Stonehenge DCO case where the ExA (and Secretary of State were also misdirected in law by the applicant and resulting in that DCO being quashed due to a failure to consider alternatives), that "any relevant legal requirements" encompasses the *Prest* common law obligations. To repeat those obligations from *Prest*: (Emphasis added)

    I regard it as a principle of our constitutional law that no citizen is to be deprived of his land by any public authority against his will, unless it is expressly authorised by Parliament and the public interest decisively so demands…
    *In the sphere of compulsory land acquisition, the **onus** of showing that a CPO has been properly confirmed rests squarely on the acquiring authority and if he seeks to support his own decision, on the Secretary of State.*

12. It could not be clearer that in the non-CPO context, EN-1 paragraph 4.4.3, bullet 8, applies. But, in the CPO context, the prior provisions of paragraph 4.4.3 expressly provide for the *Prest* provisions (as a

relevant legal requirement) to first apply and override bullet 8. That means that the onus is, and remains, exclusively the Applicant. The Applicant has not understood that fundamental legal premise. Therefore, the Applicant's approach to our Clients' case and to the ExA remains tainted by its misconception.

13. It is trite CPO law that the Applicant must itself rule out all alternatives – in this Application , alternative *ways* of permanently finishing the landform and ground finish - as *not possible,* so as to be able show "decisively" that its scheme – for permanent non-agricultural grassland and shrubs – justify as a last resort use CPO powers as a *last resort*. In this case, the Applicant cannot and has not.

14. Thirdly, the common law also provides detailed requirements that bear on the SoS in his consideration of the Application in the CPO context. As in *Prest*, and contrary to the Applicant's approach throughout to misapply the *onus* of justifying *its* taking of land by asserting that (all) Objectors must prove there to be reasonable alternatives (and thereby subverting the *Prest* tests and excluding as irrelevant the common law protections afforded to Objectors), the common law *requires* the SoS to consider *the Application*: a) with "most careful scrutiny"; b) to ensure that the "onus" of proving that section 122 of the PA 2008 is satisfied remains exclusively on the Applicant (and as a freestanding and prior test to that for alternatives in EN-1 which recognises the same) (An adjunct of (b) is that the EN-1 guidance "presumption" in favour of the Scheme cannot equate to, rebut, or override in any way, the *legal* onus derived from *Prest* (affirmed by the Supreme Court in *Sainsburys*). To do otherwise, would be to unlawfully invert the legal test below the guidance test and result in an ultra vires section 122 decision (if confirmed)); c) by resolving any "reasonable doubt" in favour of the Objector (in our case, our Clients); d) and *rule out* reasonable alternatives (An adjunct of (d) is that an alternative remains an reasonable alternative if it is *possible* (not suitable).

15. Thus, in *Prest* (where an alternative site was given as an example of an alternative *way* to acquisition of a different site), the Court of Appeal held: (Principles underlined)

> *It is clear that no Minister or public authority can acquire any land compulsorily except the power to do so be given by Parliament: and Parliament only grants it, or should only grant it, when it is necessary in the public interest. In any case, therefore, where the scales are evenly balanced — for or against compulsory acquisition with the decision — by whomsoever it is made — should come down against compulsory acquisition. I regard it as a principle of our constitutional law that no citizen is to be deprived of his land by any public authority against his will, unless it is expressly authorised by Parliament and the public interest decisively so demands: and then only on the condition that proper compensation is paid, see Attorney-General v. De Keyser's Royal Hotel Ltd. (1920) A.C. 508 . If there is any reasonable doubt on the matter, the balance must be resolved in favour of the citizen. This* ***principle*** *was well applied by Mr. Justice Forbes in Brown v. Secretary of State for the Environment (1978) P. & C.R. 285 , where there were alternative sites available to the local authority, including one owned by them. He said (at page 291):*
>
> > *It seems to me that there is a very long and respectable tradition for the view that an authority that seeks to dispossess a citizen of his land must do so by showing that it is necessary … If, in fact, the acquiring authority is itself in possession of other suitable land other land that is wholly suitable for that purpose – then it seems to me that no reasonable Secretary of State faced with that fact could come to the conclusion that it was necessary for the authority to acquire other land compulsorily for precisely the same purpose."*
>
> *…[and in respect of consideration of an alternative site]*
>
> *It is the duty of the Minister to have regard to the public interest. For instance, in order to acquire the land the acquiring authority has to use the taxpayers' money or the ratepayers' money. The Minister ought to see that they are not made to pay too much for the land – especially where there is an*

alternative site which can be acquired at a much less price. So also with the planning and development of this land. It is the public at large who are concerned. If planning considerations point to the alternative site rather than to the site proposed by the Authority, the Minister should take them into account …

… [P]ut a little more fully by Lord Diplock in Education Secretary v. Tameside (1977) A.C. 1014 at page 1065:

> *"Or, put more compendiously, the question for the court is, did the Secretary of State ask himself the right question and take reasonable steps to acquaint himself with the relevant information to enable him to answer it correctly?"…*

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

16. So too in *Sainsburys*': (Emphasis added)

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

17. In a nutshell, our Clients' submissions and dPPs satisfy paragraph 11(43) of the above quote whereas those of the Applicant cannot. The same paragraph 11(43) requirement applies to *all* of the submissions our Clients have made, including on EIA 2017 and CA Regulations 2010. We consider the Applicant and ExA have erred in their interpretation of the same.

SECTION C – THE EXCLUSION OF COMMERCIAL TELECOMS FROM THE dDCO

18. In paragraphs 5.36 to 5.40 of the ARSIR, the Applicant seeks to create within the dDCO terms a provision entitling the Applicant to rely *in the DCO* upon development comprised of "commercial telecommunications" otherwise than for the energy project. The Applicant's submissions and views remain fundamentally flawed in law for the detailed analysis and reasons previously given by our Clients.

19. In a nutshell, the *inclusion* in the dDCO of any provision for commercial telecommunications is ultra vires the PA 2008. The sole means by which such provision may be made is through section 35(2)(a)(ii) and (c)(iii) if the SoS published a "prescribed" description for a commercial project. The inclusion of *any* potential for commercial telecommunications in the dDCO remains ultra vires the scope of the PA 2008.

20. The PA 2008, section 31, interfaces with other regimes by only requiring consent for development "to the extent that" the development is an NSIP. Since commercial telecommunications cannot be within the scope of the PA 2008, provision for it cannot be included and it is enough that section 31 accommodates other authorisations by reference to the extent of a development that is not part of an NSIP.

