Neutral Citation Number: [2021] EWHC 2161 (Admin)

Case No: C0/4844/2020

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 30/07/2021

Before :

THE HON. MR JUSTICE HOLGATE

Between :

The Queen on the application of SAVE STONEHENGE WORLD HERITAGE SITE LIMITED	**Claimant**
- and -	
SECRETARY OF STATE FOR TRANSPORT	**Defendant**
- and –	
(1) HIGHWAYS ENGLAND **(2) HISTORIC BUILDINGS AND MONUMENTS COMMISSION FOR ENGLAND ("HISTORIC ENGLAND")**	**Interested Parties**

David Wolfe QC and Victoria Hutton (instructed by **Leigh Day**) for the **Claimant**
James Strachan QC and Rose Grogan (instructed by the **Government Legal Department**) for the **Defendant**
Reuben Taylor QC (instructed by **Pinsent Masons**) for the **First Interested Party**
Richard Harwood QC and Christiaan Zwart (instructed by **Shoosmiths**) for the **Second Interested Party**

Hearing dates: 23rd, 24th and 25th June 2021

Approved Judgment

assessment of the environmental information and of the statutory examination of the application for a DCO.

35. Because in this case an NPS had taken effect, s.104 of the PA 2008 was applicable. Accordingly, by s.104(2) the SST was required to have regard to *inter alia* the NPSNN. Section 104(3) required the SST to "decide the application in accordance with" the NPSNN "except to the extent that one or more of subsections (4) to (8) applies." Section 104(4) to (8) provides:-

> "(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.
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> (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.
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> (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."

The legal issues in this case are particularly concerned with s.104(3),(4) and (7). It is common ground that the World Heritage Convention was an "international obligation" falling within s.104(4).

36. Section 116 of the PA 2008 imposes a duty on the SST to give reasons for a decision to grant or refuse a DCO.

National Policy Statement for National Networks

37. The NPSNN was published on 17 December 2014 and formally designated under s.5 of the PA 2008 on 14 January 2015 following consideration by Parliament in accordance with ss.5(4) and 9.

38. Paragraph 4.2 of the NPSNN sets out a presumption in favour of granting a DCO in these terms:-

> "Subject to the detailed policies and protections in this NPS, and the legal constraints set out in the Planning Act, there is a

presumption in favour of granting development consent for national networks NSIPs that fall within the need for infrastructure established in this NPS. The statutory framework for deciding NSIP applications where there is a relevant designated NPS is set out in Section 104 of the Planning Act."

39. Paragraph 4.3 provides:-

> "4.3 In considering any proposed development, and in particular, when weighing its adverse impacts against its benefits, the Examining Authority and the Secretary of State should take into account:
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> • its potential benefits, including the facilitation of economic development, including job creation, housing and environmental improvement, and any long-term or wider benefits;
>
> • its potential adverse impacts, including any longer-term and cumulative adverse impacts, as well as any measures to avoid, reduce or compensate for any adverse impacts."

40. Paragraph 4.5 lays down a requirement for a business case:-

> "Applications for road and rail projects (with the exception of those for SRFIs, for which the position is covered in paragraph 4.8 below) will normally be supported by a business case prepared in accordance with Treasury Green Book principles. This business case provides the basis for investment decisions on road and rail projects. The business case will normally be developed based on the Department's Transport Business Case guidance and WebTAG guidance. The economic case prepared for a transport business case will assess the economic, environmental and social impacts of a development. The information provided will be proportionate to the development. This information will be important for the Examining Authority and the Secretary of State's consideration of the adverse impacts and benefits of a proposed development....."

This paragraph is relevant to ground 5(ii).

41. Paragraphs 4.26 and 4.27 deal with alternatives to a proposal:-

> " 4.26 Applicants should comply with all legal requirements and any policy requirements set out in this NPS on the assessment of alternatives. In particular:
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> • The EIA Directive requires projects with significant environmental effects to include an outline of the main alternatives studied by the applicant and an indication of the

> main reasons for the applicant's choice, taking into account the environmental effects.
>
> • There may also be other specific legal requirements for the consideration of alternatives, for example, under the Habitats and Water Framework Directives.
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> • There may also be policy requirements in this NPS, for example the flood risk sequential test and the assessment of alternatives for developments in National Parks, the Broads and Areas of Outstanding Natural Beauty (AONB).
>
> 4.27 All projects should be subject to an options appraisal. The appraisal should consider viable modal alternatives and may also consider other options (in light of the paragraphs 3.23 to 3.27 of this NPS). Where projects have been subject to full options appraisal in achieving their status within Road or Rail Investment Strategies or other appropriate policies or investment plans, option testing need not be considered by the examining authority or the decision maker. For national road and rail schemes, proportionate option consideration of alternatives will have been undertaken as part of the investment decision making process. It is not necessary for the Examining Authority and the decision maker to reconsider this process, but they should be satisfied that this assessment has been undertaken."

