APPENDIX B - MANOR FARM - REPLACEMENT LAND AND PROTECTIVE PROVISIONS

INTRODUCTION

1. This Note relates to the proposed compulsory acquisition of land at Manor Farm by National Highways ("NH") for the northernmost parts of the scheme for Lower Thames Crossing ("LTC") under an application for a development consent order ("DCO") requested to be granted by the Secretary of State under the Planning Act 2008.

2. The structure of the Planning Act 2008 ensures that the tests under section 122 of the Act sit above all other tests in the Act by means of the extensive use of the phrase "subject to".

3. This Note addresses in **Appendix A** hereto these broad points:

   a) The current triggering of section 131(3) that automatically has engaged the special parliamentary procedure that precludes the authorisation of the Secretary of State under section 122(1) pending the outcome of that procedure. Contrary to the arm waving of NH, lawfully construe, replacement land cannot be compelled to be "given" in order to satisfy section 131(4) and 122(2)(c). That construction is supported by the common law and the Parliament's NPS NN, paragraph 5.181, last sentence;

   b) The need for Protective Provisions under sections 120(3) and (4) and paragraph 10 of Part 1 of Schedule 5 to ensure matters including:

      i) an irrigation system is provided for Manor Farm to off-set the adverse impacts on the ground water environment that will result to increase and decrease soil wetness in different parts of the Farm consequent on the situation of tunnel and concrete structures *within* that Farm land;

      ii) an access system is provided to all of its component fields (and shop) during the construction phase to ensure the Farm can remain functioning during construction when numerous roads within the extent of the Farm are envisaged to be developed in some way by NH.

4. The Mees' will provide a draft of the Protective Provisions before the close of the Examination Hearing for consideration by the Secretary of State.

CHRISTIAAN ZWART

39, Essex Chambers,
81, Chancery Lane,
London WC2A 1DD.

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APPENDIX A

ANALYSIS

5. The following is apparent.

A. The Statutory Scheme of the Planning Act 2008 for Compulsory Acquisition and Provisions

6. The 2008 Act includes under section 120 for "provisions" that may be included in a DCO. Under section 120(3) and (4), and Part 1 of Schedule 5, these include under paragraph 10: "The protection of the property or interests of any person".

7. Sections 120(1)-(5) are made, by subsection (7), expressly "subject to" section 122. Therefore, the development consent aspects of a DCO are expressly required by Parliament to be subject to the compulsory acquisition aspects of a DCO, and not vice versa.

8. Section 122 provides under (1) that: " An order granting development consent may include provision authorising the compulsory acquisition of land *only if* the Secretary of State is satisfied that the conditions in subsections (2) and (3) are met."

9. Subsections (2) and (3) provide:

2) The condition is that the land—

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

b) is required to facilitate or is incidental to that development, or

c) is replacement land which is to be given in exchange for the order land under section 131 or 132.

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

10. The common law requires a particular approach to the construction of statutory provisions. See the Supreme Court's decision in *Sainsbury's*, paragraph 11. That approach *requires* the decision maker to adopt the construction that results in the least interference with private rights. Thus, in *Sainsbury's*: (Emphasis added)

9. Compulsory acquisition by public authorities for public purposes has always been in this country entirely a creature of statute: Rugby Joint Water Board v Shaw-Fox [1973] AC 202, 214. The courts have been astute to impose a strict construction on statutes expropriating private property, and to ensure that rights of compulsory acquisition granted for a specified purpose may not be used for a different or collateral purpose: see Taggart, "Expropriation, Public Purpose and the Constitution", in The Golden Metwand and the Crooked Cord: Essays on Public Law in Honour of Sir William Wade, (1998) ed Forsyth & Hare, p 91…

10. In Prest v Secretary of State for Wales (1982) 81 LGR 193, 198 Lord Denning MR said:

"I regard it as a principle of our constitutional law that no citizen is to be deprived of his land by any public authority against his will, unless it is demands . . ."

And Watkins LJ said, at pp 211—212:

"The taking of a person's land against his will is a serious invasion of his proprietary rights. The use of statutory authority for the destruction of those rights requires to be most carefully scrutinised. The courts must 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."

11. Recently, in the High Court of Australia, French CJ said in R & R Fazzolari Pty Ltd v Parramatta City Council [2009] HCA 12, paras 40, 42, 43:

"40. Private property rights, although subject to compulsory acquisition by statute, have long been hedged about by the common law with protections. These protections are not absolute but take the form of interpretative approaches where statutes are said to affect such rights."

"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, <u>against</u> 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, <u>that construction</u> <u>will</u> be chosen <u>which interferes least</u> with private property rights."

11. Applying paragraph 11 of *Sainsbury's* to section 122, in particular, section 122(2)(a) and (b), the common law precludes the scope of "required" being modified to mean "potentially" or "contingently" "required".

