SABIC UK PETROCHEMICALS LIMITED (URN 20049383)

SABIC TEES HOLDINGS LIMITED (URN: H2TS-AFP121)

SABIC PETROCHEMICALS BV

APPLICATION BY H2TEESSIDE LIMITED FOR AN ORDER GRANTING DEVELOPMENT CONSENT FOR THE H2TEESSIDE PROJECT (EN070009)

DEADLINE 5

SABIC'S RESPONSE TO EXAMINING AUTHORITY'S SECOND WRITTEN QUESTIONS (EXQ2) [PD-015]

No.	ExQ1 APPLICANT'S RESPONSES	SABIC'S RESPONSE
Q2.6.11	In their DL4 submission [REP4-050], SABIC question how the SoS is to decide whether the level of security being provided under Article 47 (funding for CA compensation) is adequate, especially in light of its concerns about the serious consequences of an incidental suspension of an inconsistent right under Article 26. Please confirm if these issues were concluded in the NZT DCO via suitable PPs and Heads of Terms agreements.	Clarification SABIC wishes to clarify that it is concerned not only about an incidental suspension of an inconsistent right under Article 26, but also: 1. The power to "acquire rights already in existence" under Article 25(1); and 2. The power to temporarily suspend its rights and exclude possession under Articles 32 and 33. Net Zero DCO SABIC'S case to the Net Zero Examination was focused on its precedent protective provisions which had recently been included in the York Potash DCO. These provisions provided strong protections to ensure that SABIC's interests could not be acquired without SABIC's consent. In its written representation SABIC also drew the ExA's attention to its loss of revenue during any system shutdown, the £5,000,000 cost of restarting the Cracker. It also highlighted that following any cessation of production on the Cracker and the immediate loss of margin, £100,000,000 of fixed costs would be the EBITDA loss of the site on an annualised basis and that it was not

		possible to quantify additional consequential losses which might arise. Compensation would be likely to be a multiple of this sum. In rejecting SABIC's preferred protective provisions the ExA made reference to "multi-million pound losses arising from a temporary loss of production" (paragraph 8.37.5), but did not then go on to assess the compensation consequences if the undertaker for that scheme exercised their unfettered powers to the fullest extent. In particular they did not make any reference to the consequences of compulsory acquisition of SABIC's interests in terms of funding the cost of business extinguishment if the Applicant chose to exercise those rights, or the implication of this in terms of Article 48 (funding for compulsory acquisition compensation) of the Net Zero DCO. Although the quantum of compensation is not a matter for the ExA, the proper and adequate assessment of potential compensation in the context of the funding statement and the adequacy and securing of the funding to sufficiently meet that liability, are (in the case of a private company) matters which the ExA should properly consider. It follows that these issues were not concluded in the NZT DCO via suitable PPs and Heads of Terms agreements. <u>Additional Issue</u> SABIC's Wilton operations are part of a larger national system of ethylene production and use via the Trans Pennine Ethylene Pipeline (**TPEP**) and the Wilton to Grangemouth Ethylene Pipeline (**WGEP**). The WGEP, in particular, links the Teesside systems to Grangemouth (where Ineos has a cracker) and Mossmorran (where ExxonMobil has a cracker). However the overall system links ethylene consumers across Grangemouth, Wilton, Stanlow, Runcorn, Carrington and Saltend (Hull). A UKOPA[a] document, providing some information about this system is annexed to this document at Annex 1. Although it dates from 2009, and is a little out of date, it provides some helpful background which might aid the ExA's understanding of SABIC's Teesside operations and the national scale of the