42. Paragraphs 5.120 to 5.142 deal with the historic environment. Paragraph 5.122 explains the concepts of "heritage asset" and "significance":-

> "Those elements of the historic environment that hold value to this and future generations because of their historic, archaeological, architectural or artistic interest are called 'heritage assets'. Heritage assets may be buildings, monuments, sites, places, areas or landscapes. The sum of the heritage interests that a heritage asset holds is referred to as its significance. Significance derives not only from a heritage asset's physical presence, but also from its setting."

43. The categories of designated heritage assets include not only listed buildings and conservation areas but also world heritage sites and scheduled ancient monuments (para. 5.123). But paragraph 5.124 provides that certain non-designated assets of archaeological interest should be subject to the policies applied to designated assets:-

> "Non-designated heritage assets of archaeological interest that are demonstrably of equivalent significance to Scheduled Monuments, should be considered subject to the policies for designated heritage assets. The absence of designation for such heritage assets does not indicate lower significance."

This paragraph is relevant to ground 1(i).

240. The SST did not disagree with the Panel's approach. Given the nature and purpose of the cost benefit analysis, the view taken on the level of heritage benefits or disbenefits attributable to parts of the scheme was not an "obviously material consideration" which the SST was obliged to take into account as altering the business case.

241. Accordingly, ground 5(ii) must be rejected.

(iii) Alternatives to the proposed western cutting and portals

242. The focus of the claimant's oral submissions was that the defendant failed to consider the relative merits of two alternative schemes for addressing the harm resulting from the western cutting and portal, firstly, to cover approximately 800m of the cutting and secondly, to extend the bored tunnel so that the two portals are located outside the western boundary of the WHS.

243. The Panel dealt with the issue of alternatives in section 5.4 of its report, before it came to deal with impacts on the cultural heritage in section 5.7. On a fair reading of the report as a whole, there is no indication that the substantial harm it identified in section 5.7 influenced the approach it had previously taken to alternatives. The same is true of section 7.2 of the report which brought together in the planning balance the various factors which had previously been considered. Paragraph 7.2.25 summarised the Panel's overall conclusion on the treatment of alternatives in section 7.4. After dealing with biodiversity and climate change the Panel summarised its conclusions on cultural heritage issues at paragraphs 7.2.31 to 7.2.33. The reason for this would appear to be the way in which the Panel applied the NSPNN.

244. It is important to see how the Panel approached the issue of alternatives in section 5.4. They directed themselves at the outset by reference to paragraphs 4.26 and 4.27 of the NPSNN (see [41] above) (see PR 5.4 to 5.4.2). Those policies framed the Panel's conclusions at PR 5.4.56 to 5.4.75.

245. IP1's case, applying paragraph 4.26 to 4.27 of the NPSNN, was that the only consideration of alternatives relevant to the Examination were:

> (i) "to be satisfied that an options appraisal has taken place,"
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> (ii) compliance with the EIA Regulations 2017 in relation to the main alternatives studied by the applicant and the main reasons for the applicant's decision to choose the scheme, and
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> (iii) alternatives to the compulsory acquisition of land (PR 5.4.3 and 5.4.60).

246. At PR 5.4.56 the Panel stated that IP1 had correctly identified all legal and policy requirements relating to the assessment of alternatives. It accepted that alternatives did not have to be assessed under The Conservation of Habitats and Species Regulations 2017 (SI 2017 No 1012) ("the Habitats Regulations 2017") or the Water Framework Directive (PR 5.4.57 to 5.4.58). In relation to policy requirements, the Panel accepted that IP1 had satisfied the sequential and exception tests for flood risk and that no part of the scheme fell within a National Park or an Area of Outstanding Natural Beauty (PR 5.4.59). However the Panel did not consider any policy requirements relating to cultural heritage impacts which might make it appropriate or even necessary to reach a

conclusion on the relative merits of IP1's scheme and alternatives to it. That is all the more surprising given that a significant part of the Panel's report was devoted to the representations of interested parties about alternatives to avoid or reduce the harm to the WHS and heritage assets that would result from IP1's scheme (see PR 5.4.35 to 5.4.55).

247. The Panel summarised IP1's case on options for a longer tunnel at PR 5.4.16 to 5.4.27 and the representations of interested parties on that issue at PR 5.4.45 to 5.4.49. As a result of the concerns expressed by the WHC about the western section of the project, IP1 had studied two longer tunnel options: first, the provision of a cut and cover section to the west of the proposed bored tunnel and second, an extension of that bored tunnel to the west so that its portals would be located outside the WHS. The former would increase project costs by £264m and the latter by £578m (PR 5.4.18 to 5.4.19). In the HIA IP1 stated that the options involving 4.5km tunnels were assessed as having "significantly higher estimated scheme costs that were considered to be unaffordable and were not considered further in the assessment" (para. 7.3.12) However, in the Examination IP1 said, in addition, that it had rejected both of these options not purely on the grounds of cost but also because they would provide "minimal benefit in heritage terms" (PR 5.4.20).

248. It is important to see IP1's case in context. First, it did not consider that any of the elements of the western section of its proposal would cause substantial harm to designated heritage assets ([73] above). Second, it considered that there would be a beneficial effect on five attributes of the OUV, only a slightly adverse effect on two attributes and a slightly beneficial effect looking at the OUV, authenticity and integrity of the WHS overall ([75] above).