12. The common law also requires that land acquisition powers only be used as a remedy of <u>last</u> resort, clear cut in favour of compulsory acquisition, and that any doubt (including evidentially) *must* be resolved in favour of the person whose land is being taken. See *Prest*: (Emphasis added)

In any case, there. fore, [sic] where the scales are evenly balanced — for or against compulsory acquisition w the decision — by whomsoever it is made — should come down against compulsory acquisition. I regard it as a principle of our constitutional law that no citizen is to be deprived of his land by any public authority against his will, <u>unless it is expressly authorised</u> by Parliament and the public interest <u>decisively</u> so demands…

If there is any <u>reasonable</u> doubt on the matter, the balance must be resolved in favour of the citizen.

13. Thus, there are three elements:

a) The authorisation must be express;

b) The public interest must "decisively" demand deprivation; and

c) Any reasonable doubt is required by law to be resolved in favour of the citizen (and against the land taker).

14. "Reasonable" doubt does not mean "*Wednesbury* reasonable" (in the sense of a decision maker choosing to make a decision). Rather, "reasonable" as used in *Prest* means *evidential* doubt. Hence, in *Prest*, the Court then applied that "principle" ("*no citizen is to be deprived of his land by any public authority against his will, <u>unless…")</u>* by illustration: (Emphasis added)

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."*

15. That is, the law treats the decision maker as *irrational* if there is *in fact* – evidenced fact - an alternative. The law does not require a precise geophysical actual match between the alternative and the proposal but only that the alternative be suitable for the "same purpose". Thereby, compulsory acquisition is ensured to be a "last resort" and not a public law "preference" for "first resort" disguised as "last resort".

16. The common law also requires a particular approach to the content of "proportionality". In *Bank Mellat v HM Treasury (No 2)* [2014] AC 700, the Supreme Court set out the elements of the "structured proportionality" test at paragraphs 65-78, in particular paragraph 74(1)-(4) where the Supreme Court set out that test and its components: (Emphasis added)

> *74. The judgment of Dickson CJ in Oakes provides the clearest and most influential judicial analysis of proportionality within the common law tradition of legal reasoning. Its attraction as a heuristic tool is that, by breaking down an assessment of proportionality into distinct elements, it can clarify different aspects of such an assessment, and make value judgments more explicit. The approach adopted in Oakes can be summarised by saying that it is necessary to determine (1) whether the objective of the measure is sufficiently important to justify the limitation of a protected right, (2) whether the measure is rationally connected to the objective, (3) whether a less intrusive measure could have been used without unacceptably compromising the achievement of the objective, and (4) whether, balancing the severity of the measure's effects on the rights of the persons to whom it applies against the importance of the objective, to the extent that the measure will contribute to its achievement, the former outweighs the latter…. In essence, the question at step four is whether the impact of the rights infringement is disproportionate to the likely benefit of the impugned measure.*

17. The guidance in the NPSNN reflects the statutory position that section 120 is "subject to" section 122 (and not the other way around). Thus, there is no reference to CPO in the NPSNN nor can the *presumption* under the NPS NN in favour of national networks be imported *into* section 122 of the Planning Act 2008 (not least because section 120(7) statutorily precludes that presumption from being imported by making section 120(1)-(5) "subject to" section 122).

18. Nor is the guidance on "Alternatives" in the NPSNN *relevant* to section 122. Instead, the separate guidance: "Planning Act 2008: guidance related to procedures for the compulsory acquisition of land (September 2013)" ("the Guidance") applies to assess the use of compulsory purchase powers under section 122 of the 2008 Act. At most, paragraph 15 recognises that "factors" may be considered under section 122. But a presumption is an approach and cannot be a factor.

19. Guidance paragraph 14 provides:

> *14. In determining where the balance of public interest lies, the Secretary of State will weigh up the public benefits that a scheme will bring against any private loss to those affected by compulsory acquisition.*

20. Guidance paragraph 16 recognises that: (Emphasis added)

> *16. There may be circumstances where the Secretary of State could reasonably justify granting development consent for a project, but decide against including in an order the provisions authorising the compulsory acquisition of the land. For example, … , the Secretary of State may consider that the scheme itself should be modified in a way that affects the requirement for land which would otherwise be subject to compulsory acquisition…*

21. The modification of a scheme is not without precedent in the DCO sphere nor though means of Protective Provisions. Indeed, the use of Protective Provisions to ensure the situations of utilities providers is relatively common practice. The same kind of Provisions have also been used to protect in the public interest businesses affected by DCO development. Thus, in the recent "Riverside Energy Park Order 2020", the Secretary of State granted a DCO that included Protective Provision for the adjacent business "RRRL" by Article 39 and Part 1 of Schedule 10: "For the Protection of RRRL". Article 2(1) of the DCO defined RRRL as a limited company:

> *"RRRL" means Riverside Resource Recovery Limited (company number 03723386) whose registered office is at 2 Coldbath Square, London, EC1R 5HL together with its successors in title of that part of the Order land identified in the book of reference;*

22. Part 1 of Schedule 10 set out various protections including, under paragraph 2 by reference to "access", with paragraph 3 ensuring access by RRRL for its existing business, whilst paragraph 4 provided to ensure the RRRL as *first* protected *before* the developer could install pipes of the authorised development:

> ***2.** In this part of this Schedule*
> *"access road" means that part of the access road known as Norman Road between points C and D on the access and public rights of way plan; …*
> *"internal street" means any roads that service the RRRL facility and which are located within the RRRL facility perimeter;*
> *"plan" or "plans" include all designs, drawings, specifications, method statements, soil reports, programmes, calculations, risk assessments and other documents that are reasonably necessary properly and sufficiently to describe and assess the works to be executed;*
> *"RRRL facility" means the energy from waste facility and associated infrastructure at Norman Road, Belvedere, Bexley, Kent;*
> *"RRRL facility perimeter" means that part of the Order land identified as plots 02/01, 02/03, 02/10, 02/13, 02/14, 02/15, 02/18, 02/19, 02/25, 02/29, 02/31 and 02/32 on the land plans;*
> *"RRRL land" means that part of the Order land in the freehold ownership of RRRL which, as at the date upon which this Order comes into force pursuant to Article 1, are those plots identified as being in the freehold ownership of RRRL in the book of reference but always excluding plots 02/43, 02/44, 02/47, 02/48, 02/49, and 02/51; …*
>
> ***3.** Upon the permanent stopping up of the access road pursuant to article 14 (permanent stopping up of streets), the undertaker must afford to RRRL the rights for RRRL and all persons authorised on its behalf*

to enter and pass and re-pass, on foot and/or with or without vehicles, plant and machinery, for all purposes in connection with its occupation and use of the RRRL facility.

***4.** The undertaker must not install pipes for the offtake of waste heat from the authorised development without first giving RRRL the option to combine its pipes with any pipes for the offtake of waste heat from the authorised development. The undertaker must have regard to any consultation responses received from RRRL when finalising the location of pipes for the offtake of waste heat from the authorised development…*

***6.** Regardless of any provision in this Order or anything shown on the land plans, the undertaker must not acquire any apparatus within the RRRL land otherwise than by agreement.*

23. Part 2 then provided for Protective Provisions for Statutory Undertakers.

B. Condition 122(2)(c) and Section 131(4) and (11): "Replacement Land"

24. The function of section 131 is to ensure that special parliamentary procedure automatically applies to a DCO if any land within the types referred to in section 131(1) are inside the order land.

25. If there is no section 122(2)(c) justification, then the Secretary of State is barred under section 122(1) from authorizing a provision containing a compulsory acquisition of section 131(1) land until the special parliamentary procedure in respect of the section 131(1) land inside the order land is followed. This is because section 122(1) requires the Secretary of State to be satisfied that condition (2)(c) is met *before* he is *empowered* to authorise a compulsory purchase provision.

26. The bar can be lifted by means of the fact of "replacement land". The means by which "replacement land" is included in a DCO is not through (an *after the event* compulsory acquisition of the logically prior necessary fact for section 122(2)(c)) provision under section 122(1) but through a *before the event* actual transaction or giving under section 131(4)(a) followed by a "provision" under section 131(11) underpinned by the fact of section 131(4)(a) being actually satisfied before the event of section 122(1) authorisation.

27. Parliament's NPS NN, paragraph 5.181, reflects that position and also the correct legal analysis set out below. Thus: (Emphasis added)

> *Where Sections 131 and 132 of the Planning Act 2008 apply, any replacement land provided under those sections will need to conform to the requirements of those sections.*

28. In essence, on its lawful construction, the sole means by which "replacement land" can be provided in relation to a DCO is by means of a "provision" *under section 131*(11) that operates to both "vest" that replacement land in the notional *prospective seller* (here, National Highways), and discharge "the order land" (here, land that is part of the Thames Chase Forest) from all rights, trusts and incidents to which it is subject". As section 131(11)(a) makes abundantly clear, replacement land must have been "*given* in exchange as mentioned in subsection (4)(a)". As section 131(4) makes clear, section 131(4) can only apply "if" a) the replacement land has been or will be **given** in exchange for the order land, and b) … will be vested in the prospective seller and **subject** to the same rights, trusts and incidents as attach to the order land". The machinery of sections 131(4)(b) and (11)(b) operates to expunge the order land parcel of pre-existing rights, trusts and incidents and to ensure such rights, trust and incidents are included in the replacement land. The power to make provision for vesting of that replacement land in the prospective seller derives from under section 131(11) (not 122(1)) and requires there to be an actual transaction or a giving underpinning that power (see sections 131(11)(a) and (4)(a)). If (as here), the prospective seller does not have land itself that it can give, then it must by private treaty secure such land by a transaction with a third party. Section 131(4)(a) does not admit of the use of compulsory acquisition to bypass the giving by that third party.