[a] United Kingdom Onshore Pipeline Operators' Association

		"circuit" which could be affected by the Applicant's proposed compulsory acquisition. In this context, and notwithstanding SABIC's comments that the DCO must ensure that adequate compensation is available for compulsory acquisition, SABIC considers that it is appropriate that the highest possible level of protection should be put in place against the compulsory acquisition of its assets so that this scheme does not remove a vital link in the nationally important ethylene system with potentially devastating consequences for the industry. This is vital not only for SABIC's own operations but also for the other parties who would be affected in the event of an interruption to the "circuit".
Q2.9.1	Article 9 (Application and Modification of Statutory Provisions) PDT in its DL4 submission [REP4-048], provides a summary of its oral submissions related to ISH2. These submissions primarily related to concerns regarding Article 9 (Application and Modification of Statutory Provisions) of the draft DCO (Current version [REP4-004]). The Applicant's document of its oral submissions concerning ISH2 are also noted. However, PDT are maintaining its request that Article 9 of the draft DCO be amended to remove the disapplication of the provisions as set out in Article 9(2)(a) and (b). The Applicant is asked to engage with PDT with a view to reaching a satisfactory resolution to PDT's concerns in regard to Article 9 of the draft DCO and advise the ExA as to what it is doing to resolve this matter.	SABIC has previously set out (in its Deadline 4 "Written Summary of Oral Submissions to ISH2" [REP4-052]) its concerns that the draft DCO does not include a requirement which would ensure that trenchless technology is used in respect of the River Tees and Greatham Creek crossings. One control against the Applicant deciding to dredge a crossing across the Tees exists outside the ambit of the proposed development consent order: namely PDT's control of the port and in particular of dredging in the river. The disapplication of PDT's powers by Article 9(2)(a) and (b) therefore compounds the problem created by the absence of an enforceable requirement as it would remove one of the controls that could otherwise be relied upon. The deletion of Article 9(2)(a) and (b) would not, of itself, resolve SABIC's concerns that a suitable requirement should be included in the order. This is because of the decision of the Court of Appeal in *R. v Warwickshire CC Ex p. Powergen Plc*[b] (the **Powergen Case**), which limits the circumstances in which an authority may refuse to allow works to proceed. The Powergen Case found that a local highway authority who had objected to the granting of planning permission on highway safety grounds could not subsequently refuse to enter into an agreement allowing works to the adopted highway (under section 278 of the Highways 1980). The rationale for the decision in the Powergen Case was that the safety implications of the development had been fully heard and rejected on appeal, which meant that the local highway authority did not retain the right to maintain and act upon its original opinion, and refuse to enter into the Section 278 Agreement, because that original opinion ran contrary to the planning inspector's independent judgment on the matter. However this leaves

[b] (1998) 75 P. & C.R. 89 copied at Annex 2

		considerable uncertainty regarding PDT's ability to prevent dredging in the event that it is not restricted by the proposed order. SABIC therefore considers both that Article 9(2)(a) and (b) should be deleted **AND** that a suitable and adequate requirement should be included in the Order to ensure that trenchless technology is used.

Womble Bond Dickinson (UK) LLP

18 December 2024

ANNEX 1

UKOPA "UK Ethylene System"

UK Ethylene System

UKOPA Meeting
25th/26th February 2009

UKOPA/09/0016

Development of a Network

- The current UK ethylene storage and distribution infrastructure has evolved through a series of investments over the last 40 years
- The system has developed to connect ethylene production centres with consumers producing ethylene derivatives, as well as bulk storage sites
- Ethylene production is centred on Grangemouth, Mossmorran and Wilton
- Ethylene consumption is distributed across Grangemouth, Wilton, Stanlow, Runcorn, Carrington and Saltend (Hull)
- Bulk ethylene storage is located at Wilton and Holford
- Export facilities at North Tees & Mossmorran

What's in a name?

- The ethylene industry loves acronyms!
- The UK ethylene pipeline network has comprised the following …

(FSEP	Fawley – Severnside)
TPEP	Trans-Pennine
SCEP	Stanlow - Carrington
WGEP	Wilton - Grangemouth
RSEP	Runcorn - Stanlow
MGEP	Mossmorran - Grangemouth
NWEP	North West
TSEP	Teesside - Saltend

United Kingdom Onshore Pipe

UKOPA

History - TPEP

- Constructed by ICI in 1966/67 to transport from Wilton to Runcorn, with a spur NE of Preston to Hillhouse
- Connection to SCEP for supply to consumers at Carrington
- Uprated in 1981 with the installation of booster stations and Holford storage

History – WGEP/MGEP

- Constructed in 1979 to transport BP's share of the ICI-BP JV cracker from Wilton to Grangemouth
- Construction of the ExxonMobil Mossmorran cracker included construction of the MGEP and modification in 1985 to allow 'reverse flow' on the WGEP to Wilton
- This allowed Shell to move ethylene from Mossmorran to Stanlow/Carrington
- At this point the main ethylene production and consumption centres were linked