249. The Panel recorded the position of IP2 as having been satisfied that IP1 had undertaken "an options appraisal in relation to the alternatives to the route of a highway in place of the A303...." (PR 5.4.55). Once again "options appraisal" referred to the term used in paragraph 4.27 of the NPSNN. IP1 also asks the court to note PR 5.4.54 and 5.4.63 where the Panel recorded that IP2 had said that they were satisfied that the EIA had addressed alternatives, relying also upon the HIA, including the text quoted in [247] above from paragraph 7.3.12. However, it was not suggested that IP2 addressed the issue whether the relative merits of alternatives needed to be considered by the SST in order to meet common law or policy requirements under the NPSNN for the protection of heritage assets and their settings. Nor has the court been shown any assessment by IP2, which was before the Panel or SST, agreeing with IP1's additional contention that the extended tunnel options would bring only minimal benefits in heritage terms.

250. In its conclusions the Panel said that it was satisfied that IP1 had carried out a "full options appraisal" for the project in achieving its selection for inclusion in the RIS[1] as referred to in paragraph 4.27 of the NPSNN. The Panel also relied upon IP2's view that "the EIA has addressed alternatives" and that IP1 had carried out an options appraisal on alternatives for the route of a highway to replace the A303 as it passes through the WHS (PR 5.4.63). The Panel stated that the criticisms made by interested parties of the appraisal process and public consultation did not alter its view that a full options appraisal had been carried out by IP1 (PR 5.4.67). Importantly, the Panel referred

[1] For a discussion of the statutory regime under which Road Investment Strategies are set see *R (Transport Action Network v Secretary of State for Transport* [2021] EWHC 2095 (Admin)

expressly to IP1's case that because the scheme retained its status in the RIS, "further option testing need not be considered by the [Panel] or by the [SST]" (PR 5.4.68). The Panel also referred to the "full response" which IP1 had given on the alternatives referred to by interested parties, noting that IP1 had "explained" its reasons for their rejection and the selection of the scheme route. The Panel said that it found "no reason to question the method and approach of the appraisal process that led to that outcome" (PR 5.4.69).

251. After noting the views of the WHC (PR 5.4.70), the Panel then reached this highly important conclusion at PR 5.4.71:-

> "However, insofar as the options appraisal is concerned, the ExA is content that the Applicant's approach to the consideration of alternatives is in accordance with the NPSNN. It is satisfied that the Applicant has undertaken a proportionate consideration of alternatives as part of the investment decision making process. *Since that exercise has been carried out, it is not necessary for this process to be reconsidered by the ExA or the decision maker*." (emphasis added)

This simply restated paragraph 4.27 of the NPSNN.

252. The Panel addressed the EIA requirement for assessment of alternatives in PR 5.4.72 to 5.4.73. Its conclusions focused on the adequacy of the description in the ES of IP1's study of alternatives. Consistent with what it had just said in PR 5.4.71, the Panel did not make its own appraisal of the relative merits of the proposed scheme and alternatives, in particular the longer tunnel option, despite the fact that subsequently in section 5.7 of its report, the Panel went on to make a number of strong criticisms of the proposed western section which subsequently drove its recommendation that the application for development consent be refused.

253. In PR 5.4.74 the Panel addressed alternatives in the context of compulsory acquisition. But it is not suggested that that addressed alternatives to, for example, the western cutting. Instead, the Panel referred to land required for the deposit of tunnel arisings.

254. The Panel's overall conclusions at PR 5.4.75 was:-

> "The ExA concludes that there are no policy or legal requirements that would lead it to recommend that development consent be refused for the Proposed Development in favour of another alternative."

255. Similarly at PR 7.2.28 the Panel concluded:-

> "The ExA is satisfied that the Applicant has carried out a proportionate option consideration of alternatives as part of the investment decision making process which led to the inclusion of the scheme within RIS1. It concludes that the Applicant has complied with the NPSNN, paragraphs 4.26 and 4.27. There are no policy, or legal requirements that would lead the ExA to

> recommend that consent be refused for the Proposed Development in favour of another alternative."

256. In his decision letter the SST merely stated that the impacts of a number of factors, including alternatives, were neutral (DL 63). In relation to alternatives, the SST relied upon section 5.4 of the Panel's report and PR 7.2.28. He said that he saw "no reason to disagree with the [Panel's] reasoning and conclusions on these matters."

257. Accordingly, both the Panel and the SST considered alternatives on the same basis as IP1, in that it was necessary to consider alternatives, but only in relation to whether an options appraisal had been carried out, whether the ES produced by IP1 had complied with the EIA Regulations 2017 and whether compulsory acquisition of land was justified. Although regulation 21(1) of the EIA Regulations 2017 required the SST to take into account the "environmental information", which included the representations made on the ES (see [31] above), the Panel and the SST did not go beyond assessing the adequacy of the assessment of alternatives in the ES for the purposes of compliance with that legislation. Neither the Panel nor the SST expressed any conclusions about whether the provision of a longer tunnel would achieve only "minimal benefits" as claimed by IP1 in its evidence to the Examination (PR 5.4.20), taking into account not only the costs of the alternatives but also the level of harm to heritage assets which would result from the proposed scheme.