21. Paragraph 5.38 of the ARSIR includes proposed wording as follows: (Emphasis added)

> ***Any*** *fibre optic cable and associated facilities laid as part of the authorised development shall only be used to facilitate the operational use of the interconnector through cable protection, control or monitoring and for simple communications between the two Converter Stations.*

22. The wording proposed in paragraph 5.38 of the ARSIR is infelicitous and admits of commercial telecommunications (and buildings as "facilities") within the development in order "to facilitate" it, for example, financially.

23. Consequently, as drawn, the suggested wording remains ultra vires as it admits of commercial telecommunications otherwise than for the energy project that may "facilitate" the energy project. The core legal issue remains the scope of the purpose ("for") of such development. As we showed in our comparison table, any inclusion of telecommunications in an energy-related project has been confined by the term "for" to ensure the exclusive purpose of the telecommunications remains exclusively (here) "for" energy project and, in consequence, intra vires the PA 2008. Conversely, not excluding commercial telecommunications would be ultra vires, and this is reinforced by the evidence in paragraph 5.37 whereby the Applicant evinces an intention to include *in a DCO under the PA 2008* commercial telecommunications in due course.

24. The complete answer remains for the Applicant to await a *prescribed description* being made by the SoS under section 35 of the PA 2008 to prescribe "commercial telecommunications" as description (and no doubt after discussion and consultation with industry) or to apply for planning permissions to the relevant local planning authority (as could occur as the Swansea Bay Tidal Lagoon DCO for development to sit alongside that consented pursuant to section 35). If the SoS makes an appropriate prescribed description, then the Applicant could apply for a variation of the DCO (if granted). Our Clients have suggested draft dDCO terms that ensure the DCO remains *intra vires* and excludes the legal potential to include any commercial telecommunications within its scope.

25. In respect of paragraphs 5.28-5.31 of the ARSIR, the Applicant appears to make submissions aligned with the *Wheatcroft* test regulating the *reduction* of the scope of an application. We note that the Applicant's evidence is that removal of commercial telecommunications from the dDCO would make no material or financial difference of any kind to the development (including as to landscape and related effects). We agree that the key test is whether the *public* have had an opportunity to make representations on such reduction so that the SoS can evaluate whether the change is material. Whether that test is or is not satisfied remains for the SoS to evaluate. He would be entitled to conclude that the change was material. He would also be entitled to conclude that it was not.

26. It remains our Clients' case that the *inclusion* of commercial telecommunications development within the dDCO is in law ultra vires the PA 2008. It follows that the removal of such *ultra vires* development could not be material. Consequently, the *Wheatcroft* test would be satisfied (if applicable at all) because the scope of the Application would be being brought into line with the law.

SECTION D – CERTIFIED DOCUMENTS - FLOOD RISK ASSESSMENT

27. In paragraphs 5.32-5.35 of the ARSIR, the Applicant addresses Certified Documents. These include a Flood Risk Assessment prepared under EN-1 and that includes extensive references to the NPPF(2019). However, in July (2021), the Secretary of State fundamentally altered the approach to and application of the flood sequential test under the NPPF.

28. The revised approach is that the aim of the sequential test is to steer new development to the "lowest risk of flooding" (and as changed) from any source". Thus, the NPPF(2019) stated:

> *158. The aim of the sequential test is to steer new development to areas with the lowest risk of flooding. Development should not be allocated or permitted if there are reasonably available sites appropriate for the proposed development in areas with a lower risk of flooding. The strategic flood risk assessment will provide the basis for applying this test. The sequential approach should be used in areas known to be at risk now or in the future from any form of flooding.*

Whereas the NPPF(2021) now states:

> *162. The aim of the sequential test is to steer new development to areas with the lowest risk of flooding from any source. Development should not be allocated or permitted if there are reasonably available sites appropriate for the proposed development in areas with a lower risk of flooding. The strategic flood risk assessment will provide the basis for applying this test. The sequential approach should be used in areas known to be at risk now or in the future from any form of flooding.*

29. Further, another fundamental change is to gauge the evaluation of flood risk against the more flexible conceptual criteria of "area" and not inflexible criteria of "flood zone". See paragraph 159 of the NPPF(2019): (Emphasis added)

> *If it is not possible for development to be located in zones with a lower risk of flooding (taking into account wider sustainable development objectives), the exception test may have to be applied. The need for the exception test will depend on the potential vulnerability of the site and of the development proposed, in line with the Flood Risk Vulnerability Classification set out in national planning guidance.*

and paragraph 163 of the NPPF(2021):

> *If it is not possible for development to be located in areas with a lower risk of flooding (taking into account wider sustainable development objectives), the exception test may have to be applied. The need for the exception test will depend on the potential vulnerability of the site and of the development proposed, in line with the Flood Risk Vulnerability Classification set out in Annex 3.*

30. Section 104 of the PA 2008 requires the SoS to have regard to matters as at the time of his determination that are important and relevant. The Applicant's inclusion in its FRA of the NPPF(2019) makes the NPPF important and relevant. So too does the nature of the Application as it traverses, for example, Portsmouth.

31. Whilst the FRA executed under the NPPF(2019) provisions forms part of the Application and is sought to be certified in Schedule 14 of the dDCO, the FRA was not in fact executed under the changed NPPF(2021) provisions that currently determine how an FRA must be executed and are current as at the time when the SoS is determining whether or not to grant development consent. Gauged against the new criteria of "areas" at risk of flood (and not of flood zones), it cannot be said that the FRA is fit for purpose nor that it should be "certified" as such under a superseded framework.

32. The SoS is not in a position to know, absent an FRA that adheres to the NPPF(2021) in place of the NPPF(2019) different gauge, to know whether the Sequential and the Exception Tests can be, and have been lawfully satisfied, in relation to the development as at the time of his decision.

33. It is difficult to see how he can evaluate lawfully whether the flood risk may or may not be outweighed by the development proposed nor be satisfied that the FRA be able to be certified under Article 43.

SECTION E – POLICY

34. In paragraphs 3.40-3.34, of the ARSIR, the Applicant addresses guidance.

35. The Application scheme is not within the Green Belt, nor within a National Park nor within an Area of Outstanding Natural Beauty.

36. There is no express policy “requirement” for the matters raised in those paragraphs. Rather, there are numerous references to aspirations. Aspirations cannot qualify as “requirements” for the purposes of section 122 of the PA 2008.

SECTION F - THE NATURE OF THE APPLICATION AND CERTIFIED DOCUMENTS

37. What is the development scheme? In paragraphs 5.32-5.35 of the ARSIR, the Applicant addresses Certified Documents. Article 2(1) of the dDCO identifies defined documents that are certified that include specified plans and only certain documents including the design and access statement. The land plans and the parameter plans (as described) are certified, as are a Outline landscape and biodiversity strategy and a Surface water drainage and aquifer contamination mitigation strategy but no other plans such as detailed landscape plans. Schedule 14 of the dDCO contains Certified Documents. [REP8-004] dDCO 3.1, Rev -007, includes Schedule 14.