29. The Planning Act 2008 provides:

a) Under section 120(3), for the inclusion of "**provisions**" in a DCO;

b) Under section 120(4) that: "The provision that may be made under subsection (3) includes in particular provision for or relating to any of the matters listed in Part 1 of Schedule 5";

c) Under Part 1, of Schedule 5, the matters that may be included in a provision relate to: paragraph 1: The acquisition of land, compulsorily or by agreement; and paragraph 2: The creation, suspension or extinguishment of, or interference with, interests in or rights over land (including rights of navigation over water), compulsorily or by agreement; paragraph 3: The abrogation or modification of agreements relating to land;

d) Under section 120(7) that "subsections (3) to (6) are subject to … the following provisions of this Chapter";

e) A following provision in that Chapter is section 131(11) that provides: " If an order granting development consent authorises the compulsory acquisition of land to which this section applies, it may include **provision**— a) for vesting replacement land given in exchange as mentioned in subsection (4)(a) in the prospective seller and subject to the rights, trusts and incidents mentioned in subsection (4)(b), and b) for discharging the order land from all rights, trusts and incidents to which it is subject";

f) A following provision of that Chapter is section 122 that provides for the "Purpose for which compulsory acquisition may be authorised". Section 122(1) provides: An order granting development consent may include **provision** authorising the compulsory acquisition of land only if the Secretary of State is satisfied that the conditions in subsections (2) and (3) are met;

g) Under section 122(2) there are three conditions: " The condition is that the land— a) is required for the development to which the development consent relates, b) is required to facilitate or is incidental to that development, or c) is replacement land which is to be given in exchange for the order land under section 131 or 132."

h) Under section 131(1): "This section applies to any land forming part of a common, open space or fuel or field garden allotment." Under section 131(3): " An order granting development consent is subject to special parliamentary procedure, to the extent that the order authorises the compulsory acquisition of land to which this section applies, unless – a) the Secretary of State is satisfied that one of subsections (4) to (5) applies, and b) that fact, and the subsection concerned, are recorded in the order or otherwise in the instrument or other document containing the order."

i) Under section 122(3): "The condition is that there is a compelling case in the public interest for the land to be acquired compulsorily."

30. Section 122(1) provides for a "provision" authorizing the compulsory acquisition of land where the *justification* is supplied by sections 122(2) and (3) *for that* "provision".

31. Section 122(1) is linked to section 120(3) is the means by which compulsory acquisition of land is given effect and, by section 120(4), the matters for provisions include under Part 1, Schedule 5, paragraph 1, the compulsory acquisition of land. But, section 120(7) make (3) to (6) (and so (3) and (4)) "subject to" the following provisions of the Chapter. Those following provisions include sections 122(1) and also 131. In particular, they include section 122(1), (2)(c) and 131(3), (4) and (11) (that itself applies to a DCO that "authorises" the compulsory acquisition of land (covered by section 122(1))).

32. Section 122(2) provides three categories of *evidential* justification for the section 122(1) authorisation and section 122(3) provides for the compelling nature of the justification for the section 122(1) authorisation. These justifications are all questions of *fact and degree*. Thus, section 122(2)(a) and (b) falls to be satisfied is the test of "requirement" is evidenced. By contrast, section 122(2)(c) is not satisfied by a "requirement". Instead, section 122(2)(c) falls to be justified by reliance on the output from either section 131 or 132.

33. Here, section 131(1) applies because Thames Chase Forest is inside "the order land". Therefore, section 131(4) provides for the fact of a giving that inputs *to* section 122(2)(c) by dint of section 131(1) and (3), and section 131(11) ensures the giving is secured by a provision made under section 131(11) after a provision is made under section 122(1) has been justified by the *prior facts* supplying the justification under section 122(2).

34. It will be recalled that section 120(7) makes the 120(3) power to include "provisions" thereunder expressly "subject" to the power under section 122(1) to include a "provision", and that itself relies on section 122(2)(c) (and so, in turn, *assumes* the power under section 131(11) to make "provision", in the circumstances of section 131(1), to give effect under the Act to the giving referred to in section 131(4)(a).

35. As has been referred to above, the function of section 131 is to ensure that special parliamentary procedure automatically applies to a DCO if any land within the types referred to in section 131(1) are inside the order land. If there is no section 122(2)(c) justification, then the Secretary of State is barred under section 122(1) from authorizing a provision containing a compulsory acquisition of section 131(1) land until the special parliamentary procedure in respect of the section 131(1) land inside the order land is followed. This is because section 122(1) requires the Secretary of State to be satisfied that condition (2)(c) is met *before* he is *empowered* to authorise a compulsory purchase provision and it does not authorise the compulsory acquisition of land for "replacement land" to satisfy section 122(2)(c) in advance of the test under section 122(1) being met. To consider otherwise is logically unsustainable and puts the legal powers authorisation cart (cpo provision) *before* the factual justification (replacement land) horse.