- Booster station capability installed in 1997

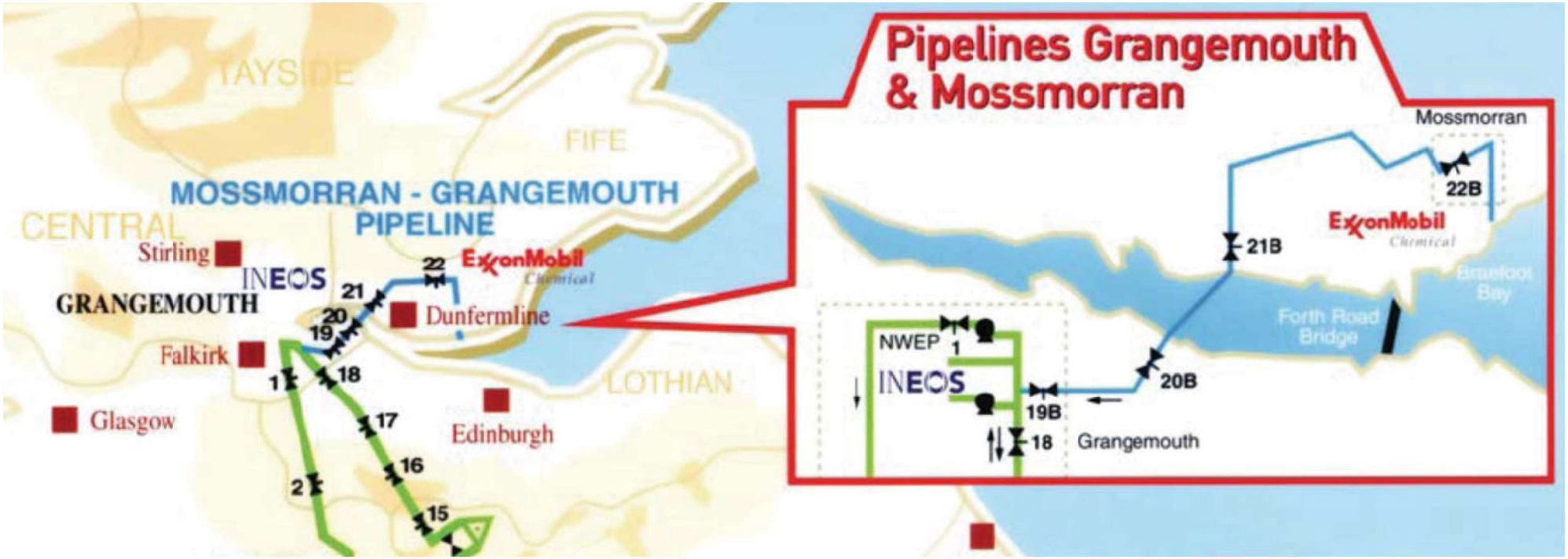
History - NWEP

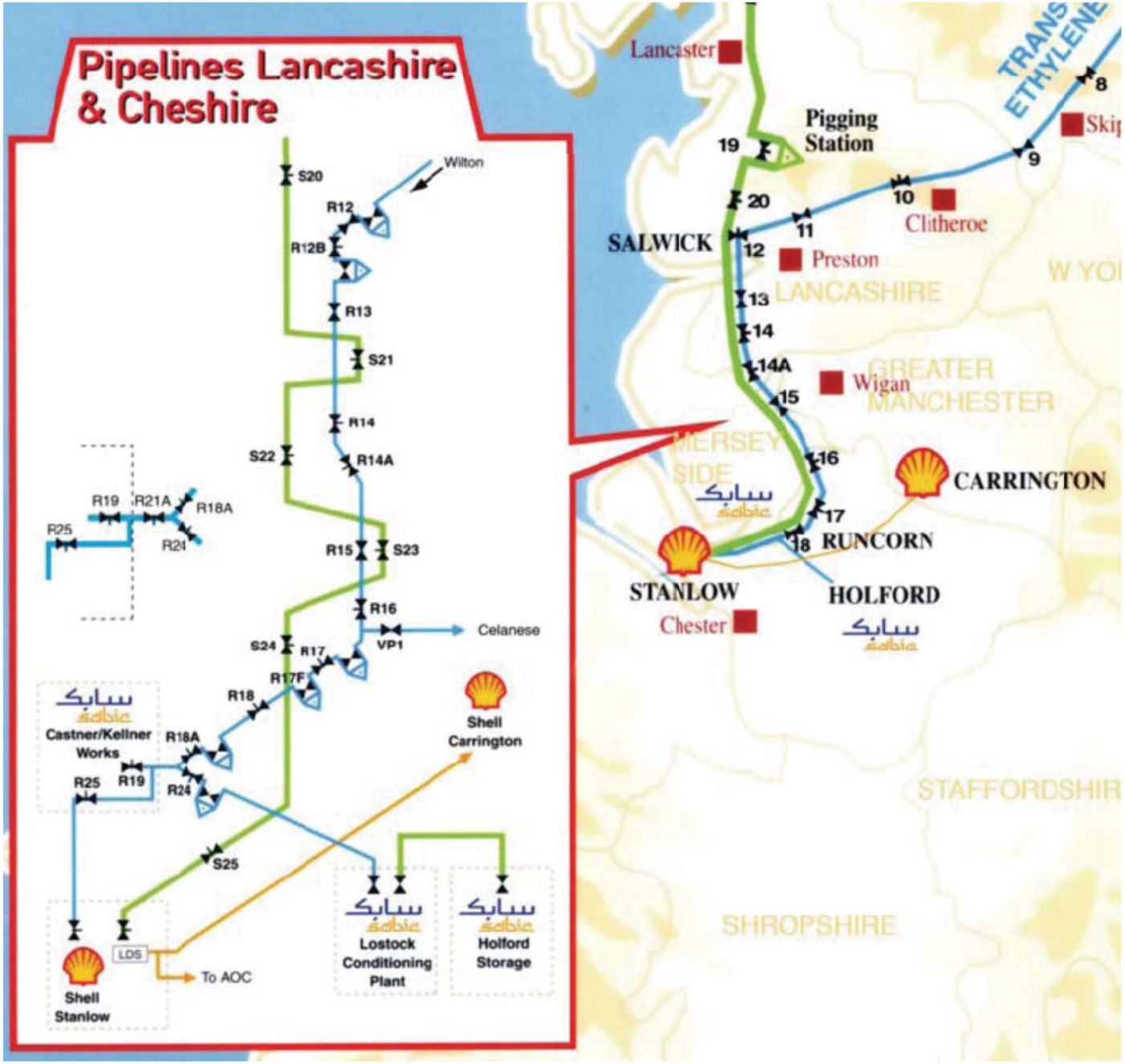
- In response to capacity issues, Shell constructed the NWEP in 1992
- This provides a direct link between Grangemouth and Stanlow and forms the third leg of the network triangle