258. Accordingly, the approach taken by the Panel and by the SST under the EIA Regulations 2017 did not go beyond that set out in PR 5.4.71. Yet these were vitally important issues raised in relation to a heritage asset of international importance by WHC, ICOMOS and many interested parties, including archaeological experts. It is also necessary to keep in mind the nature of the western section of the proposal which had given rise to so much controversy. The Panel pithily described it as the greatest physical change to the Stonehenge landscape in 6000 years and a change which would be permanent and irreversible, unlike a road constructed on the surface of the land (PR 5.7.224 to 5.7.225 and 5.7.247). Does the approach taken by the Panel and adopted by the SST disclose an error of law?

259. It is necessary to return to the NPSNN. Paragraph 4.26 begins by stating a general principle, that an applicant should comply with "all legal requirements" and "any policy requirements set out in this NPS" on the assessment of alternatives. The NPSNN goes on to set out requirements which should be considered "in particular," namely the EIA Directive and the Water Framework Directive and "policy requirements in the NPS for the consideration of alternatives." But those instances are not exhaustive. "Legal requirements" include any arising from judicial principles set out in case law as well as the Habitats Regulations 2017. Similarly, the references in paragraph 4.26 to developments in National Parks, the Norfolk Broads and AONBs and flood risk assessment are given only as examples of policy requirements for the assessment of alternatives.

260. But the Panel, and by the same token, the SST, applied paragraph 4.27 of the NPSNN, which states that where a project has been subject to full options testing for the purposes of inclusion in a RIS under the IA 2015 it is *not necessary* for the Panel or the decision-maker to reconsider this process; instead, they should be satisfied that the assessment has been carried out. On a proper interpretation of the NPSNN, I do not consider that where paragraph 4.27 is satisfied (i.e. there has been full options testing for the purposes

of a RIS) the applicant does not need to meet any requirements arising from paragraph 4.26. As the NPSNN states, a RIS is an "investment decision-making process". For example, page 91 of the current RIS, "Road Investment Strategy 2: 2020-2025", explains that the document makes an investment commitment to the projects listed on the assumption that they can "secure the necessary planning consents." "Nothing in the RIS interferes with the normal planning consent process."[2]

261. A few examples suffice to illustrate why paragraph 4.27 of the NPSNN cannot be treated as overriding paragraph 4.26. First, a scheme may require appropriate assessment under the Habitats Regulations 2017 and the consideration of alternatives by the competent authority, following any necessary consultations (regulations 63 and 64). Those obligations on the competent authority (which are addressed in para. 4.24 of the NPSNN) cannot be circumvented by reliance upon paragraph 4.27 of the NPSNN.

262. Second, even if a full options appraisal has been carried out for the purposes of including a project in a RIS, that may not have involved all the considerations which are required to be taken into account under the development consent process, or there may have been a change in circumstance since that exercise was carried out. In the present case page 3-3 of chapter 3 of the ES stated that the options involving a 4.5 km tunnel (i.e. a western extension) all involved costs significantly in excess of the available budget and so had not been considered further. During the Examination IP1 stated in a response to questions from the Panel that it also considered that extending the tunnel to the west would provide only "minimal benefit" in heritage terms (PR 5.4.20). That was an additional and controversial issue in the Examination which fell to be considered by the Panel.

263. Third, the options testing for a RIS may rely upon a judgment by IP1 with which the Panel disagrees and which therefore undermines reliance upon that exercise and paragraph 4.27 of the NPSNN. In the present case IP1's assessment that the extended tunnel options would bring minimal benefit in heritage terms cannot be divorced from its judgments that (i) no part of its proposed scheme would cause substantial harm to any designated heritage asset ([71] above) and (ii) there would be a beneficial effect on five attributes of the OUV, only a slightly adverse effect on two attributes and a slightly beneficial effect looking at the OUV, authenticity and integrity of the WHS overall ([75] above). By contrast, the Panel explained why it considered that (i) the western section of the proposal would cause substantial harm to the settings of assets ([97-98] above) and (ii) there would be harm to six attributes of the OUV (including great or major harm to three attributes), the integrity and authenticity of the WHS would be substantially and permanently harmed, and its authenticity seriously harmed ([101 to 103] above). In such circumstances, it was irrational for the Panel to treat the options testing carried out by IP1 as making it unnecessary to assess the relative merits of the tunnel alternatives for themselves, *a fortiori* if there was a policy or legal requirement for that matter to be considered by the decision-maker.

264. The Panel's finding that substantial harm would be caused to a WHS, an asset of the "highest significance" meant that paragraph 5.131 of the NPSNN was engaged (see [46]

[2] See *R (Transport Action Network v Secretary of State for Transport* [2021] EWHC 2095 (Admin) at [28]-[37] and [96(vii)].

above). On that basis it would have been "wholly exceptional" to treat that level of harm as acceptable.