36. In this case, the order land includes parts of Thames Chase Forest. That Forest land is described in Table 7.3 on page 69 of Document 4.1, Statement of Reasons, as "Designated Open Space" and for Works planned comprised of Works 9A, 9C, 9D, 9E, 9O, and 9R. Such "open space" qualifies within section 131(1) "open space". Therefore, the current position is that section 131(3) is engaged on the facts and special parliamentary procedure automatically applies by operation of section 131(3) to this DCO application, in particular to the exercise of power to authorise compulsory acquisition under section 122(1). By that means, Parliament ensures that section 131(1) land proposed to be taken is subject to scrutiny by Parliament before section 122(1) "provision" for compulsory acquisition of land is authorised in the DCO.

37. Section 131(3) operates to permit the lifting of the engagement of that special parliamentary procedure if a requirement ("unless") is satisfied: The requirement is that the terms of section 131(3)(a) and (b) are satisfied so that it can then be said that section 122(2)(c) is satisfied – before the Secretary of State can ask whether or not he is then "satisfied" under section 122(1) that the conditions under section 122(2)(c) (that provides for replacement land as a question of fact) "are met".

38. In particular, section 131(3)(a) requires the Secretary of State (as the exclusive person charged with the function of deciding an order) to be "satisfied" that one of subsections (4) to (5) applies, and b) "that fact " is recorded in the order or other document containing the order. The requirement for "fact" is consistent with the objective nature of the justification required to both lift section 131(3) and, in turn, supply the "satisfaction" (via section 122(2)(c)) required under section 122(1) of the Secretary of State (again).

39. As has been referred to above, section 122(2)(c) refers to "replacement land" under section 131 or 132. That phrase cannot mean that all subsections of sections 131 and 132 are "replacement land". In particular, this is because sections 131(12) and 132(12) each independently define "replacement land" on different terms to the other section. Therefore, "replacement land" in section 122(2)(c) means the particular "replacement land" engendered by section 131 or section 132. In that way, section 122(2)(c) operates to supply the *justification* for a "provision authorising the compulsory acquisition of land". Thus, section 122(1) ensures that the authorisation cart cannot be put before the section 122(2) (and (3)) justification horse.

40. It is clear from the terms of sections 122(1), (2), and 131(12) that the Act differentiates between "the order land" (that would be covered by the provision in section 122(1)) and "replacement land" (that would be covered by a provision in section 131(11)). The section 122(2) justification required by section 122(1) to be "met" expressly recognizes the *difference* geographically between land that is inside and land that is outside of "the order land" encompassed by the section 122(1) provision. Thus: 1) section 12(1) provision will relate to the order land; 2) section 122(2)(c) refers to "replacement land" and "replacement land" is defined in both section 131(12) and 132(12) and so too is "the order land". The meaning of "replacement

land" refers to both land and to the defined term "the order land" as a comparator. Consequently, "replacement land" cannot be geographically inside "the order land" under the definition of "replacement land" because the comparator definition of "replacement land" would be then circular (as the order land would then *include* the replacement land), impossible to compare, and because the order land means the land authorised to be compulsorily acquired (whereas the terms of sections 131(4)(a) and (11)(a) require land to be "given", not 'taken'); and 3) section 122(1) refers to a "provision" authorizing compulsorily acquisition of land, but relies on section 122(2)(c) to supply justification by "replacement land" through section 131 (that is itself exclusively concerned with "living" and not 'taking' of land).

41. Returning to the *justification* required to be met by section 122(1) under (2)(c) for the "provision" to authorise a taking of land inside the order land, section 122(2)(c) "replacement land" under section 131 requires satisfaction of section 131(4) (to lift the section 131(3) special parliamentary procedure).

42. Section 131(4) contains a number of terms including defined terms that must be considered: a) nowhere in section 131(4) (or 131(12)) is there any reference to a compulsory acquisition of "replacement land". Such acquisition is not expressly authorised by Parliament; b) "the order land" referred to in (4) is a defined term and under (12) the order land is defined to mean "the land authorised to be compulsorily acquired"; c) (4) uses the phrase "land has been or will be given in exchange for [the land authorised to be compulsorily acquired (ie the order land)]". The presence in the *same phrase* of "given" *and* "compulsorily acquired" precludes the potential for "has been or will be *given* in exchange" to be interpreted as "compulsorily acquired" (a 'taking'). It remains abundantly clear that section 131(4)(a) can in law only be satisfied by a giving and in law cannot be satisfied by a 'taking'. There is no rational basis nor construction to support satisfaction of section 131(4)(a) by means of a 'taking'. Applying Sainsbury's, the Supreme Court requires under paragraph 11 of that case that "the construction will be chosen which interferes least with private property rights".