38. The SoS will recall that the Application remains for a DCO in outline form that adopts a *Rochdale Parameters* Envelope approach. The law permits that approach, subject to safeguards that include the provision of "*clear* parameters" within which *details* can be worked out in due course. See *Smith v Secretary of State for the Environment* [2003] Env LR 32 where the Court of Appeal held:

> *33. In my view it is a further important principle that when consideration is being given to the impact on the environment in the context of a planning decision, it is permissible for the decision maker to contemplate the likely decisions that others will take in relation to details where those others have the interests of the environment as one of their objectives. The decision maker is not however entitled to leave the assessment of likely impact to a future occasion simply because he contemplates that the future decision maker will act competently. Constraints must be placed on the planning permission within which future details can be worked out, and the decision maker must form a view about the likely details and their impact on the environment.* (Emphasis added)

39. Thus, "the development" is not what is shown in the illustrative plans or the extract of a plan in Figure 1 of the ARSIR because the "illustrative plans" are mere *examples* of what might be chosen by the developer to be manifested by application, for example, of the *terms* Landscape Design Principles within the Design and Access Statement that are "constraints". The development comprises the framework dDCO *terms.*
40. The framework of terms forming constraints is comprised of: dDCO terms; parameter volumes; and terms of "Principles" that the *Prest* and *Sainsbury's* cases common law protections and principles of bear also, including the assessment of: whether there is a reasonable doubt about any matter; what is the evidence of the Scheme at this stage; is that evidence a fixed constraint or an example of the application of a constraint; and the *construction or interpretation* of the dDCO provisions as draft statutory terms required to be interpreted as set out in the *Sainsbury's* case, paragraph 11(43).
41. So understood, there is no "requirement" for an *extent* of landscape or an *extent* ground scape to be of a particular form or an *extent* of particular vegetation, but only *examples* or manifested choices. Instead, properly understood, the genesis of a "requirement" for the purposes of section 122 of the PA 2008 can only arise from the *terms* of the dDCO, that, in turn, must derive from an external "requirement".
42. In line with the *Smith* case, the "details" (or fixes) await to be worked out within the proposed parameters in due course. Thus, during the Examination Period, no detailed drawings were published in evidence enabling them to be scrutinised, and all detailed material was identified as "illustrative". For example, paragraph 15.7.1.18 of ES, Chapter 15, (November 2019) states in relation to "Landform and Drainage" that: "Proposals would be refined through a detailed coordinated drainage design post DCO consent, exploring SuDs and the potential for marginal planting within the ponds". The drawings included in the ES Appendix 3.6 as part of the "Surface water drainage and aquifer contamination mitigation strategy", paragraphs 2.7.1.1 and 2.7.1.2 that refer to "Access Road Drainage" are referred to as "Indicative

Drainage Proposal" and were included in that Appendix under internal Appendix 1. However, as at 1st October 2021, the Applicant has in its ARSIR included those same drawings in Appendix 4 to that ARSIR and, at paragraph 3.19, now stated that "the surface water drainage proposals *have been designed*" but by reference to the September 2018 and 2019 drawings are expressly labelled in that document as "Indicative. Resolving a "reasonable doubt" in favour of our Client results in those Appendix 4 drawings remaining "Indicative", and their *not* representing "details" that are fixed but that remain an *example* of the application of the Strategy terms.

43. Furthermore, the proposed Certified provisions of the "Surface water drainage and aquifer contamination mitigation strategy" include, under paragraph 2.7.1.1 the following statement: (Emphasis added)

> ***2.7 Access Road Drainage***
> *2.7.1.1 The proposed Access Road will approach the Converter Station from the southeast and will create an impermeable surface of approximately 1.7 ha. The road will be designed with a cross fall to its south/west to direct runoff to an infiltration swale. The swale will be sized to store surface water and allow infiltration through an underlying infiltration drain, but will also be able to convey exceedance flows to an infiltration basin **if** additional storage is **required**. Water quality treatment will be provided by the swale and vegetation, then subsequent infiltration through the underlying drain.*

44. There is no "requirement" for an infiltration basin but there is only a contingent requirement: "if ... required". "If … required" cannot be "required". Resolving a "reasonable doubt" in favour of our Client results in there being no "requirement" for an infiltration basin" serving an Access Road and there was no evidence before the Examination Authority that that was "required" for "the development" as opposed to might be. Nor, for example, can "if … required" satisfy the section 122(3) PA 2008 test of "compelling" case for acquisition because "if … required" is expressly ambivalent and contingent.
45. Thus, when one considers paragraphs 3.14 – 3.33 and Figure 1 of the ARSIR relating to "Drainage Scheme" and the location of the basin south of the label "EH-18" and the (ultra vires) commercial Telecommunications Buildings and related car parking and landscaping, Figure 1 is only "indicative" and cannot be said to be "required" but might be "if …". The same analysis applies to the new evidence in ARSIR Appendix 5 not before the ExA during the Examination Period recently envisaged by the Applicant to be taken into account by the SoS after the close of that statutory Period. Appendix 4 shows a fantastical scheme to provide a basin on the site of those Buildings and to pump water uphill to fill it. Of course, the plan derives from an indicate proposal also and sets up a stall that it knocks down for no purpose than to explain that water runs downhill. It also evidences the embryonic drainage proposals remain and underscores (as in paragraph 15.7.1.18 of ES, Chapter 15), that the proposals await refinement. Our Clients' Objections remains as put at the Examination Period and not, contrary to paragraph 3.24 of the ARSIR, again as is mischaracterised by the Applicant, in out of context misapplied discussions between the parties prior to consultation and when the proposals were embryonic also.
46. Consequently, "the development" against which alternatives fall to be assessed remains no more than a framework of *terms* coupled with parameter volume *terms*. There is no other *evidence* in relation to the "extent" of land *required* to be taken from our Clients. For example, the parameter volume is of fixed dimensions so as to physically *contain* equipment that will be installed in that volume. But there is no *evidence* that x m^2 of grass land or y m^2 of trees or z m^2 of scrub is actually *required* and *permanently* so required for the reinstatement of the ground form of our Clients' land after construction of the Converter Station or of the finish of that ground form is *required* to be grass and shrubs plants instead of crop plants.

SECTION G - THE APPLICANT'S RESPONSE TO THE SOS QUESTION AS TO "EXTENT"

47. In paragraphs 3.1 – 3.28 of its ARSIR, the Applicant address the question asked by the SoS by reference to a wide ranging review of the asserted justification for the land form and land form finish that is shown on Figure 1. Our Clients respond as follows.