265. Furthermore, on the Panel's view paragraph 5.133 of the NPSNN was engaged. It would follow that the application for consent was to be refused unless it was demonstrated that the substantial harm was "necessary" in order to deliver substantial public benefits outweighing that harm. It is relevant to note that this policy also applies to the complete loss of a heritage asset. In such circumstances, it is obviously material for the decision-maker (and any reporting Inspector or Panel) to consider whether it was unnecessary for that loss or harm to occur in order to deliver those benefits. The test is not merely a balancing exercise between harm and benefit. Accordingly, relevant alternatives for achieving those benefits are an obviously material consideration. However, although in the present case the Panel made its vitally important finding of substantial harm, it simply carried out a balancing exercise without also applying the necessity test. In the Panel's judgment the proposal failed simply on the balance of benefits and harm, even without considering whether any alternatives would be preferable (see [120]). Because the Panel approached the matter in that way, the SST did not have the benefit of the Panel's views on the relative merits of the extended tunnel options compared to the proposed scheme.

266. The SST differed from the Panel in that he considered the western section of the scheme would cause less than substantial harm. Consequently, paragraph 5.134 of the NPSNN was engaged. That only required the balancing of heritage harm against the public benefits of the proposal without also imposing a necessity test. However, when it came to striking the overall planning balance, the SST relied upon the need for the scheme and the benefits it would bring (see [130] and [140-141] above).

267. Furthermore, the SST did not differ from the Panel in relation to the effect of the western section on attributes of the OUV and the integrity and authenticity of the WHS. He also accepted the Panel's view that the beneficial effects of the scheme on the OUV did not outweigh the harm caused (see [139] and [142 to 144] above).

268. The principles on whether alternative sites or options may permissibly be taken into account or whether, going further, they are an "obviously material consideration" which must be taken into account, are well-established and need only be summarised here.

269. The analysis by Simon Brown J (as he then was) in *Trusthouse Forte v Secretary of State for the Environment* (1987) 53 P & CR 293 at 299-300 has subsequently been endorsed in several authorities. First, land may be developed in any way which is acceptable for planning purposes. The fact that other land exists upon which the development proposed would be yet more acceptable for such purposes would not justify the refusal of planning permission for that proposal. But, secondly, where there are clear planning objections to development upon a particular site then "it may well be relevant and indeed necessary" to consider where there is a more appropriate site elsewhere. "This is particularly so where the development is bound to have significant adverse effects and where the major argument advanced in support of the application is that the need for the development outweighs the planning disadvantages inherent in it." Examples of this second situation may include infrastructure projects of national importance. The judge added that even in some cases which have these characteristics, it may not be necessary to consider alternatives if the environmental impact is relatively slight and the objections not especially strong.

270. The Court of Appeal approved a similar set of principles in *R (Mount Cook Land Limited) v Westminster City Council* [2017] PTSR 116 at [30]. Thus, in the absence of conflict with planning policy and/or other planning harm, the relative advantages of alternative uses on the application site or of the same use on alternative sites are normally irrelevant. In those "exceptional circumstances" where alternatives might be relevant, vague or inchoate schemes, or which have no real possibility of coming about, are either irrelevant, or where relevant, should be given little or no weight.

271. Essentially the same approach was set out by the Court of Appeal in *R (Jones) v North Warwickshire Borough Council* [2001] PLCR 31 at [22] to [30]. At [30] Laws LJ stated:-

> "..... it seems to me that all these materials broadly point to a general proposition, which is that consideration of alternative sites would only be relevant to a planning application in exceptional circumstances. Generally speaking—and I lay down no fixed rule, any more than did Oliver L.J. or Simon Brown J.—such circumstances will particularly arise where the proposed development, though desirable in itself, involves on the site proposed such conspicuous adverse effects that the possibility of an alternative site lacking such drawbacks necessarily itself becomes, in the mind of a reasonable local authority, a relevant planning consideration upon the application in question."

272. In *Derbyshire Dales District Council v Secretary of State for Communities and Local Government* [2010] 1 P&CR 19 Carnwath LJ emphasised the need to draw a distinction between two categories of legal error: first, where it is said that the decision-maker erred by taking alternatives into account and second, where it is said that he had erred by failing to take them into account ([17] and [35]). In the second category an error of law cannot arise unless there was a legal or policy requirement to take alternatives into account, or such alternatives were an "obviously material" consideration in the case so that it was irrational not to take them into account ([16] to [28]).

273. In *R (Langley Park School for Girls Governing Body) v Bromley London Borough Council* [2009] EWCA Civ 734 the Court of Appeal was concerned with alternative options within the same area of land as the application site, rather than alternative sites for the same development. In that case it was necessary for the decision-maker to consider whether the openness and visual amenity of Metropolitan Open Land ("MOL") would be harmed by a proposal to erect new school buildings. MOL policy is very similar to that applied within a Green Belt. The local planning authority did not take into account the claimant's contention that the proposed buildings could be located in a less open part of the application site resulting in less harm to the MOL. Sullivan LJ referred to the second principle in *Trusthouse Forte* and said that it must apply with equal, if not greater, force where the alternative suggested relates to different siting within the same application site rather than a different site altogether ([45 to 46]). He added that no "exceptional circumstances" had to be shown in such a case ([40]).