43. The evidence here records in Document 4.2, the Book of Reference: a) on page (no less) than 8992, identifies in relation to land within the order land as pink land, "Plot 43-04", "all interests and rights in approximately 109,836 square metres of agricultural arable land, overhead power lines and shrubland" be compulsorily acquired (i.e. taken) (purportedly) as "replacement land" referred to in Column 3 on that page; b) on page 8, Table 3.1, row 1, identifies the "Pink" land as "All interests in…" and the principle land use power sought" to be "Compulsory acquisition of all interests and rights in land (including as required, subsoil, surface land or airspace)" and the "Principal relevant DCO Article" to be "Article 25". The evidence of inclusion of the land as a "Plot", and as a "Plot" of land inside the order land, evidences that that land cannot in law or fact satisfy section 131(4)(a). The evidence of Table 3.1, row 1, that shows the

44. *How* does section 131(4) operate then? The simple answer to this is as follows. Only a evidence of a giving by NH of land already in the hands of NH that has not been compulsorily acquired or a voluntary transaction between the third party provider of the land sought to be used as replacement land can satisfy section 131(4)(a) (and 131(11)(a) to result in a section 131(11) "provision") that itself supplies the justification for section 122(2)(c) that, in turn, can be evaluated by the Secretary of State as evidencing section 122(2)(c) as being "met" *before* he then authorises the compulsory acquisition of the order land (covered by the provision in section 122(1)). This is because the voluntary agreement precludes compulsory acquisition of the replacement land and simultaneously objectively lifts the section 131(3) bar to the Secretary of State *himself* authorizing the compulsory acquisition of section 131(1) land instead of Parliament doing so. Once that authorisation has been granted by him, as the terms of section 131(11) show, then the Secretary of State can include a provision under section 131(11) to give effect to the agreed exchange. Understandably, section 131(11)(a) requires the provision for vesting be based on the section 131(4)(a) voluntary transaction. Thereafter, the section 131(11) "provision" operates to enable the prospective seller (the developer) to exchange the land (it having vested in the developer under the provision) for the order land taken and simultaneously the provision ensures the taken order land is free from rights, trusts and incidents so that it can be developed.

45. In more detail, it will be recalled that section 122(2)(c) provides for *justification* to prevent engagement of section 131(3) (if, as here, section 131(1) land is sought to be take) and is not itself a "requirement" like 122(2)(a) or (b).

46. Once it is recognized that section 131(3) bars the Secretary of State from authorizing a compulsory acquisition under section 122(1) <u>if</u> it includes section 131(1) land in the order land and where there is <u>no qualifying</u> replacement land, the machinery of section 131 and its inter-relationship with section 122(1) becomes clear.

47. Section 131(4) supplies the *justification* in fact for a provision made under section 122(1) – not for the compulsory acquisition of the replacement land as necessarily land outside of the order land but - itself authorises only the *compulsory* acquisition of land <u>within the order land</u> that includes section 131(1) land, it is easy to see why the NPS NN, paragraph 5.181 explains: "<u>Where</u> Sections 131 and 132 of the Planning Act 2008 <u>apply</u>, any replacement land provided under those sections <u>will need to conform</u> to the requirements of <u>those</u> sections" and <u>not</u> to the requirements of section 122.

48. Section 131(12) makes clear that "replacement land" cannot be within "the order land" under section 122(1) (without inherent circularity). Section 131(11) operates to ensure a tie with section 122(1) authorisation and by means of a different "provision" under section 131(11) (to that under section 122(1)). Section 131(11) the ensures that the voluntary ("given") exchange of land envisaged *in return for*

the taking of section 131(1) land within the order land (by means of a section 122(1) "provision", and assuming justified under section 122(2)(a) or (b) as "required" for the development proposal) is by means of a "provision" that both vests that section 131(4)(a) replacement land "in the prospective seller" and also ensures discharging of the order land (i.e. section 131(1) land in the order land) from "all rights, trusts and incidents to which it is subject". That is, the evidence of the fact of "replacement land has been or will be given in exchange for the order land" described in (4) supplies the justification for the "provision" in section 131(11)(a) that gives effect to the "exchange" or "replacement" of land for the order land that is itself taken.

C. Article 8 and Article 1 of the First Protocol

49. Because the compulsory acquisition of the land as "replacement land" is not *expressly* authorised in section 131 (but is instead expressly authorised to be part of a provision under subsection (11) if it has been *given* under section 131(4)(a)), and there remains no evidence of a transaction between NH and the Mees for the "replacement land", the purported and unlawful taking of the land of Mr Mee would be a breach of his Article 8 and Article 1, First Protocol Rights in his property. See *Bank Mellat*.

D. The Reduction in the Agricultural Grade of the Land that will result from the development

and the Necessary Ongoing Irrigation of the Land

50. The land of Manor Farm is identified on **Document APP-321, page 4 of 5**, at the confluence of the railway and M25. The fields of Manor Farm comprise an engineered landscape, being etched with land drainage systems installed in Victorian times and that irrigate and drain the farmland land today.

51. The Natural England Agricultural Classification, at 1:250,000 scale, identifies the farm as blue coloured, Grade 1, Excellent.

52. In October 2022, **Document App-301, Figure 10.3, page 5**, identifies the land as Grade 1 also. That Figure also shows the envisaged route of the new motorway as it loops around and under the M25 before joining it further north when emerging from a tunnel west of the M25, under Manor Farm land.