48. By way of evidence before the ExA, ES, Chapter 15, provides: (Emphasis added)

> *1.4.1.21 Following construction activities, it is expected land temporarily used for construction and Laydown Area / Works Compound would be reinstated, planted and enhanced…*
> *1.4.1.29 On completion of construction works the Access Road both west and east of Broadway Lane would remain a permanent feature…*
> *1.4.2.5 Receptors who experience a small magnitude of change would be subject to a minor-moderate adverse effect (not significant) in year 0, falling to negligible by year 20 as the mitigation planting develops, as described below. The extent of residents who would experience a view would be limited, due to intervening vegetation and the orientation of properties as well as the sparsity of residents within specific locations.*
> *1.4.2.11 From the south and southwest, from Anmore and from the edges of Denmead as well as isolated properties and farmsteads including Merritt's and Pyles Farms, the Converter Station is anticipated to be visible above the horizon but with views of the buildings well-filtered (more so in summer) by the trees and hedgerows in the foreground.*

49. The reference to "farmsteads" is to our Clients' land and Figure 2 of the ARSIR shows the cluster of viewpoints Nos 10-13 are in that location and the two Converter Station locations are shown by blue and purple squares and Stoneacre Copse is shown too. The Company's examples of its ideas for the ground form and ground finish are illustrated in Figure 1 of the ARSIR by reference to colours. The content of each colour is described in paragraph 3.38 of the ARSIR. Within Figure 1, the commercial Telecommunications Buildings is next to "EH-19", a pond is shown above "PW-17", an Access Road is shown in white next to "PH-3" and the pylon cables are in dashed red line at "EH-1" with the Converter Station just above the location of "SC-8".

50. The Applicant seeks to *compel* a change of view upon our Clients and to *compel* a change from cropping plants to grass and shrub plants, that carry with that compulsion the destruction of our Clients' farm and business as farmers as a result of that compulsion and its "extent", for a "neglible" difference.

51. It is difficult to see how such a case could be *begun* to be advanced by the Applicant but that is what its core case distils to in relation to our Clients' land: the *imposition of a changed view of different plants to achieve a neglible difference*.

52. The destruction of our Clients' farm and business appears a high price to pay when *their* preference is to co-exist, as they have done for decades, with electricity infrastructure of the Substation and the pylons (that cross in front of the same view they would have of the Converter Station. Consequently, the Applicant seeks to compel a change of *ground level* planting and *ground* level view. However, our Clients are farmers and remain content to enjoy views rising northwards across farmland (towards that Station).

53. Our Client's case throughout remains simple: the post-construction *permanent* land take of its freehold land remains not required for the development and they want to retain their land as reinstated farmland as part of the ongoing farm business that would otherwise be destroyed by the extent of land take. Their dPPs enable construction and ensure reinstatement of the agricultural land whilst accommodating regular maintenance of the unmanned Converter Station and the unexpected. The Applicant's case remains a desire to compel a permanent change from a view of farm*land* to provide different vegetation and biodiversity and a different view.

54. The Applicant Company asserts in paragraphs 3.35 and 3.94 of its ARSIR that it "requires" the "planting" of our Clients' land after construction of the Converter Station for: "visual screening, landscape and biodiversity". It identifies in Figure 1 an illustrative coloured plan that includes light green areas and shows the Carpenters' farmhouse close to the location of "PH8" and has, under paragraph 3.37, reviewed an extensive area that broadly equates to that of our Clients' land. Paragraph 3.38.5 identifies that "proposed calcareous grassland is to be introduced" because that is "where planting in the form of trees/scrub cannot be introduced due to existing constraints", and that that may result in such grassland not becoming established, and so instead a "neutral grassland will be created", and the dark green on Figure 1 is "scrub".
55. There is no evidence of a legal or policy "requirement" to instate the ground form or ground finish described in broad terms in paragraph 3.38 of the ARSIR. *Because* the landscape remains not fixed, the reference to "relevant areas" in paragraph 3.38 is an example only of the application of proposed Principles and an example of the application of Principles is a choice not a requirement.
56. The Company's preference derives from a choice described at paragraph 3.38.6 of the ARSIR as being because the existing land is "limited by agricultural improvement" and it prefers to take our Clients' land to provide neutral grassland instead of re-providing the pre-existing agricultural land with periodic crop plants.
57. There is no policy or legal *requirement* for that choice nor does the development underground of our Clients' land of below-ground electricity bearing cables dictate the ground surface form or finish and nor does the different geographical location of the Converter Station farther north of this area dictate the ground form or surface finish of the restored land. The sole potential "requirement" is the Landscape Design Principles whose terms provide a framework within which details of form and finish can be worked out.
58. Importantly, the Company confirms in its ARSIR:
    a) paragraphs 3.86.6 and 3.41.1 confirm that that preference for ground *finish* is at its highest to support "strategy" "objectives". Further, the outcome of that preference derives from the proposed Landscape Design Principles and not from a requirement for a particular restoration scheme of which the Figure 1 extract is an example alone;
    b) paragraph 3.48.1 that the NPS EN-1 is an "aim" and not a "requirement" and that, even if there is theoretical significant harm, then "appropriate compensation measures" should be sought and remain not a requirement;
    c) paragraph 3.48.2, that local plan policy does not bar development in the absence of measures and seeks to maintain the status quo and support targets;
    d) paragraph 3.59, there would be a "neglible effect" on the setting of the South Downs National Park";
    e) paragraph 3.63, the visual effect of "individual contribution of types of planting .. would remain unchanged";
    f) paragraph 3.91, the post-development biodiversity value is reduced by 6.9 units and that is "not significant", and the development "can achieve a net gain" were the Telecommunications Buildings and the land surrounding removed from permanent acquisition;

g) paragraph 3.76, “despite” that reduction, “the loss of landscaping” would not alter the conclusion of a neglible effect identified in Onshore Ecology Assessment”; and that

h) paragraph 3.81, ultimately, *not* executing the Company’s choice of landscape ground form and finish “would weaken the proposals to enhance biodiversity at the Converter Station”, but no more.

59. The Company’s preference derives from a choice described at paragraph 3.38.6 of the ARSIR as being because the existing land is “limited by agricultural improvement”. That is, the Company prefers to take our Clients’ land to provide neutral grassland instead of re-providing the pre-existing agricultural land with periodic crop plants.

60. The choice of to what ground *form* and what ground *finish* to reinstate our Clients’ land after the erection of the Converter Station remains a choice and not a requirement of “the development”.