274. At [52-53] Sullivan LJ stated:-

> "52. It does not follow that in every case the "mere" possibility that an alternative scheme might do less harm must be given no

> weight. In the Trusthouse Forte case the Secretary of State was entitled to conclude that the normal forces of supply and demand would operate to meet the need for hotel accommodation on another site in the Bristol area even though no specific alternative site had been identified. There is no "one size fits all" rule. The starting point must be the extent of the harm in planning terms (conflict with policy etc.) that would be caused by the application. If little or no harm would be caused by granting permission there would be no need to consider whether the harm (or the lack of it) might be avoided. The less the harm the more likely it would be (all other things being equal) that the local planning authority would need to be thoroughly persuaded of the merits of avoiding or reducing it by adopting an alternative scheme. At the other end of the spectrum, if a local planning authority considered that a proposed development would do really serious harm it would be entitled to refuse planning permission if it had not been persuaded by the applicant that there was no possibility, whether by adopting an alternative scheme, or otherwise, of avoiding or reducing that harm.
>
> 53.Where any particular application falls within this spectrum; whether there is a need to consider the possibility of avoiding or reducing the planning harm that would be caused by a particular proposal; and if so, how far evidence in support of that possibility, or the lack of it, should have been worked up in detail by the objectors or the applicant for permission; are all matters of planning judgment for the local planning authority. In the present case the members were not asked to make that judgment. They were effectively told at the onset that they could ignore Point (b), and did so simply because the application for planning permission did not include the alternative siting for which the objectors were contending, and the members were considering the merits of that application."

275. The decision cited by Mr Taylor QC in *First Secretary of State v Sainsbury's Supermarkets Limited* [2007] EWCA Civ 1083 is entirely consistent with the principles set out above. In that case, the Secretary of State did in fact take the alternative scheme promoted by Sainsbury's into account. He did not treat it as irrelevant. He decided that it should be given little weight, which was a matter of judgment and not irrational ([30 and 32]). Accordingly, that was not a case, like the present one[3], where the error of law under consideration fell within the second of the two categories identified by Carnwath LJ in *Derbyshire Dales District Council* (see [272] above).

276. The wider issue which the Court of Appeal went on to address at [33] to [38] of the *Sainsbury's* case does not arise in our case, namely must *planning permission be refused* for a proposal which is judged to be "acceptable" because there is an alternative scheme which is considered to be more acceptable. True enough, the decision on acceptability in that case was a balanced judgment which had regard to harm to heritage assets, but that was undoubtedly an example of the first principle stated in *Trusthouse*

[3] Which is to do with a failure to assess the relative merits of identified alternatives.

Forte (see [269] above). The court did not have to consider the second principle, which is concerned with whether a decision-maker may be obliged to take an alternative *into account*. Indeed, in the present case, there is no issue about whether alternatives for the western cutting should have been taken into account. As I have said, the issue here is narrower and case-specific. Was the SST entitled to go no further, in substance, than the approach set out in paragraph 4.27 of the NPSNN and PR 5.4.71?

277. In my judgment the clear and firm answer to that question is no. The relevant circumstances of the present case are wholly exceptional. In this case the relative merits of the alternative tunnel options compared to the western cutting and portals were an obviously material consideration which the SST was required to assess. It was irrational not to do so. This was not merely a relevant consideration which the SST could choose whether or not to take into account[4]. I reach this conclusion for a number of reasons, the cumulative effect of which I judge to be overwhelming.

278. First, the designation of the WHS is a declaration that the asset has "outstanding universal value" for the cultural heritage of the world as well as the UK. There is a duty to protect and conserve the asset (article 4 of the Convention) and there is the objective *inter alia* to take effective and active measures for its "protection, conservation, presentation and rehabilitation" (article 5). The NPSNN treats a World Heritage Site as an asset of "the highest significance" (para. 5.131).

279. Second, the SST accepted the specific findings of the Panel on the harm to the settings of designated heritage assets (e.g. scheduled ancient monuments) that would be caused by the western cutting in the proposed scheme. He also accepted the Panel's specific findings that OUV attributes, integrity and authenticity of the WHS would be harmed by that proposal. The Panel concluded that that overall impact would be "significantly adverse", the SST repeated that (DL 28) and did not disagree (see [137], [139] and [144] above).

280. Third, the western cutting involves large scale civil engineering works, as described by the Panel. The harm described by the Panel would be permanent and irreversible.

281. Fourth, the western cutting has attracted strong criticism from the WHC and interested parties at the Examination, as well as in findings by the Panel which the SST has accepted. These criticisms are reinforced by the protection given to the WHS by the objectives of Articles 4 and 5 of the Convention, the more specific heritage policies contained in the NPSNN and by regulation 3 of the 2010 Regulations.