53. The blue coloured land immediately East of the M25 is arable farmland forming part ("the Blue Field") of Manor Farm.

54. In October 2022, **Document App-302, Figure 10.3, page 5**, identifies the Blue Field as now sub-divided into: Blue; Green and Yellow, being Grade 2, Grade 3a, and Grade 4 land respectively.

55. In October 2022, **Document App-425, Appendix 10.4, Agricultural Land Classification Factual Report, Figure 1, page 14**, identifies the Blue Field together with survey points used to identify its sub-categories of Grade 3a and Grade 4 land.

56. In July 2023, Mr Mees obtained a "Manor Farm Options Report for Lower Thames Crossing (July 2023)" from Sustainable Water Solutions because he was concerned at the severance effect on hydrology of his land, in particular, the Blue Field and in respect of Manorial Fishery. This identified concerns about the interception of the LTC highway cutting construction between the reservoir to the west and the supply catchment to the East, which together currently supply the Manor Farm irrigation system and irrigate the Blue Field. See Figure 1, and Figure 2 (and also Figure 1 of the November 2023 Report). It also expressed "low confidence in the run off figures calculated in the [LTC Water Balance Report]" because the model will only be as good as the averaged flow data that has been out into it", and the Environment Agency basis data underpinning the abstraction licences was considered better quality and reliable also when it issued in 2007 its licences.

57. In November 2023, Sustainable Water Solutions updated its Report and "Manor Farm Options Summary (November 2023)". Sustainable Water Solutions described the "Impact" of the proposals and also evaluated the "LTC Proposal". See Figures 1 and 2. LTC are described as acknowledging that the flow data inputs results from "complications with the monitoring equipment" and recognize that there must be "lo confidence" in the flow data. That is, the "flow data is potentially inaccurate" and the modelling work was based on that (inaccurate) data. Sustainable Water Solutions identified "The Problem with the proposed solution":

    a) the LTC highway footprint represents a "significant proportion of the catchment area supplying Mr Mee's abstraction";

    b) the re-routing of the drain by National Highways may result in insufficient hydraulic gradient to ensure a flow of water can be maintained;

    c) the steep hydraulic gradient introduced by the highway cutting will increase the risk of loss of water at the base of the cutting from the base of the drain and new highway drains (even if the new cutting is partly tanked);

    d) the new highway footprint will intercept rainfall and reduce recharge and storage capacity within the catchment and re-route water away from current flow paths reducing the potential yield at Mr Mee's abstraction point;

    e) there is no confidence in the data collected by National Highways to support its proposal.

58. Sustainable Water Solutions propose a solution described in Figure 2.3 and comprised of two elements:

    a) A re-instatement element;

    b) A make-up element to ensure like-for-like solution is delivered.

The Statutory Scheme

59. Section 103 of the Planning Act 2008 requires the DCO application to be determined by the Secretary of State himself. Section 120(3) provides that he can include "provisions" in a DCO, and particular provisions are described in Part 1 of Schedule 5. These include: paragraph 10: "The protection of the property or interests of any person"; paragraph 15: Carrying out civil engineering or other works"; paragraph 26: "The discharge of water into inland waters or underground strata".

60. Section 104(2)(d) requires the Secretary of State to have regard to any other matters which the Secretary of State thinks are both important and relevant to the Secretary of State's decision. National Highways agree that sustained irrigation of the Blue Field is important and relevant because it is seeking to resolve the matter in some way. It also agrees that the Manorial Fish Pond is "important" and it is relevant also.

61. Section 103(3) requires the Secretary of State must decide the application in accordance with any relevant national policy statement (subject to compliance with the remaining particulars of that section).

Guidance: NPSNN (December 2014)

62. The NPSNN (December 2014) is the NPS for national networks.

63. The NPSNN provides for: "Land use including open space, green infrastructure and Green Belt".

64. In respect of the potential for exchange land, paragraph 5.181: The Secretary of State should also consider whether mitigation of any adverse effects on green infrastructure or open space is adequately provided for by means of any planning obligations, for example, to provide exchange land and provide for appropriate management and maintenance agreements. Any exchange land should be at least as good in terms of size, usefulness, attractiveness, quality and accessibility. Alternatively, where Sections 131 and 132 of the Planning Act 2008 apply, <u>any replacement land</u> provided <u>under those sections</u> <u>will need to conform to the requirements of those sections</u>.

65. In respect of land quality, paragraph 5.168 provides: "Applicants should take into account the economic and other benefits of the best and most versatile agricultural land (defined as land in grades 1, 2 and 3a of the Agricultural Land Classification)…. Applicants should also identify any effects, and seek to minimise impacts, on soil quality, taking into account any mitigation measures proposed."

66. Paragraph 5.176 provides: "The decision-maker should take into account the economic and other benefits of the best and most versatile agricultural land. The decisionmaker should give little weight to the loss of agricultural land in grades 3b, 4 and 5, except in areas (such as uplands) where particular agricultural practices may themselves contribute to the quality and character of the environment or the local economy."

67. Paragraph 5.179 provides:" Applicants can minimise the direct effects of a project on the existing use of the proposed site, or proposed uses near the site by the application of good design principles, including the layout of the project and the protection of soils during construction."

68. "Water Quality and Resources" is also provided for. Paragraph 5.219 includes: "Infrastructure development can have adverse effects on the water environment, including groundwater, inland surface water, transitional waters111." … During the construction and operation, it can lead to increased demand for water, involve discharges to water and cause adverse ecological effects resulting from physical modifications to the water environment…. These effects could lead to adverse impacts on health or on protected species and habitats (see Section paragraphs 5.20 to 5.38 on biodiversity and geological conservation), and could, in particular, result in surface waters, groundwaters or protected areas112 failing to meet environmental objectives established under the Water Framework Directive."

69. Paragraph 5.220 includes: "The Government's planning policies make clear that the planning system should contribute to and enhance the natural and local environment by, amongst other things, preventing both new and existing development from contributing to, or being put at unacceptable risk from, or being adversely affected by, water pollution…".

70. Paragraph 5.221 includes: "Applicants should make early contact with the relevant regulators, including the Environment Agency, for abstraction licensing …Where a development is subject to EIA and the development is likely to have significant adverse effects on the water environment, the applicant should ascertain the existing status of, and carry out an assessment of the impacts of the proposed project on water quality, water resources and physical characteristics as part of the environmental statement."

71. Paragraph 5.225 provides: "The Secretary of State will generally need to give impacts on the water environment more weight where a project would have adverse effects on the achievement of the environmental objectives established under the Water Framework Directive."

72. Paragraph 5.22 includes: "The Examining Authority and the Secretary of State should consider proposals put forward by the applicant to mitigate adverse effects on the water environment and whether appropriate requirements should be attached to any development consent and/or planning obligations."

73. Paragraphs 5.228 to 5.229 include:

> *5.228 The impact on local water resources can be minimised through planning and design for the efficient use of water, including water recycling.*
>
> *5.229 The Secretary of State should consider whether the mitigation measures put forward by the applicant which are needed for operation and construction (and which are over and above any which may form part of the project application) are acceptable...*

74. Within "Impacts on transport networks", the NPSNN provides for local impacts resulting from the national scheme. Paragraph 5.202 provides: "Development of national networks can have a variety of impacts on the surrounding transport infrastructure including connecting transport networks. Impacts may include economic, social and environmental effects. The consideration and mitigation of transport impacts is an essential part of Government's wider policy objectives for sustainable development."

75. Paragraph 5.211 includes: "The Examining Authority and the Secretary of State should give due consideration to impacts on local transport networks."

76. Paragraph 5.216 includes: "Where development would worsen accessibility such impacts should be mitigated so far as reasonably possible…".

Article 8 and Article 1 of the First Protocol

77. The interference with the Mees Farm property (and the related lives of the Mees) engages Article 1, First Protocol Right and Article 8. Without more, the absence of a lesser measure would result in a disproportionate affect on those rights because a lesser measure remains available and "could" be imposed under section 120(3) and (4) and paragraph 10 of Part 1 of Schedule 5 to the Act: a protective provisions. See *Bank Mellat*.

78. The inclusion of protective provisions ensuring access and ongoing equivalent irrigation of the Farm would result in satisfaction of element 3 of the "structured proportionality" test of Bank Mellat whilst simultaneously not having an unacceptable effect on the objective of the scheme. That would ensure satisfaction of element 3.

D. The Mees' Proposed Protective Provisions

79. The proposed development remains in outline without detailed drawings and comprises a series of word descriptions providing parameters inside of which the detailed design will be subsequently created. The parameters will only be fixed upon the occurrence of the decision of the Secretary of State under section 103 of the Planning Act 2008. Within those parameters, the detailed design *by the contractor* can only occur after the event of Stage 4 of the Project Control Framework Handbook that prohibits the *awarding of a contract* to construct the project before the conclusion of the Secretary of State's decision under section 103 of the Planning Act 2008 and before the mandatory National Highways Gateway has been passed.

80. By section 120(3) and (4), protective provisions can be provided for "any persons".

81. The scope of "any persons" remains not confined to a particular class of persons such as statutory utilities. For example, in the Riverside Energy Park Order 2020, the access and pipework of a private limited company ("RRRL") was protected by protective provisions under Part 1 of Schedule 10 to that DCO.

82. The Mees need protective provisions to ensure:

    a) An irrigation system in line with Figure 3 of the Sustainable Water Solutions "Manor Farm Options Summary (15h November 2023)" is provided as part of the scheme to maintain the hydro-engineered landscape of Manor Farm that will be adversely affected by the construction of concrete tunnels and cuttings under and through that Farm and to ensure that the water resource of the Farm is maintained;

    b) Access to the fields making up the Farm during the construction of the scheme to ensure that the farm can remain operational and function during the period of construction works.

83. Because National Highways has failed to address its mind to the foregoing or to produce themselves protective provisions to ensure the ground water system and the ongoing functioning of the farm, the Mees will provide a draft of protective provisions before the conclusion of the Examination Hearing.