History - TSEP

- To support new ethylene consumption at Saltend, BP constructed the TSEP in 1999/2000
- This new link was connected to the WGEP, providing an extended ethylene reservoir and connection of BP's production and consumption assets


Pipelines Teesside
North Tees Works
Compound 38
VG1
Jetty
REDCAR
PRODUCTION
COMPRESSION
STORAGE
VR1A
Wilton Works
VR1
TSEP
MIDDLESBROUGH
Consett
Sunderland
Durham
N. TEES SITE
WILTON
Middlesbrough
Darlington
Whitby
Scarborough
Thirsk
Bedale
Ripon
TEESSIDE - SALTEND
ETHYLENE PIPELINE


TAYSIDE
FIFE
MOSSMORRAN - GRANGEMOUTH
PIPELINE
CENTRAL
Stirling
INEOS
GRANGEMOUTH
ExxonMobil
Chemical
Dunfermline
Falkirk
Glasgow
Edinburgh
LOTHIAN
1
2
15
16
17
18
19
20
21
22
Pipelines Grangemouth
& Mossmorran
Mossmorran
22B
21B
ExxonMobil
Chemical
Braefoot
Bay
Forth Road
Bridge
NWEP
1
INEOS
20B
19B
18
Grangemouth


Pipelines Lancashire & Cheshire
Wilton
S20
R12
R12B
R13
S21
R14
S22
R14A
R19
R21A
R18A
R25
R24
R15
S23
R16
Celanese
VP1
S24
R17
R17F
R18
R18A
R19
R25
R24
S25
Castner/Kellner Works
Shell Carrington
LDS
To AOC
Shell Stanlow
Lostock Conditioning Plant
Holford Storage
Lancaster
Pigging Station
19
20
SALWICK
12
13
14
14A
15
16
17
18
8
9
10
11
Clitheroe
Preston
LANCASHIRE
Wigan
GREATER MANCHESTER
MERSEYSIDE
CARRINGTON
RUNCORN
STANLOW
HOLFORD
Chester
STAFFORDSHIR
SHROPSHIRE

The Ethylene Network – SH&E Benefits

- The alternative to the bulk transport of high pressure ethylene via pipeline is as a liquid (-103°C)
- Environmental penalties
  - liquefaction energy
  - road transport
- Safety risks
  - mobile major hazard
  - loading/offloading hazards

The Ethylene Network – Commercial Benefits

- With increasing production and consumption plant scale, plant outages create major impact
- The UK network provides the means to link production and consumption to bulk storage
- This allows quite large swings in supply and demand to be balanced
- Most plants on maintenance intervals of 3-6 years
- Network enables swaps within and outside the UK to manage these intervals
- Concept of virtual flows

United Kingdom Onshore Pipe

UKOPA

ANNEX 2

R. v Warwickshire CC Ex p. Powergen Plc (1998) 75 P. & C.R. 89

*89 R. v Warwickshire County Council

Positive/Neutral Judicial Consideration

Court
Court of Appeal (Civil Division)

Judgment Date
31 July 1997

Report Citation
(1998) 75 P. & C.R. 89

Court of Appeal

(Simon Brown , Otton and Mummery L.JJ.):

July 31, 1997

Town and country planning—Refusal of outline planning permission for development as detrimental to interests of highway safety—Inspector upheld appeal subject to proposed highway works being carried out—Highway authority then refused to enter into agreement under section 278 Highways Act 1980 to carry out necessary works—Whether refusal lawful

In 1994, the respondent, P, applied for outline planning permission for a supermarket. The proposed access and necessary highway works were fully detailed and were not reserved matters. Warwick District Council refused permission. One of the reasons given was that, having consulted the appellant county council as the local highway authority with regard to the proposed highway works, as required by article 18 of the Town and Country Planning (General Development) Order 1988 , the proposal was considered to be detrimental to the interests of highway safety. On appeal under section 78 of the Town and Country Planning Act 1990 , the Inspector concluded that the proposals for access to the site were adequate. He allowed the appeal and granted outline permission subject, *inter alia* , to the proposed highway works being carried out. P then sought to enter into an agreement under section 278 of the Highways Act 1980 with the appellant council whereby the council, as highway authority, would carry out the necessary works. The appellant refused to enter into an agreement for the same reasons as the district council had originally refused planning permission. An application for judicial review of the highway authority's refusal to enter into a section 278 agreement was upheld by Forbes J. on the basis that section 278 must be interpreted in the context of the planning process. To allow a highway authority to reconsider the benefit to the public of the highway works when such works had already been considered and determined in the planning process would largely frustrate the scheme of the legislation of which section 278 was a part. On appeal to the Court of Appeal:

Held, dismissing the appeal, that, following a successful appeal by the developer the relevant highway authority has no option but to co—operate in implementing the planning permission by entering into a section 278 agreement. Apart from the argument based on the role of section 278 within the scheme of the legislation, it was unreasonable in the *Wednesbury* sense for a highway authority, whose road safety objections have been fully heard and rejected on appeal, then, quite inconsistently with the Inspector's independent factual judgment on the issue, nevertheless to maintain its original view.

Cases referred to:

(1) *Padfield v. Minister of Agriculture, Fisheries and Food [1968] A.C. 997; [1968] 2 W.L.R. 924 ; [1968] 1 All E.R. 694; 112 S.J. 171, HL* .
(2) *R. v. Secretary of State for the Home Department ex parte Onibiyo [1996] 2 W.L.R. 490; [1996] 2 All E.R. 901; [1996] Imm.A.R. 370, CA* .

Legislation construed:

Section 278 Highways Act 1980 , the material parts of which are set out in the judgment of Simon Brown L.J.

Appeal by Warwickshire County Council as highway authority from a decision of Forbes J. given in the Divisional Court of Queen's Bench on January 9, 1997 by which he allowed an application for judicial review by ***90** Powergen Plc and held that the Council's refusal to enter into an agreement under section 278 of the Highways Act 1980 , after a successful appeal against a refusal of planning permission was unlawful. The facts are stated in the judgment of Simon Brown L.J.

Representation

Michael Supperstone, Q.C. for the appellant.
William Hicks, Q.C. for the respondent.

Simon Brown L.J.

Highway authorities are the bodies primarily charged with the responsibility of ensuring that our roads are reasonably safe: safely designed, safely regulated and safely maintained. Ample powers are given to them for this purpose, both under the Highways Act 1980 and the Road Traffic Regulations Act 1984.

Section 278 of the Highways Act 1980 , one of a group of sections in part XIII under the heading "Financial Provisions", allows highway authorities to enter into agreements with developers for the execution of highway works at the developer's expense. In its present form (substituted by section 23 of the New Roads and Street Works Act 1991 for the section originally enacted) it states, so far as material:

> **Agreements as to execution of works.**
>
> 278
> (1) A highway authority may, if they are satisfied it will be of benefit to the public, enter into an agreement with any person—
>
> (a) for the execution by the authority of any works which the authority are or may be authorised to execute, or
>
> (b) for the execution by the authority of such works incorporating particular modifications, additions or features, or at a particular time or in a particular manner,
>
> on terms that that person pays the whole or such part of the cost of the works as may be specified in or determined in accordance with the agreement.

There can be no doubt that ordinarily speaking a highway authority will not be "satisfied it would be of benefit to the public" to enter into a section 278 agreement unless it is satisfied, *inter alia* about the road safety implications of the proposed scheme. And until it is thus satisfied, it has no discretion to enter into an agreement. What, however, is the position when the highway authority has objected to the grant of planning permission for a particular development on road safety grounds and then, on

appeal to the Secretary of State, that objection has been fully heard and resolved in the developer's favour with the grant of a conditional planning permission? Is the highway authority then still entitled (perhaps even bound, assuming it remains of its original view) to maintain its objection and to refuse to enter into a section 278 agreement, even though such refusal will prevent the developer from satisfying the condition and implementing his permission?

That is the crucial issue now before us. It is formulated by Mr Supperstone, Q.C. for the appellant highway authority thus: What is the proper legal relationship between the role of a planning authority in determining whether or not to grant planning permission, and, if so, subject to what conditions if any, and the role of a highway authority in determining whether or not to enter into a section 278 agreement? It is, he submits, a question of fundamental importance to all planning authorities and highway authorities throughout the country.

***91**

With that brief introduction let me turn now to the facts of the case which I shall set out altogether more shortly than did the judge below.

In June and September 1994 Powergen applied to Warwick District Council (the District Council) for outline planning permission for the development of Powergen's site at the former Avon Power Station in Emscote Road, Warwick. The proposed development was for a supermarket, associated car parking for 500 cars, petrol filling station and suitable means of access to the site from Emscote Road. The proposed access and highway works were fully detailed and illustrated on drawings which accompanied the applications; they were not reserved matters. In summary they comprised the following main elements:

(i) widening the highway and a bridge across the Grand Union Canal to provide a site access junction;
(ii) installing a full traffic signal control junction;
(iii) providing a right hand turning lane and pedestrian crossings.

As part of its consideration of the planning applications the District Council, in compliance with article 18 of the Town and Country Planning (General Development) Order 1988 , was required to consult with the appellant county council as the local highway authority with regard to the proposed highway works. Having done so, on November 1, 1994, the District Council refused the September 1994 application. (It failed to determine the June 1994 application within the prescribed time limit. Nothing, however, turns on this: it was a duplicate application and its non-determination gave rise to an identical right of appeal. It is accordingly convenient to treat there as having been but a single application.) The first of the four reasons given for refusing planning permission was this:

> The District Planning Authority, in consultation with the County Highway Authority, considers that the proposed traffic signal junction would provide insufficient forward visibility over the Canal bridge and therefore stopping sight distance requirements are not met through the proposed junction. The proposal would therefore be detrimental to the interests of highway safety on this busy section of the A445.

Powergen duly appealed under section 78 of the Town and County Planning Act 1990 whereupon the Secretary of State appointed an Inspector to hold a local inquiry and to determine the appeal on his behalf.

In describing the development proposal in his decision letter of January 11, 1995 the Inspector noted that:

> Although the appeals relate to applications for outline planning permission the details of the proposed access to the site are not a reserved matter and I have accordingly taken account of them.

As to whether planning permission should be granted he said:

> I consider the outcome of the appeals … turns on whether the proposals for access to the site are satisfactory.

Amongst the witnesses called by the District Council at the three day public inquiry was Mr Winch, one of the appellant's senior highway contract engineers. He gave detailed evidence about the road safety issue and fully explained the county council's reasons for concluding that the proposed access and highway works were unsatisfactory in road safety terms. Opposing expert evidence was given on behalf of Powergen. Having ***92** reviewed all this evidence and the rival submissions at some length in his decision letter the Inspector then reached the following main conclusions:

> The question is then whether the proposed signal-control junction offers in this case an adequate degree of traffic safety. (paragraph 27)
>
> In all the circumstances I am not persuaded that the proposed signal-control junction would present such a threat to road safety as to justify dismissing the appeals. (paragraph 28)
>
> In sum, I accept on the traffic issue that adequate provision would be made for vehicular and pedestrian movement in relation to the benefits to be derived from the reclamation of the site. (paragraph 29)

The Inspector accordingly allowed the appeals and granted outline planning permission subject to a number of conditions of which one only is presently relevant.

> 8. The development hereby permitted shall not come into use before the bridge across the Grand Union Canal shall have been widened sufficiently to enable access to the site to be provided with a traffic signal installation in accordance with [a particular drawing] the adjustment of carriageway levels on the bridge approaches and the provision of pedestrian guard railings.

To satisfy condition eight Powergen obviously need the appellants to carry out the specified highway works which, for practical purposes, requires also that they now enter into a section 278 agreement. By letter dated February 3, 1995 such an agreement was sought. It was refused. On June 15, 1995 the relevant committee of the county council resolved that it "still" considered the proposed access arrangements to be unsafe. (The county council has accepted throughout that its refusal

is based on the self-same objections as underlay the District Council's original refusal of planning permission and which Powergen then succeeded in overcoming on the planning appeal.) Powergen then sought to resolve the matter by negotiation and in the event put forward two further schemes. On August 24, 1995, however, these in turn were rejected.

Hence this judicial review application, a challenge to the highways authority's refusal to enter into a section 278 agreement with Powergen such as will enable them to implement the planning permission granted on appeal. That challenge succeeded before Forbes J. on January 9, 1997. The highway authority now appeal to this court.

The essence of Forbes J.'s judgment is, I think, to be found in this passage:

> It is common ground that the new section 278 was intended to fit into and play its part in the overall legislative system for the controlled development of land through the planning process and I accept that section 278 must be interpreted accordingly. In my opinion, where the benefit to the public of the proposed highway works, in respect of which an agreement with the Highway Authority is sought under section 278 of the 1980 Act, has been fully considered and determined in the planning process, because the highway works in question form a detailed and related aspect of the application for development of land in respect of which planning consent has been properly obtained through that planning process, then the Highway Authority's discretion whether to enter into the section 278 agreement will necessarily be somewhat limited. In such a case, the matters remaining to be considered by the ***93** Highway Authority in the proper exercise of its discretion under section 278, are likely to be relatively minor in nature. I agree with Mr Hicks that the proper exercise of that discretion by the Highway Authority will not embrace a further and separate reconsideration of the benefit to the public of the highway works in question by reference to the same reasons as those which had already been considered and determined in the planning process. If such a reconsideration by the Highway Authority were to be a proper exercise of its discretion under section 278, then that would largely frustrate the scheme of the legislation of which section 278 is conceded to be part. This would be particularly so where, as in the present case, there has been no challenge to the validity of the relevant planning decision pursuant to section 288 of the Town and Country Planning Act 1990 , notwithstanding the Highway Authority's right to bring such a challenge under that section.

This last sentence refers to the fact that even though the highway authority here were not separately represented as an objector on Powergen's appeal, they were clearly a “person aggrieved” and thus entitled, were the decision unreasonable or otherwise erroneous in point of law, to challenge it by way of statutory application under section 288 . Without such a challenge, section 284 provides that the decision on the section 78 appeal “shall not be questioned in any legal proceedings whatsoever”.

It is the appellant's case, however, that they neither need nor seek to question this grant of planning permission. It is, they contend, one thing to grant such a permission, quite another to suggest that it operates as an implied direction to the county council then to enter into a section 278 agreement to enable it to be implemented. The planning permission, submits Mr Supperstone, implies only that no valid planning grounds exist for refusing permission. The question thereafter arising for the highway authority is, he maintains, a different one. They must still ask: is this development to be regarded as a benefit to the public? That involves the county council exercising what throughout his argument Mr Supperstone repeatedly called “an independent discretion” whether or not to enter into the proposed section 278 agreement.

The strength of Mr Supperstone's argument appears to lie in this: that on its face section 278 requires the highway authority itself to be satisfied that the proposed roadworks would be of benefit to the public, there being no provision under the legislation for the Secretary of State or anyone else to direct that it be thus satisfied or otherwise to require it to exercise

its discretion to enter into an agreement with the developer. Its weakness, however, is that it would leave the highway authority able to override the planning process withstanding (a) that road safety considerations are clearly material to the determination of planning applications—see for example paragraphs 2.11 and 6.1 of PPG 13, and, indeed, article 18 of the General Development Order ; and (b) that whereas there is ample scope on a section 78 appeal for the Secretary of State to hear and determine a factual dispute between the developer and the highway authority on road safety issues, no such possibility arises if the highway authority refuses to enter into a section 278 agreement.

It was essentially because Forbes J. found it unacceptable that the housing authority should be able to defeat the planning process in this way that, in the passage already cited from his judgment, he held that where, as here, a conditional planning permission is granted on appeal, "the highway ***94*** authority's discretion whether to enter into the section 278 agreement will necessarily be somewhat limited". He then turned at the end of his judgment to consider Powergen's challenge in *Wednesbury* terms:

> In this case there had been a dispute as to the balance of the public interest with regard to the proposed development. The adequacy of the access arrangements and the related highway works was one factor in that balance. In the course of the planning process, the County Council as Highway Authority argued that, because of the lack of forward visibility, the balance of public interest was against the proposed development for road safety reasons. The dispute was fully argued at the planning appeal and determined by the Secretary of State by his duly appointed Inspector. The Inspector's conclusions were clear and were not challenged pursuant to Section 288 of the 1990 Act, within the prescribed time limits or at all. Having regard to the terms of Section 284 of the 1990 Act, I accept Mr Hicks' submission that the Inspector's conclusions should be treated as both reasonable and final. The present proceedings are not the place to reconsider the merits of the foregoing dispute. Since the development proposals as a whole were found to be in the public interest, so too were the detailed highway works which formed a necessary and related part of those proposals. In those circumstances, I accept Mr Hicks' submission that no reasonable Highway Authority would, on the sole basis of the arguments as to road safety which had been fully considered and determined in the planning process, refuse to enter into any necessary Section 278 Agreement on the grounds that to do so was not a benefit to the public, thereby preventing the development from proceeding. I have therefore come to the conclusion that the decision of the County Council in this case to refuse to enter into the Section 278 agreement in question is both perverse and unreasonable in the Wednesbury sense. As Mr Hicks succinctly put it, it cannot be reasonable for the Highway Authority to allow a decision of the Secretary of State to be implemented only if it agrees with that decision.

There was some debate before us whether that conclusion of *Wednesbury* irrationality was free-standing of the judge's earlier view based on the scheme of the planning legislation as a whole. To my mind it was not: in truth there is here but one issue: who, as between the Secretary of State (or Inspector) on appeal and the highway authority, is to have the last word in deciding a road safety issue of this nature?

I have reached the clear conclusion that the judge below came to the right answer: that following a successful appeal by the developer the relevant highway authority has no option but to co-operate in implementing the planning permission by entering into a section 278 agreement. Although both the judgment below and the arguments before us focused principally upon the scheme of the legislation and whether the highway authority's approach to its section 278 discretion thwarted the policy and objects of the two Acts here in question see, for example, *Padfield v. Minister of Agriculture, Fisheries and Food* [1] —I for my part prefer the broader *Wednesbury* analysis of the case. Indeed, so far from this appeal raising, as Mr Supperstone submitted, "a short point of statutory construction", I see it ***95*** rather as raising this simple question: is it reasonable for a highway authority, whose road safety objections have been fully heard and rejected on appeal, then, quite inconsistently

with the Inspector's independent factual judgment on the issue, nevertheless to maintain its own original view? To my mind there can be but one answer to that question: a categoric “no”. That answer, I should make plain, I arrive at less by reference to any general question regarding the proper legal relationship between planning authorities and highway authorities upon road safety issues than in the light of these basic considerations:

1. The site access and associated highway works here, together with the road safety problems which they raised, were (a) central (indeed critical) to this particular planning application, and (b) considered in full detail rather than left to be dealt with as reserved matters.

2. This planning permission was granted following appeal to the Secretary of State and not merely by the local planning authority itself. In the perhaps unlikely event that a local planning authority, having consulted with the highway authority under the provisions of article 18 of the GDO , nevertheless in the face of road safety objections grants a conditional planning permission of the kind granted by the Inspector here, it seems to me less than self-evident that the highway authority would thereby become obliged to co-operate in its implementation by entering into a section 278 agreement. True, Article 12 of the 1977 GDO, by which a local highway authority could give directions restricting the grant of planning permission by a local planning authority in this kind of cases, was repealed by the 1988 GDO , but it does not follow that the local planning authority thereafter in turn became able to dictate the highway authority's course.

3. There were no new facts or changed circumstances whatsoever following the Inspector's determination of this appeal. The highway authority's continued refusal was based upon the identical considerations that their witness had relied upon in seeking to sustain the planning objection before the Inspector. Quite what change of circumstances would entitle a highway authority in this sort of case to withhold its co-operation after an appeal it is, of course, impossible to lay down in advance. Some help, however, may be found in Sir Thomas Bingham M.R.'s approach in *Onibiyo v. Secretary of State for the Home Department* [2] to the very different question of what constitutes a fresh asylum claim:

> The acid test must always be whether, comparing the new claim with that earlier rejected, and excluding material on which the claimant could reasonably have been expected to rely in the earlier claim, the new claim is sufficiently different from the earlier claim to admit of a realistic prospect that a favourable view could be taken of the new claim despite the unfavourable conclusion reached on the earlier claim.

Adapting that to the present planning context, the highway authority would have to raise a fresh objection sufficiently different from their earlier one to admit of a realistic prospect that, had they advanced it before the Secretary of State on the planning appeal, it might, unlike the earlier one, have prevailed. Whether or not that was indeed the situation would in the first instance be a question for the highway authority itself (just as initially it is for the Secretary of State to decide whether a fresh asylum claim has been **96* made); such decisions are, of course, in appropriate cases susceptible to challenge by way of judicial review. Whilst, of course, no such difficulty arises in the present case, it perhaps highlights this, that if Mr Supperstone is right in his main argument, then it would be perfectly open to a highway authority to ignore the planning appeal process entirely, to withhold its witnesses and co-operation when the road safety implications of the development scheme are being debated before the Inspector, and then simply to exercise what effectively amounts to a veto by ultimately declining to enter into a section 278 agreement. This cannot be right. Rather the highway authority should play its full part in the planning process and, in the event that a conditional planning permission is granted, co-operate just like the local planning authority itself in the fulfilment of any relevant conditions.

For these reasons I would reject Mr Supperstones central argument that, even following the grant of planning permission on appeal, the highway authority retain "an independent discretion" to refuse to enter into the requisite section 278 agreement —by which I think he must mean that they remain reasonably entitled to adhere to and act upon their original view that the public would not benefit from this development because of the highway dangers it would create. I believe on the contrary that the Inspector's conclusion on that issue, because of its independence and because of the process by which it is arrived at, necessarily becomes the only properly tenable view on the issue of road safety and thus is determinative of the public benefit. This is not, I should perhaps note, to overlook paragraph 35 of the decision letter, a standard rubric stating that:

> This letter does not convey any approval or consent which may be required under any enactment, bye-law, order or regulation other than s.57 of the Town and Country Planning Act 1990 .

Section 57 , of course, is the basic provision requiring that development has planning permission. Accepting, as I do, that the highway authority's "approval or consent" is still required before condition eight can be satisfied, my judgment comes simply to this: such approval or consent cannot in the present circumstances properly be withheld. Paragraph 35 is in substance directed to quite other consents, under various Licensing Acts, Building Regulations and the like.

I would accordingly dismiss this appeal.

Otton L.J.

I agree.

Mummery L.J.

I also agree.

Representation

Solicitors—County Solicitor, Warwickshire County Council; Wragge & Co. , Birmingham.

Order

Reporter —David Stott.

Appeal dismissed with costs. Leave to appeal to the House of Lords refused. ***97**

Footnotes

1 *[1968] A.C. 997*
2 *[1996] Imm.A.R. 370* .