282. Fifth, this is not a case where no harm would be caused to heritage assets (see *Bramshill* at [78]). The SST proceeded on the basis that the heritage benefits of the scheme, in particular the benefits to the OUV of the WHS, did not outweigh the harm that would be caused to heritage assets. The scheme would not produce an overall net benefit for the WHS. In that sense, it is not acceptable *per se*. The acceptability of the scheme depended upon the SST deciding that the heritage harm (and in the overall balancing exercise *all* disbenefits) were outweighed by the need for the new road and *all* its other benefits. This case fell fairly and squarely within the exceptional category of cases

[4] It should be recorded that neither the Panel nor the SST considered exercising any discretion to consider the relative merits of alternative options for extending the proposed tunnel to the west, given PR 5.4.71 and their reliance upon para. 4.27 of the NPSNN.

identified in, for example, *Trusthouse Forte*, where an assessment of relevant alternatives to the western cutting was required (see [269] above).

283. The submission of Mr. Strachan QC that the SST has decided that the proposed scheme is "acceptable" so that the general principle applies that alternatives are irrelevant is untenable. The case law makes it clear that that principle does not apply where the scheme proposed would cause significant planning harm, as here, and the grant of consent *depends* upon its adverse impacts being outweighed by need and other benefits (as in para. 5.134 of the NPSNN).

284. I reach that conclusion without having to rely upon the points on which the claimant has succeeded under ground 1(iv). But the additional effect of that legal error is that the planning balance was not struck lawfully and so, for that separate reason, the basis upon which Mr. Strachan QC says that the SST found the scheme to be acceptable collapses.

285. Sixth, it has been accepted in this case that alternatives should be considered in accordance with paragraphs 4.26 and 4.27 of the NPSNN. But the Panel and the SST misdirected themselves in concluding that the carrying out of the options appraisal for the purposes of the RIS made it unnecessary for them to consider the merits of alternatives for themselves. IP1's view that the tunnel alternatives would provide only "minimal benefit" in heritage terms was predicated on its assessments that no substantial harm would be caused to any designated heritage asset and that the scheme would have slightly *beneficial* (not adverse) effects on the OUV attributes, integrity and authenticity of the WHS. The fact that the SST accepted that there would be net harm to the OUV attributes, integrity and authenticity of the WHS (see [139] and [144] above) made it irrational or logically impossible for him to treat IP1's options appraisal as making it unnecessary for him to consider the relative merits of the tunnel alternatives. The options testing by IP1 dealt with those heritage impacts on a basis which is inconsistent with that adopted by the SST.

286. Seventh, there is no dispute that the tunnel alternatives are located within the application site for the DCO. They involve the use of essentially the same route and certainly not a completely different site or route. Accordingly, as Sullivan LJ pointed out in *Langley Park* (see [246] above), the second principle in *Trusthouse Forte* applies with equal, if not greater force.

287. Eighth, it is no answer for the defendant to say that DL 11 records that the SST has had regard to the "environmental information" as defined in regulation 3(1) of the EIA Regulations 2017. Compliance with a requirement to take information into account does not address the specific obligation in the circumstances of this case to compare the relative merits of the alternative tunnel options.

288. Ninth, it is no answer for the defendant to say that in DL 85 the SST found that the proposed scheme was in accordance with the NPSNN and so s.104(7) of the PA 2008 may not be used as a "back door" for challenging the policy in paragraph 4.27 of the NPSNN. I have previously explained why paragraph 4.27 does not override paragraph 4.26 of the NPSNN, and does not disapply the common law principles on when alternatives are an obviously material consideration. But in addition the SST's finding that the proposal accords with the NPSNN for the purposes of s.104(3) of the PA 2008 is vitiated (a) by the legal error upheld under ground 1(iv) and, in any event, (b) by the

legal impossibility of the SST deciding the application in accordance with paragraph 4.27 of the NPSNN.

289. I should add for completeness that neither the Panel nor the SST suggested that the extended tunnel options need not be considered because they were too vague or inchoate. That suggestion has not been raised in submissions.

290. For all these reasons, I uphold ground 5(iii) of this challenge.

Conclusions

291. The court upholds two freestanding grounds of challenge, 1(iv) and 5(iii). Permission is granted to the claimant to apply for judicial review in relation to those grounds.

292. Permission is refused to apply for judicial review in respect of all other grounds on the basis that each of them is unarguable.

293. There is no basis for the court to hold that relief should be withheld under s.31(2A) of the Senior Courts Act 1981. It is self-evident from the nature of each of the grounds I have upheld that it cannot be said that it is highly likely that the application for development consent would still have been granted if neither error had been made.

294. The claim for judicial review succeeds to the extent I have indicated. The claimant is entitled to an order quashing the SST's decision to grant development consent and the DCO itself.