61. Therefore, the simple answer to the SoS question, bullet 2, and set out by the Company, is that removal of the commercial Telecommunications Buildings and associated development would make no real net difference to the ground surface *form* and its particular *grass-type and shrub-type plant finish*, as against the permanent restoration (after construction) of the land, *between* the erected Station and our Clients’ farmhouse, to an agricultural land *form* able to continue with *planting of crop-type vegetation* and to enable the continued operation of a 100 year old farm business.

Section H – Reasonable Alternative Way to Avoid the Need for Permanent Acquisition of Land

62. At paragraphs 5.6 – 5.7 of the ARSIR, the Applicant asserts that it has considered the alternatives put forward by our Client but asserts them as not "suitable". See our submissions above. It has not lawfully done so.
63. Once it is recognised that the Rochdale Envelope Approach adopted by the Applicant to its Application results necessarily in blank boxes, no fixed detail, merely illustrative (theoretical) material, and draft DCO *terms*, there is no evidentially rational basis in fixed *fact* against which to gauge the Applicant's illustrative proposals as *more* or less "suitable" (on their test) (or not "possible" on our test) *because* they are not fixed but illustrative.
64. Instead, whether an alternative way to permanently shape the ground form and finish its surface covering that is possible is gauged against the Rochdale Envelope that comprises the proposed development for which *development consent is required* and is *sought* and no more.
65. So viewed and gauged against published and publicly available evidence able to be subject to most careful scrutiny, the *terms* of our Clients dPPs are themselves an alternative and possible way as to how the ground form and plant finish *can* be reinstated, accommodating particular matters, and with the commensurate flexibility of detailed application in due course that the Rochdale Envelope Approach of the dDCO *itself* adopts and adheres to. Thus, it is no answer for the Applicant to assert: "There is not enough detail" or "the proposals are not suitable"; because those assertions can only be measured against the Rochdale Envelope which by definition is devoid of detail at this stage.
66. Thus, in simple terms, the Applicant has not to date and cannot show that it is not *possible*: to reinstate our Clients' land post-construction as agricultural land; to grow crops on that reinstated land instead of grass or shrubs; to grub up a construction-related Access Road and pond after erection of the Converter Station; to lay a temporary haul road for abnormal loads over the Clients' land if an unforeseen event occurs; to use the existing perimeter accessway for maintenance van access; to rely on easements of access to maintain reinstated perimeter hedgerows. If a way of providing a matter that otherwise results in permanent land acquisition remains possible to be provide, logically compulsory acquisition cannot be a remedy of "last resort".
67. The Applicant has had numerous opportunities to raise detailed concerns about the dPPs terms but has not and the absence of dissent from those terms can give comfort to the SoS that the Applicant is not discontent with the *terms* of the dPPs as a matter of principle. The ExA also had no questions for our Clients about the terms and, similarly, can be regarded as content with them. Indeed, the terms follow the Riverside DCO precedent submitted by our Client at the request by the ExA.
68. Applying the *Prest* requirement to resolve a reasonable doubt in favour of our Client results to require the SoS to adhere to the dPPs terms as a reasonable alternative way resulting in the absence of need to *permanently* acquire our Clients' land (excluding the Converter Station footprint) after the event of construction of the Converter Station.
69. In more detail, our Clients make the following points.
70. Our Clients have advanced *during* the Examination Period our Clients' dPPs. The Applicant has had during that Period the opportunity to comment on the dPPs but has made no adverse representations

about the *terms* of the dPPs. Therefore, the SoS can properly understand that the *terms* of the dPPs are common ground or not uncommon ground.

71. Instead, the Applicant has resisted the dPPs for the summary response referred to in paragraphs 5.6 and 5.10 of the ARSIR and seeks to mischaracterise our Clients' point: the Applicant has not gone through and returned to our Clients a tracked changed version of the dPPS to show what of the draft dPPs *terms* may be acceptable to it. Rather, the Applicant has consistently relied on detail not yet in existence to assert that the dPPs are not "suitable". But evidence in support of the Applicant's assertions that can be most carefully scrutinised remains absent from the public domain of the Examination Period, understandably, *because* of the Rochdale Envelope Approach relied on by the Applicant. The Applicant cannot rely on non-existence "detail" to exclude the terms of the dPPs.
72. Instead: a) the Applicant has sought to characterise the dPPs as an EN1, paragraph 4.4.3, bullet 8, "Alternative Scheme" and advised the ExA to treat it as such including to seek to require (in the CPO context) that our Clients 'prove' the alternative way, and prove that that way show is 'reasonable'; b) the Applicant has aligned its dDCO provisions that include Protective Provisions to those of the Riverside DCO at the request of the ExA for a precedent and our Clients have taken that same approach and aligned their dPPs to the Riverside DCO protective provisions that included particular protective provisions for an ongoing business affected by the Riverside DCO scheme. Our Clients' business is a 100 year old farm. Consistent with the Riverside DCO scheme, and (subject to Aquind proving its case for the Converter Station and related underground electricity bearing cables and the permanent acquisition of land for the Converter Station on a choice of sites), our Clients dPPs facilitate the construction and ongoing presence of that Station and of those cables underground as follows.
73. The dPPs *assume* the destruction of large tracts of their farmland *during* the construction of the Station, situating of the underground cables, and the instatement and amplification of hedgerows around the edge of their farm land. It is difficult to see how the dPPs are not reasonable. The dPPs also provide for a reasonable alternative to the preference of the Applicant to the permanent ground finish of the land after the event of construction and in this way.
74. Firstly, the dPPs align with the Applicant's "Landscape Design Principles" (see ES Chapter 15, paragraphs 15.7.1.19-15.7.1.21, & 15.7.1.26] that include a purpose to "reinstate historic field boundaries" and to "integrate the Converter Station into its surroundings" that comprise a 100 year old operational farm and its farmland, and that the "indicative plans" articulating an example of the application Principles seek "mitigation" to "enhance (where practicable)". Consequently, the Applicant's own evidence is not that mitigation is <u>required</u> but that "where practicable" it *may* be included. "Practicability" cannot, in law, satisfy the section 122(2) (a) or (b) PA 2008 test of "required" because it is a choice. Similarly, the Landscape Design Principles are *principles* not expressed as "requirements" (in the ordinary sense). Even were the "principles" to be "required" as a mitigation framework, there terms are not expressed as requirements and the outcome of the application of those principles cannot be "required" because the Principles are tempered or conditioned in their articulation by "practicability" and "practicability" is a choice that cannot be said to be required or essential.
75. In this respect, the terms of the Principles have an inherent flexibility that allows for a range of manifested real outcome of land form and land finish. That flexibility admits of the way described by the dPPs as an

alternative way to manifest the Principles in real life. The Prest requirement to resolve a reasonable doubt in favour of the landowner bears on that choice so as to require the SoS to favour our Client.

76. However, the Applicant is treating the flexible "Principles" also as fixed and as of having only one real outcome: grassland and shrubs. That is to mislead the ExA and SoS by inferring that there is a fixed scheme for landscaping when the Principles do not so fix it. The Applicant prefers or desires "the" real result of the application of the Principles to be the *form* of non-agricultural land and that is *finished* in different shrubs as opposed those Principles also accommodating a real result of the reinstatement pre-existing farmland *form* of the landscape finished with ongoing periodic crops plants.
77. Our Clients' case from the outset remains that the compulsory a change of view of a type of vegetation cannot justify the taking of private land. In the CPO context (and not in the non-CPO context), and applying the common law and statutory protections, the question is not whether our Clients can show that its dPPs proposals are a "reasonable alternative" but whether the Applicant can show that they cannot be a "reasonable alternative". Since the choice of landscape finish derives from "Principles" and not from a detailed scheme, and the dPPs articulate the purpose of the Principles, the dPPs cannot be said in law to be not able to be characterised as a "reasonable alternative".
78. Secondly, applying *Prest*, the law requires (as above) the SoS to align a "reasonable doubt" in favour of our Clients. Therefore, if he has any doubt about the *preference* between the proposed permanent formation of land after construction to non-farmland with shrubs and grass as against reinstating the pre-existing farmland to farmland with periodic crop vegetation, the law requires him to choose our Clients' dPPS *form* (agricultural) and *finish* (period crops instead of shrubs) of the resulting landscape. There is no Landscape Design Principle of the Scheme that *bars* the landscape framework provisions of the dPPs that provide for reinstatement of agricultural land to enable crops (instead of shrubs) to be continued to be grown and, indeed, the provisions have been formulated to be consistent with those Principles as applicable.
79. The Application scheme is not within the Green Belt, nor within a National Park nor within an Area of Outstanding Natural Beauty. The "mitigation" that comprises *ground level* landscape form and *ground* level landscape finish can be observed or viewed *from* our Clients' farmhouse but appears otherwise unobservable or unviewable by any other party. This explains the absence of any views in the ES (or elsewhere) of the proposed finished scheme that show ground level of the land immediately south of the Converter Station and between it and our Clients' land. If there were public vantage points of that particular ground form and finish then the ES or other material will have evidenced the same but there is no such evidence of such views with envisaged landscape or Access Road at ground level in situ. This affirms the impact of the *ground* level manifestation of the Landscape Design Principles are not "required" but being a choice.
80. The ES, Chapter 15, paragraph 15.8.3.6, describes that "the creation of a permanent Access Road across fields [our Clients' land] and the loss of vegetation [our Clients' crops] including hedgerow removal … would change the character of the minor roads to the east, just south and east of the junction of Broadway Lane and Day Lane. *This* change, from a sense of enclosure to one of openness, would give rise to a moderate adverse permanent long-term (significant effect)". However, that assessment does not conclude that the local change of the Clients' land as a result of such a Road would itself engender a likely

significant effect. There is no evidence of such an affect. The effect is not more than "localised". Instead, ES, Chapter 15, paragraphs 15.8.4.4-5, and 15.8.4.14, and following assess the effect of the "mitigation" of "a mix of scrub and trees": "Effects would be permanent, long-term and localised" and, in respect of bullet 3, the magnitude of change "would later to small" after 10 years of that planting, it is "assumed" that the Road's surface "would blend in with the surrounding calcareous grassland, the hedgerow would have matured and some of the hedgerow trees would start to become noticeable features. On this basis, the LVIA considers that the effect would reduce to direct minor adverse (not significant)". Paragraphs 15.8.4.24, bullet 5 and 15.8.4.25, bullet 5, assess that the "worst affected" receptor (no 12) (and Nos 11-13) would have initial post-construction significant effects but that by year 10, "as a consequence of new planting situated to the north of properties there would be a direct change to the depth and composition of view for No 12 resulting in a medium magnitude of change" and minor-moderate effects for 11-13 "due to their proximity to the Converter Station". (The reference to Nos 11-13 is a reference to viewings points clustered around our Clients' farmhouse, see Figure 2 in the Second Response and the purple and blue squares showing the Converter Station parameter footprints). This evidence shows that the "mitigation" relates to changes of "view" by means of differences in "new planting" resulting from the application of the Landscape Design Principles. However, our Clients have occupied and worked their land and cheek by jowl with the Sub-Station of National Grid for many years, as well as having pylons in the same view from their land as will be the location of the Station. Their dPPs accommodate the landscaping of the perimeter of their land with hedgerows and trees in hedgerows and it remains the case that the *ground* level form and finish of the landscape between the Station and their farmhouse is both a localised effect and one that they cannot be required to be changed to a different type of form or vegetation. There is no evidence that the *ground* level is required to be shrubs and grassland in this location instead of being reinstated to farmland for new planting periodically of crops. It is also difficult to see how a change of *view* can be compelled upon a landowner or that a change of view can in law engender a compelling case for permanent acquisition of the land. The dPPs accommodate that reasonable alternative of agricultural land form and new planting comprised of periodic crops. It cannot be said that that is not able to be characterised as a reasonable alternative type of planting to the desired "calcareous grassland" in the same situation.

81. Thirdly, the envisaged landscape of the Applicant includes an Access Road and a second attenuation pond. It will be recalled from the above, that there is no more than a conditional requirement ("if… required") for the basin/pond. The presence of the pond is parasitic on the presence of a Road, and, during construction, on the Road as a haul road. This is because, by contrast with the existing farmland permeable soil surface, the ground make-up of the Road would result in some surface water run-off from the road requiring to be drained and that assumes the presence of a Road. The Drainage Strategy confirms that run-off would be managed by swales (shallow depressions) and not by basins.
82. During the temporary period of construction, a Road will be required to enable the installation of machinery required for the Converter Station but upon construction that installation *need* will be removed. Once the Station has been built and commenced operation, the need for the Access Road to construct that structure necessarily goes and with it that need for the Road to remain in situ. This is where a key issue in this matter arises: whether there is any, and any lawful, justification for permanent retention in-situ

of the constructed Access Road, and if there is, whether it is "compelling", and that requires also consideration of the question of "reasonable alternatives" to *permanent* presence of a Road and for what purpose and whether such purpose can be sufficiently satisfied by an alternative (where the reasonable doubt is required to be exercised in favour of the landowner, our Clients).

83. During the Examination Period, the Applicant asserted a mischaracterisation of our Clients' dPPs relating to road access and asserted that our Clients proposed the *construction* of the Converter Station be executed by exclusive use of an existing perimeter accessway that connected the highway to the Station site. The Applicant went so far as to submit to the ExA that cranes could not carry abnormal load equipment along that accessway *because* of the required degree of clearance height below the existing pylons cables. The ExA appeared to *accept* (by their nodding) that asserted situation. However, that remains not the situation actually advanced by our Clients and it is a mystery why the Applicant chose to (again) misled the ExA into error on the facts by asserting as our Clients case an imaginary situation. The imagined situation does not arise because the Clients' have never envisaged use of the existing accessway by abnormal loads or cranes whose height may be problematic for pylon cables. The application of the *Prest* test of "most careful scrutiny" *of the Applicant's case* ought to have revealed that imagined situation.
84. It will be self-evident to an interested reader of the terms of the dPPs that they expressly provide for the presence of the Access Road *during* construction of the Station and it remains a mystery to our Clients why, or on what rational basis, the Applicant read and assessed the dPPs terms otherwise. It may otherwise reflect no more than the Company's inexperience in DCOs and CPO.
85. It is common ground that: sufficient additional spare transformers would be installed on-site during construction and retained on-site to ensure continuity of electrical supply for the currency of the Station's operational life; the Station site has space in which to keep a demountable crane; the ES assessed major accidents and did not cite transformer replacement or fire as a critical requirement relating to a likely significant effect; key equipment would be stored on the Station site during its operational lifetime; small vans would make annual visits to the Station for maintenance purposes; the risk of equipment failure was not credible; there was and is no evidence of equipment failure risk resulting in national energy transmission failing.
86. That considerable degree of common ground rules out a legally rational purpose, coupled with our Clients' dPPS and their executed DCO planning obligations, for the *permanent* presence of an Access Road on the land of our Client after the event of the construction of the Convertor Station. The *Prest* case requires that any "reasonable doubt" be exercised in favour of our Client because this is a CPO case (and not an NSIP case where there is no CPO).
87. In that context, our Client has also provided in the dPPs for the *theoretical* provision of a temporary haul road to bear an abnormal load to enable a temporary construction period to occur in which abnormal equipment may fall to be delivered to the Converter Station (simultaneously with removal of stored abnormal size defunct equipment). Our Client has provided evidence during the Examination Period of the installation a suitable temporary haul road enabling abnormal loads to be delivered (and removed), and understands such a haul road has been used in other NSIPs involving large equipment (hence the (again)

lack of DCO experience of the Applicant and its team who rejected without credible consideration (again) that alternative).

88. Further, the existing accessway is a single track suitable for a range of vehicles including fire tenders that theoretically may visit were the Converter Station's integral fire safety system to fail. There is no evidence to show that a fire tender could not travel in an emergency from the highway along the perimeter accessway to the Converter Station. Consequently, unlike the Applicant in its ES assessment, the Clients have considered the theoretical need for fire access and provide for it in their dPPs and the executed development consent planning obligation. That obligation also provides for access by maintenance vehicles, and for access to the land for maintenance, and the dPPs provide for further replacement equipment in the event that on-site spare equipment needs to be further. Applying *Prest*, it cannot be said that there is no reasonable alternative, and also "reasonable doubt" must be exercised in favour of our Clients. Thus, we recognise that, as at Buncefield, the unanticipated can happen, and it is understood that a recent fire at an interconnector in the south-east resulted in power outage. Our Clients' dPPs accommodate that unanticipated theoretical situation.
89. Consequently, there remains no lawful, nor credible, nor factual justification, nor any real *requirement* to *permanently* retain the Access Road on our Clients' land after the event of construction of the Converter Station. So far as there is considered to be residual theoretical fire risk, the dPPs, executed DCO planning obligation, together provide for a sufficient lawful safeguarding framework for what remains an outline (not detailed) DCO and within which constraints details can be worked out. See the *Smith*; *Prest*; *Sainsburys*.
90. By contrast, the *detail* of the southern pond ("if … required"), and the drainage scheme, during the Examination Period was expressly evidenced as not going to be refined to a "detailed co-ordinated drainage design" until "post DCO consent" at which future point in time that design would be "exploring SuDs and the potential for marginal planting within the ponds". That is, as at the end of that Period, the *evidence* of the Applicant was that the DCO remained in outline and that the detailed design of the drainage system and ponds remained then unfixed and the extent of any requirement could not yet be known to the Applicant. It is difficult to see how the SoS can be in a better position to evaluate the extent of land for a potential pond than the Applicant.
91. The outcome of the above is that it cannot be said that there is not a reasonable alternative way to provide for different types of access to and from the Converter Station without the need for permanent access: a) maintenance access along the existing perimeter accessway under the executed DCO planning obligation and b) periodic access across our Clients' land *under* the pylon cables in the same location as the Applicant also chose to manoeuvre its tall cranes.
92. The *Prest* case requires the SoS to resolve the difference in the way permanent landforms are envisaged to be manifested and their surface finished with planting in favour of our Client with the result that permanent acquisition cannot be necessary.
93. So far as there remains any doubt, the SoS remains also entitled (and required) to tailor the dPPs (as draft DCO provisions) in the event that he considers it necessary or expedient, taking account of our Clients' case and the common law and statutory safeguards above that require also the ***least intrusive*** means of interfering with our Clients land and to be used where land is required to be acquired compulsorily. See *Sainsburys*.

94. The dPPs supply what our Clients' consider to be the least intrusive means. Were the SoS to align the draft DCO provisions with those dPPS by their inclusion in a DCO granted, we consider that would be lawful whereas to not so include them would be ultra vires section 122 of the PA 2008.
95. In practicable terms, the removal of the Access Road after construction and the associated grubbing up of its surface, potential retention of a sub-base at least 1 m below ground to avoid plough snagging and provide such future added base for any future temporary haul road in future, and restoration to agricultural land of the Access Road surface to the form of agricultural land with a ground level finish enabling planting of periodic crops instead of a preferred finish of new planting of calcareous grass land, *also* results to remove any *permanent need* for a second attenuation pond serving the run-off from the Access Road surface. Consequently, after the event of the construction of the Converter Station, the pond edge can be grubbed up and the *ground* form reinstated as agricultural land and finished in periodic crops instead of the Applicant's preferred choice of grassland and shrubs. The dPPS accommodate this situation in their landscape provisions.
96. The Telecommunications Building is envisaged by the scheme to have a car park related to it. However, because the provision of that Building is ultra vires the PA 2008 as it is common ground on the Applicant's own evidence that it is solely for commercial telecommunications, then so too is the related car park. The inclusion of the car park is ultra vires the PA 2008.

Permanent Access

97. Our Clients have executed a development consent planning obligation affording access between the highway, over their land, and to the perimeter of the Converter Station parameter volume and its southern area of landscape.
98. Once it is recognised with the required degree of "most careful scrutiny" and without falling into legal error (as it appears the ExA has done at the instigation of the Applicant, and as also occurred in the recent *Stonehenge* case that resulted to quash that DCO), this supplies a "reasonable alternative" for the accepted need for up to twice annual maintenance visits by small van to the Converter Station parameter volume.
99. Since the DCO has been applied for in outline and by exclusive reference to parameter volumes, our Client has provided commensurate flexibility by providing for access to that volume as indicated by the illustrative plans showing where access to the volume is envisaged *by the Applicant*. Such a framework is sufficient and legal for this type of DCO. See the *Smith* case.

The Stoneacre Copse

100. Figures 1 and 2 of the ARSIR show "Stoneacre Copse" that is a copse of Ash on land owned by our Clients. EN-1, paragraph 5.3.14 requires that development consent not be granted "for any development that would result in the loss or deterioration of" of Ancient Woodland. The development would not result in the loss or deterioration of The Stoneacre Copse. The Application made did not include the land of that Copse that remains owned by our Clients. In January 2021, the Company chose to seek to enlarge the Application red line area to include that Copse and seek to take it compulsorily from our Clients. It remains the case that even on that basis, the development would not *result* in loss or deterioration of that Woodland. No actual development is provided for on that land. Consequently, no paragraph 5.3.18 or 5.3.19 mitigation considerations can arise nor are *required*.

101. The extent of land desired to be taken tardily included, in the last half of the Examination Period, an extent of land called “The Copse” that lies within the north-east part of our Client’s land and comprises an Ancient Woodland next to the Accessway. Our Clients have executed a development consent planning obligation in relation to The Copse on terms that ensure the obligation provides a reasonable alternative way of ensuring that woodland remains managed in a sustainable way (as sought by the Applicant) and so results to remove the need to acquire that land compulsorily.

102. However, there are four logically prior points. Firstly, the Applicant visited the Clients’ land before the DCO Application was made, assessed The Copse, and represented to them that it did not *need* The Copse for the development. That representation was welcome news to our Clients as The Copse holds [redacted] and is a place of particular value to them as a result. It is difficult to see how what was not needed for the development then has become needed for the development now.

103. Secondly, the representation on behalf of the Company that there was then no need for acquisition itself shows that there is a “reasonable doubt” required to be exercised by the SoS in favour of our Client that there is no real need now for the acquisition of The Copse by the Company. The Outline Landscape and Biodiversity Strategy, paragraph 1.3.3.3, bullet 1, identified the Stoneacre Copse in November 2019 as a “high value feature”, and at paragraph 1.6.3.12, bullet 1, recorded the management objectives for the area are to “expand and enhance” that Copse but did not apply in its Application to require it as part of the development. Surveys of that Copse by the Company also identified that Copse to be subject to Ash Dieback but before the Application was made.

104. The asserted changed circumstances are that whilst the Company knew that The Copse was not concerned to require for the Scheme development acquisition by CPO of The Copse despite knowing that it was subject to Ash Die back (and so that evidences that The Copse was not then *required* for the Application development on any basis), at the end of the Examination Period it changed its mind and chose to require The Copse *because* it had not evaluated how swiftly the disease may take hold. The Company now seeks to rely on the public interest in arresting the disease to support its project where before that was not *required* but first requires to take that land from our Client in the public interest in arresting that disease order to be able to rely on the public interest to arrest the disease to support its development. The Company’s rationale for taking our Client’s land seems logically circular and self-liquidating.

105. Thirdly, the absence of prior requirement to acquire the land for the development before and during the Examination Period is evidence of that not acquiring The Copse is itself a reasonable alternative way – to not acquire The Copse.

106. Fourthly, the protections of the *Sainsbury’s* case concerning the correct approach to statutory interpretation where CPO is involved bear on the provisions of the Infrastructure Planning (Compulsory Acquisition) Regulations 2010/104. Our Clients made representations during the Examination Period that the extension of CPO powers to an area <u>outside</u> of the original Application red line area was ultra vires. We reiterate the same to the SoS. This is because the Supreme Court in *Sainsburys’* case required the interpretation of a statutory provision that results in least interference in third party land to be chosen. So properly interpreted, the Regulations do not permit the *addition of land* to be subject to compulsory purchase that is *outside* of the area identified in the Application *as first accepted* by the SoS for

examination. That is, once the red line of the Application has been drawn and the Application has been *made*, the Regulations allow for additional land within that application area to be identified as "additional land". However, the Regulations do not admit of the identification of such "additional land" in an area that originally lay *outside* of the Application red line area when made. That interpretation aligns with the SoS NSIP Guidance that proceeds on the basis that the Application are may reduce (but not increase) without a new application having to be made. The foregoing interpretation by our Clients aligns with the *Wheatcroft* and *Kent* cases which confirmed how a reduced area may be arrived at, and how it was *ultra vires* to grant more than the development applied for. The SoS is not in law entitled to increase the area of a DCO as applied for (but may reduce it) and is not in law entitled to allocate as "additional land" for CPO an area in that increased area. Indeed, the *absence* of SoS NSIP Guidance on such extensions is evidence that it is unlawful.

107. Our Clients consider that the *extension* of the Application red line area to create a larger Application area does not appear ultra vires but there is no guidance in how to assess that kind of situation.

108. Our Clients, however, consider that the inclusion, within a so extended area, of "additional land" under the Compulsory Acquisition Hearings Regulations 2010 is ultra vires because the concept of "additional land", properly interpreted, can only apply to the area of the application as originally made. However, in this Application, our Client has helpfully provide in the dPPs provision to ensure maintenance of The Stoneacre Copse in line with the aspirations of the Applicant. Those provisions, again, supply a reasonable alternative way to securing the ongoing currency of that Ash woodland. Applying *Prest*, the SoS is required to resolve that reasonable doubt in favour of our Client with the result that there is no need (whether or not ultra vires as above) for acquisition of that Copse.

109. We have also made representations about the procedure required to be adhered to by the ExA where land is being taken against the will of a party such as our Client but the ExA erred in not adhering the prescribed procedure (and others also) I not hearing them as required. Our Clients awaited a hearing and, on the face of it, continue to suffer prejudice for want of opportunity to be heard under those Regulations and before an independent ExA properly directing itself in law.

110. Our Clients accept that, in the event that the SoS properly does include our Clients dPPS, then that Copse would be within an enlarged Application area but not acquired. Then this *ultra vires* matter would not arise.