Appendix 1 – Legal principles agreed between the parties

1. The general legal principles applicable to a judicial review of this kind are well-established. Amongst other things:

    a. There is a clear and basic distinction between questions of interpretation of policy and the application of policy and matters of planning judgment. The Court will not interfere with matters of planning judgment other than on legitimate public law grounds: see for example *Client Earth* at [101] and [103] [4/9/203- 204], applying *R (Samuel Smith Old Brewery (Tadcaster)) v North Yorkshire County Council* [2020] PTSR 221 and *St Modwen Developments v Secretary of State for Communities and Local Government* [2017] EWCA Civ 1643; [2017] PTSR 476 at [7].

    b. Decision Letters should be read (1) fairly and in good faith, and as a whole; (2) in a straightforward and down-to-earth manner, without excessive legalism or criticism; and (3) as if by a well-informed reader who understands the principal controversial issues in the case: see *St Modwen* above and the principles *in Save Britain's Heritage v Number 1 Poultry Ltd* [1991] 1 WLR 153, 164E-G).

    c. Reasons given for a decision must be intelligible, adequate and enable the reader to understand why the matter was decided as it was: see for example *South Bucks DC v Porter* (No 2) [2004] 1 WLR 1953. The question is whether the reasons given leave room for genuine, as opposed to forensic, doubt as to what was decided and why (*R (CPRE Kent) v Dover District Council* [2017] UKSC 79 at [42]). Reasons can be briefly stated and there is no requirement to address each and every point made, provided that the reasons explain the decision maker's conclusions on the principal important controversial issues. In circumstances where the Secretary of State disagrees with a recommendation from a planning inspector, there is no different standard of reasons: see *Client Earth* High Court judgment at [146] and *Secretary of State for Communities and Local Government v Allen* [2016] EWCA Civ 767 at [19]. However, 'if disagreeing with an inspector's recommendation the Secretary of State is...required to explain why he rejects the inspector's view' see *Horada v SSCLG* [2016] EWCA Civ 169, at [40]. Similarly, in the heritage context, the need to give considerable importance and weight to listed building preservation does not change the standard of legally adequate reasons for granting planning permission: see *Mordue v Secretary of State for Communities and Local Government* [2015] EWCA Civ 29434 1243 at [24]-[26]. Reasons do not need to be given for the way in which every material consideration has been dealt with (*HJ Banks & Co Ltd v Secretary of State for Housing, Communities and Local Government* [2019] PTSR 668).

    d. The judgment of Lewis J. in *R (Mars Jones) v Secretary of State for Business, Energy and Industrial Strategy* [2017] EWHC 1111 (Admin) has applied the South Bucks standard of reasons to development consent decisions (at [47]).

    e. Where it is alleged that a decision-maker has failed to take into account a material consideration, it is insufficient for a claimant simply to say that the decision-maker has failed to take into account a material consideration. A legally relevant consideration is only something that is not irrelevant or immaterial, and therefore something which the decision-maker is empowered or entitled to take into

account. But a decision-maker does not fail to take a relevant consideration into account unless he was under an obligation to do so. Accordingly, for this type of allegation it is necessary for a claimant to show that the decision-maker was expressly or impliedly required by the legislation (or by a policy which had to be applied) to take the particular consideration into account, or whether on the facts of the case, the matter was so "obviously material", that it was irrational not to have taken it into account: see *Client Earth* at [99] applying *R (Samuel Smith Old Brewery (Tadcaster)) v North Yorkshire County Council* [2020] PTSR 221

f. The interpretation of planning policy is a matter for the court. In *R (Scarisbrick v Secretary of State for Communities and Local Government* [2017] EWCA Civ 787, the Court of Appeal considered the interpretation of national policy statement for nationally significant hazardous waste infrastructure under the Planning Act 2008. See paragraphs 5-8. Lindblom LJ (with whom the other Lord Justices agreed) held:

> "19. The court's general approach to the interpretation of planning policy is well established and clear (see the decision of the *Supreme Court in Tesco Stores Ltd. v Dundee City Council* [2012] UKSC 13 , in particular the judgment of Lord Reed at paragraphs 17 to 19). The same approach applies both to development plan policy and statements of government policy (see the judgment of Lord Carnwath in *Suffolk Coastal District Council v Hopkins Homes Ltd* . and *Richborough Estates Partnership LLP v Cheshire East Borough Council* [2017] UKSC 37 , at paragraphs 22 to 26). Statements of policy are to be interpreted objectively in accordance with the language used, read in its proper context (see paragraph 18 of Lord Reed's judgment in *Tesco Stores v Dundee City Council*). The author of a planning policy is not free to interpret the policy so as to give it whatever meaning he might choose in a particular case. The interpretation of planning policy is, in the end, a matter for the court (see paragraph 18 of Lord Reed's judgment in *Tesco v Dundee City Council*). But the role of the court should not be overstated. Even when dispute arises over the interpretation of policy, it may not be decisive in the outcome of the proceedings. It is always important to distinguish issues of the interpretation of policy, which are appropriate for judicial analysis, from issues of planning judgment in the application of that policy, which are for the decision-maker, whose exercise of planning judgment is subject only to review on public law grounds (see paragraphs 24 to 26 of Lord Carnwath's judgment in *Suffolk Coastal District Council*). It is not suggested that those basic principles are inapplicable to the NPS – notwithstanding the particular statutory framework within which it was prepared and is to be used in decision making."

Heritage Assessment - The Statutory Duty

2. Regulation 3 of the 2010 Regulations states: