Immingham Green Energy Terminal

9.55 Applicant's Response to the Examining Authority's Action Points from Issue Specific Hearing 6 (ISH6)

Infrastructure Planning (Examination Procedure) Rules 2010

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Introduction

Overview

1.1 This document has been prepared to accompany an application made to the Secretary of State for Transport (the Application") under section 37 of the Planning Act 2008 ("PA 2008") for a development consent order ("DCO") to authorise the construction and operation of the proposed Immingham Green Energy Terminal ("the Project").

1.2 The Application is submitted by Associated British Ports ("the Applicant"). The Applicant was established in 1981 following the privatisation of the British Transport Docks Board. **The Funding Statement [APP-010]** provides further information.

1.3 The Project as proposed by the Applicant falls within the definition of a Nationally Significant Infrastructure Project ("NSIP") as set out in Sections 14(1)(j), 24(2) and 24(3)(c) of the PA 2008.

The Project

1.4 The Applicant is seeking to construct, operate and maintain the Immingham Green Energy Terminal, comprising a new multi-user liquid bulk green energy terminal located on the eastern side of the Port of Immingham (the "Port").

1.5 The Project includes the construction and operation of a green hydrogen production facility, which would be delivered and operated by Air Products (BR) Limited ("Air Products"). Air Products will be the first customer of the new terminal, whereby green ammonia will be imported via the jetty and converted on-site into green hydrogen, making a positive contribution to the UK's net zero agenda by helping to decarbonise the United Kingdom's (UK) industrial activities and in particular the heavy transport sector.

1.6 A detailed description of the Project is included in **Chapter 2: The Project** of the **Environmental Statement ("ES") [APP-044]**.

Purpose of this Document

1.7 This document provides the Applicant's response to the actions arising from Issue Specific Hearing 6 (ISH6) held on 16 April 2024, which were collated in the Examining Authority's **Action Points from Issue Specific Hearing 6 [EV9-008]**, issued April 24 2024.

1. Issue Specific Hearing 6 (ISH6) Action Points

Action Point 1
Agenda Item 3 Strategic Matters
Provide a supplement to the Applicant's transcript of ISH1 to include the correct references.
The supplement is provided as **Appendix 1** of this document.
Action Point 2
Agenda Item 3 Strategic Matters
Provide relevant extracts of Court Judgement - Ross vs Secretary of State 2020 EWHC226.
The relevant extracts have been provided in **Appendix 2** of this document.
Action Point 3
Agenda Item 3 Strategic Matters
Provide relevant extracts from the Tilbury 2 Application that illustrates the distinction between the port development and the associated development.
The relevant extracts have been provided in **Appendix 3** of this document.
Action Point 4
Agenda Item 3 Strategic Matters

Provide a written response to question on climate change greenhouse gas assessments.

The question broadly raised in Examination (by Mr Page) was: the Examining Authority understands the general principle that every single benefit does not need to be secured. For low carbon hydrogen, as a significant component, is it in public interest that it is secured to make sure that the planning balance that is undertaken when benefits are offset against adverse impacts endures for life of the proposed development? Does the market appetite for low carbon hydrogen provide sufficient certainty?

A number of points came up in the discussion at ISH6 item 3(ii) in relation to whether the benefits of the production of low carbon hydrogen should be secured. In order to assist the Examining Authority, each of these points is addressed below for completeness.

The assessment of the benefits of low carbon hydrogen (by the displacement of greenhouse gas emissions) is relevant in two contexts – first, in the environmental impact assessment (EIA) and second, in the planning assessment. Each of these is considered in turn below.

1. ENVIRONMENTAL IMPACT ASSESSMENT

1.1 The Infrastructure Planning (Environmental Impact Assessment) Regulations 2017 (EIA Regulations) makes provision in relation to the consideration of environmental information. Regulation 21 requires the Secretary of State to examine the environmental information, take that examination (and any necessary supplementary examination) into account in reaching a reasoned conclusion on the significant effects of the proposed development on the environment, integrate that conclusion into the decision and, if an order is to be made, consider whether it is appropriate to impose monitoring measures.

1.2 In terms of how the environmental assessment is addressed in the decision through the Development Consent Order (drawing on the explanation provided by Counsel for the Applicant in ISH6 (see transcript (Part 1) at 1:15:40 to 1:22:55 and the Applicant's **Summary of Issue Specific Hearing 6 (ISH6),** submitted at Deadline 3 **[TR030008/EXAM/9.61]**):

1.2.1 There is no legal or policy requirement to achieve certainty about environmental effects.

1.2.2 Advice Note Nine: Rochdale Envelope (1 July 2018) addresses the 'Rochdale Envelope' approach which can be employed where the nature of the proposed development means that some details of the whole project have not been confirmed on submission (i.e. the application is in 'outline' or equivalent) and flexibility is sought to address uncertainty (paragraph 1.2).

In such a scenario, clearly defined parameters can be established which enable a worst-case scenario to be assessed in the EIA. The DCO should then not permit the proposed development to extend beyond those parameters and the Secretary of State may choose to impose requirements to secure this (paragraph 2.4).

1.2.3 The legal requirements arising from the case law that underpins the 'Rochdale Envelope' approach are not concerned with achieving certainty as to environmental effects. Rather they are to ensure alignment between the parameters that have been used to define the proposed development for the purposes of the EIA and what is then ultimately consented in the resulting decision document. For example, the EIA was undertaken on the basis of maximum heights for the hydrogen production facility, which are secured through **Requirement 4(4) Schedule 2** of the **draft Development Consent Order** [**REP1-016**].

1.2.4 Judgments and assumptions need to be made by the professionals who undertake the environmental assessment in order to consider the likely significant effects of a development that meets the defined parameters. That does not mean that every single assumption that is made by those professionals must be secured. That would require the fixing of matters that are unknown, and which do not need to be known or secured.

1.2.5 There are, however, instances where exceedances of a particular level of effect would make the development unacceptable and, therefore, a requirement should be imposed, effectively ensuring the significant effects are no greater than those assessed. For example, Requirement 17 requires approval of an operational noise management plan which must demonstrate that the effects of noise on the noise sensitive properties identified in **Chapter 7** of the **ES [APP-049]** are no worse than the residual effects identified in that chapter, so as to avoid unacceptable levels of noise arising during operation of the hydrogen production facility. For the avoidance of doubt, however, this principle applies only where the application should otherwise be refused as a result of the potential generation of a more significant effect.

1.2.6 Paragraph 16.1 of Advice Note 15 "Drafting Development Consent Orders" (1 July 2018) confirms that any mitigation measures relied upon in the ES must be robustly secured and this will generally be achieved through Requirements in the draft DCO. For example, mitigation during construction is secured through the construction environmental management plan (secured by Requirement 6).

1.2.7 However, the actual environmental effects that may occur in practice may or may not be the same in all respects as those predicted at the time the decision is made, not least because the receiving environment itself often changes over time and neither law nor policy requires that those effects must be the same. In the absence of some particular justification as above, it is neither necessary nor appropriate to impose a requirement to ensure the effects of the development do not differ from those which are assessed.

1.2.8 The example given by Counsel was that, if based on reasonable worst case assumptions as to traffic generation, it is concluded that the likely level of traffic flowing through a junction does not cause any impact, there is no reason to limit the traffic generated by a proposed development to the level assessed where there is no evidence that the junction could not cope with a higher traffic flow.

1.3 Schedule 4 of the EIA Regulations sets out what matters must be included in an environmental statement where relevant to the proposed development, which may include the impact of the proposed development on climate (for example the nature and magnitude of greenhouse gas (GHG) emissions) and the vulnerability of the proposed development to climate change. **Chapter 19 (Climate Change) [APP-061]** considers such impacts as relevant to the Project.

1.4 The assessment of GHG set out within Chapter 19 has been undertaken on a highly conservative basis:

1.4.1 The quantification of the significant beneficial effect of the Project in terms of GHG emissions displacement is based solely on the hydrogen produced by the Project, replacing the use of fossil fuels.

1.4.2 The potential for beneficial effects from the import of CO2 is only taken account of on a qualitative basis. This is based on the evidence provided that demonstrates that the use of the jetty for CO2 is likely (section 5 of the **Planning Statement [APP-226]** and supporting statements made in response to WQs, in particular Q1.2.1.2, Q1.2.1.4, Q1.2.2.3 [**REP1-023**] and in oral submissions at ISH6 [TR030008/EXAM/9.61]), and as a result, there is sufficient information to allow that qualitative assessment to be undertaken.

1.4.3 On the other hand, there is a quantitative assessment of the adverse effects arising from the reasonable worst case assumption of the full use of the jetty i.e. the full 292 vessel movements.

1.5 Accordingly, the ES assumptions reflect what is, as supported by evidence, considered likely. No adverse environmental effects have been identified and therefore no adverse effects need to be controlled for example through a requirement in the DCO.

1.6 The DCO seeks consent for the associated development required for the specific use proposed by Air Products. If another liquid bulk were to be imported, then the associated landside development would require further consents and any likely significant environmental effects would need to be considered at that time (please refer to the answer provided to Action Point 5 in this document).

2 ASSESSING THE BENEFITS (S104 PLANNING ACT 2008)

General principles

2.1 As has been explained by the Applicant – for example at ISH6 (see ISH6 transcript (Part 1) at 1:29:30 to 1:34:58 and the Applicant's written summary submitted at Deadline 3 **[TR030008/EXAM/9.61]**) and in response to Q1.2.1.14 **[REP1-023]** – the benefits of the Project and the weight to be attached to them are matters to be considered in respect of section 104(7) of the Planning Act 2008 and the consideration as to whether the "adverse impact of the proposed development would outweigh its benefits" so as to justify an exception from the presumption in section 104(3).

2.2 The planning balance exercise to be undertaken pursuant to section 104(7) follows on from the application of section 104(3) which, in this instance, clearly establishes both the compelling need for the Project and that the starting point for the decision maker is a presumption in favour of granting consent.

2.3 In respect of the section 104(7) planning balance exercise (see ISH1 **[REP1-064]**, ISH6 **[TR030008/EXAM/9.61]** and responses to Q1.2.1.2, Q1.2.1.6, Q1.2.1.10 and Q1.2.1.14 **[REP1-023]**), the weight to be attached to the public interest benefits associated with the Project's contribution to meeting the specific low carbon hydrogen element of the identified need does not require a quantitative analysis, but is clearly substantial.

2.4 As a general principle and as acknowledged by the Examining Authority, there is no legal requirement that all benefits which are given weight in the planning balance must be formally secured, in order to be treated as material considerations (see paragraph 161 of the Substation Action case provided at **Appendix 2** to REP1-023). As explained at ISH6 (see transcript (Part 1) at 49:12 to 49:59 and written

summaries submitted at Deadline 3 **[TR030008/EXAM/9.61]**), this is entirely orthodox and is reflected in the approach taken to benefits associated with planning applications and DCO applications more generally.

2.5 As a matter of principle, the Secretary of State is able to attach such weight as is judged appropriate to the benefits associated with the particular product that Air Products proposes to produce using the facilities for which consent is sought without those benefits being legally secured; it is not necessary for there to be a securing mechanism to underpin any planning judgement as to how weight is pitched.

Evidence in relation to the production of low carbon hydrogen

2.6 The Applicant has provided significant evidence as to the market for low carbon hydrogen and the reasons why it is proposed to be produced and supplied as part of the Proposed Development. This is explained in the response to Q1.3.2.7 **[REP1-024]** and amplified below.

2.6.1 In order to meet the UK's legally binding target to achieve net zero by 2050, the Government must drive progress in decarbonisation, particularly of industry, including the heavy transport sector. There is clear national policy in place to achieve this (see paragraphs 5.2.27-5.2.39 of the Planning Statement [APP-226]). By way of example, within the Applicant's response provided to Q1.2.1.10 **[REP1-023]** it is highlighted that the Government (within the Overarching National Policy Statement for Energy EN-1) identified that there is an urgent need for all types of low carbon hydrogen infrastructure and that substantial weight should be given to this need. When fully operational, the Project will deliver 300MW of low carbon hydrogen, the equivalent of 3% of the Government's 2030 target set out in the British Energy Security Strategy.

2.6.2 A key plank of the Government's plan is to develop a thriving low carbon hydrogen sector in the UK – it identifies low carbon hydrogen as having a critical role to play in the transition and is pursuing a number of strategies and developing policies and business models to achieve this[1].

[1] See: UK Hydrogen Strategy (publishing.service.gov.uk); Hydrogen Strategy Delivery Update: Hydrogen Strategy Update to the Market: December 202e (publishing.service.gov.uk); Hydrogen in a low-carbon economy - Climate Change Committee (theccc.org.uk)

2.6.3 In order to transition to hydrogen, customers (e.g. industrial users and those using heavy transport) need to have a reliable supply of alternative fuels.

2.6.4 Once customers have transitioned to hydrogen (for example through significant investment in hydrogen fuelled vehicles and plant), those customers cannot simply transition back, due to the net zero transition requirements and the financial investment involved. Accordingly, they will continue to require reliable sources of hydrogen.

2.6.5 Therefore, the achievement of the Government's clear legal and policy commitments to net zero requires there to be strong and consistent market demand for low carbon imports in the future.

2.7 The existing and emerging incentivisation schemes, standards and business models introduced by the Government to incentivise a shift to low carbon fuels are set out in the response to Q1.3.3.1 **[REP1-024]** and are intended to produce that strong and consistent market demand. Of particular relevance to the Project, the Renewable Transport Fuel Obligation (RTFO) has been in place to encourage the supply and use of renewable fuels (which includes hydrogen) for transport since 2008. Further, the Government is introducing new standards and business models to help fund the transition of other industries to low carbon hydrogen.

2.8 The response to Q1.3.3.1 explains that Air Products anticipates entering into contracts with most of its customers requiring the supply to the customer of low carbon or renewable fuel. In doing so, Air Products anticipates qualifying for Renewable Transport Fuel Certificates (RTFCs) or equivalent measures under alternative incentive schemes which it will be able to trade on the market. If Air Products fails to deliver the required low carbon fuel, then it will not be able to sell RTFCs and will lose an income stream. There may also be penalties under the contract as a result of the customer not receiving the fuel contracted for. The underlying economics provide a powerful natural incentive for Air Products to meet the requirements of the RTFO and the low carbon hydrogen standards.

2.9 It is as a result of the anticipated strong and consistent market demand for low carbon hydrogen that Air Products is making a substantial investment in the hydrogen production facility at Immingham and other locations in Europe. It has also invested substantially in upstream green ammonia facilities, initially in the Middle East where construction is well underway, and green ammonia is programmed to be available in Europe in 2027.

2.10 On the basis of the evidence presented by the Applicant as what is likely (and in the absence of any evidence to the contrary from any other party), the Applicant considers that the Secretary of State should give weight to the benefits of the proposed production of low

carbon hydrogen and treat those benefits as significant when forming a planning judgement, without those benefits being secured by a requirement; that would represent an entirely normal exercise of planning judgement.

Tests for requirements

2.11 It is also relevant to consider whether a requirement securing the benefits of low carbon hydrogen would meet the relevant tests for requirements. As noted in the response to Q1.3.3.1, Advice Note Fifteen states that (in line with the law and policy relating to planning conditions imposed on planning permissions under the Town and Country Planning Act 1990) requirements should be precise, enforceable, necessary, relevant to the development, relevant to planning and reasonable in all other respects.

2.12 In terms of necessity:

2.12.1 Consideration needs to be given as to how the planning balance would be affected. Unless the planning balance would be in favour of refusal in the absence of a requirement to control a particular matter, such a requirement is not necessary. In this case, the Project would accord with the relevant National Policy Statement, resulting in a presumption in favour of grant, and the planning balance would clearly be in favour of approval, even if the ammonia imported was not renewable or the hydrogen produced was not low carbon. On that basis, a requirement for example to restrict the import of non-renewable ammonia or to prevent the production of hydrogen which is not low carbon) is not necessary (see ISH6 transcript (Part 1) at 58:14 to 59:28 and the Applicant's written summary submitted at Deadline 3 **[TR030008/EXAM/9.61]**).

2.12.2 As explained in response to agenda item 3(i) of ISH1 **[REP1-064]**, the National Policy Statement for Ports (NPSfP) makes it clear that matters relating to the resilience and efficiency of port infrastructure form part of the need for additional port infrastructure. Unnecessarily placing restrictions on created port infrastructure in this regard, therefore, runs counter to the clear policy position expressed in the NPSfP.

2.12.3 Paragraphs 2.6 to 2.10 above set out what is in fact likely to happen, given the legally binding net zero target, the policies and strategies that are in place to seek to achieve that target and the existing and emerging business models and incentives aimed at driving decarbonisation. As explained in the response to Q1.3.3.1, the underlying economics

provide a powerful natural incentive for Air Products to meet the requirements of the RTFO and the Low Carbon Hydrogen standards, such that a requirement in the dDCO, however it may be formulated, is not necessary.

2.12.4 As is also clear from the above, the Government is taking considered steps (including the use of appropriate and evolving economic levers) to encourage decarbonisation and to reduce greenhouse gas emissions, and to seek to duplicate such steps by way of a requirement in the DCO is not necessary or otherwise reasonable.

2.13 In terms of reasonableness:

2.13.1 The purpose of the RTFO and low carbon hydrogen business models is to create a level playing field where the necessary standards are set by Government and apply at a national level (see the response to Q1.3.2.4). The application of additional limitations and controls at a project level through development control decisions on individual applications for new facilities clearly has the potential to adversely affect that level playing field, potentially increasing the risks and costs of the relevant operator. This in turn has the potential to distort the market, to impact competition (contrary to the NPSfP – see paragraph 3.4.13) and ultimately to discourage trade (undermining the purpose of the business models). A requirement with any of these effects would be unreasonable.

2.13.2 Further, as explained above, a key factor in securing energy transition is the need to secure certainty of supply of alternative fuels. In the event that there is a temporary break in the supply chain of renewable ammonia (particularly as sources of renewable ammonia develop), there may be a requirement to import non-renewable ammonia on a temporary basis to maintain continuity of supply for customers. As explained above, Air Products would suffer financial loss during that period, which in itself provides a powerful incentive for it to minimise the need for such imports. To prevent such imports, however, could undermine Air Products' ability to deliver a reliable supply of fuel, an effect which would run directly contrary to the Government's policy of stimulating energy transition. A requirement that had such an effect would not be reasonable.

2.14 Further:

2.14.1 As explained in the response to Q1.3.3.1, any such requirement limiting or controlling imports or production in practice would not be enforceable. As acknowledged by Advice Note Fifteen, it is usually the relevant planning authority who

would be responsible for enforcing compliance with requirements. In order for NELC to monitor compliance, it would need to receive and then analyse some form of regular report on the nature of the imports to or the production of the hydrogen production facility. NELC, as a local planning authority, has no expertise in compliance with low carbon hydrogen standards and this would be an unnecessary bureaucratic burden upon it. Compliance with the above standards and their administration is audited by appointed third parties in accordance with the terms of the relevant Government schemes. It would not be appropriate, however, for such parties to be responsible for enforcing a requirement on a DCO which seeks to duplicate that separate system for addressing this issue through development control decision-making.

2.14.2 Further, the nature of the incentivisation schemes present clear difficulties in formulating a requirement that is reasonable and precise – and enforceable. For example, compliance with the RTFO is assessed for each “batch” or “unit” of hydrogen. If the supplier of renewable electricity through the power purchase agreement failed in its renewable supply for a short period (such that electricity was taken from the grid), that could render the associated batch of hydrogen non-compliant and Air Products would be forced to sell it as such. Whether hydrogen is compliant or non-compliant can only therefore be assessed on a batch-by-batch basis once it is produced. The complexity of factors underpinning the production of low carbon hydrogen means that any requirement that seeks to prevent low carbon hydrogen from being generated or sold is essentially unenforceable (as well as being unnecessary or unreasonable).

2.15 In summary, for the reasons explained in detail above, any such requirement would fail the policy tests as set out below.

2.15.1 A requirement to import or process a minimum quantity of renewable ammonia a year (in order to secure the benefits of low carbon hydrogen) would be unnecessary, unreasonable and unenforceable.

2.15.2 Equally, some form of limitation on the operation of the jetty unless such minimum quantities were achieved would be unnecessary, unreasonable and contrary to the policies in the NPSfP.

2.15.3 A requirement preventing the import of non-renewable ammonia would be unnecessary and unreasonable, particularly in undermining the ability of Air Products to contribute to the energy transition by offering a reliable source of supply.

2.15.4 A requirement restricting the production or sale of hydrogen from the facility to low carbon hydrogen in compliance with relevant standards would be unnecessary and unreasonable, and would be unenforceable in light of the complexities of hydrogen production and audit.

Action Point 5

Agenda Item 4 Climate Change

Provide clarification of the additional landside components that would require consent to fulfil the additional capacity of liquid bulk imports.

1. This Action Point is responded to in the following text by reference to the handling of carbon dioxide. This is because of the likelihood of that product being handled across the jetty (matters explained at Issue Specific Hearing 1 ("ISH1") – see, for example, the opening statement of Mr Simon Bird provided within the Appendices of **REP1-064**) and thus the Applicant is able to make reasonable assumptions on the components required for such a product to inform the analysis. Moreover, there is no evidential basis on which to select possible alternative liquid bulks for this purpose albeit that there is likely to be commonality in terms of the landside components likely to be required for the handling of other liquid bulks.

2. For completeness, the following information covers the full scope of the infrastructure likely to be required, both marine side and land side. For the avoidance of doubt, however, the DCO already incorporates the necessary marine side works for the handling of carbon dioxide. It is highlighted that the precise nature of the landside infrastructure required cannot be fully determined at this stage so what is provided below is a high-level explanation only. To assist the written explanation, **Figure 1** provided below schematically illustrates the relevant components.

3. Finally by way of introduction, matters relating to the separate consents likely to be needed for those components discussed which are not already to be authorised by the DCO, and the application of the Environmental Impact Assessment and Habitats Regulations Assessment regimes to those separate consent regimes are considered in the Applicant's separate joint response to ISH6 Action Point 6 and ISH7 Action Point 5.

Marine Side Infrastructure

4. Marine side infrastructure for the handling of carbon dioxide would consist of appropriate top side infrastructure on the jetty structure, namely marine loading arms ("MLAs") on the jetty head and a transfer pipeline or pipelines and associated operational infrastructure linking the MLAs to the relevant landside facilities.

5. As indicated above, approval for these elements is being sought through the DCO for the Project as part of Work No. 1.

Landside Infrastructure

6. Landside infrastructure would likely consist of:

(i) *Appropriate transfer pipeline / pipelines* – consisting of pipelines connecting the marine infrastructure to appropriate landside storage infrastructure.

(ii) *Appropriate landside storage infrastructure* – consisting of appropriately sized and designed storage tanks or storage vessels with appropriate operational infrastructure such as valves and safety infrastructure.

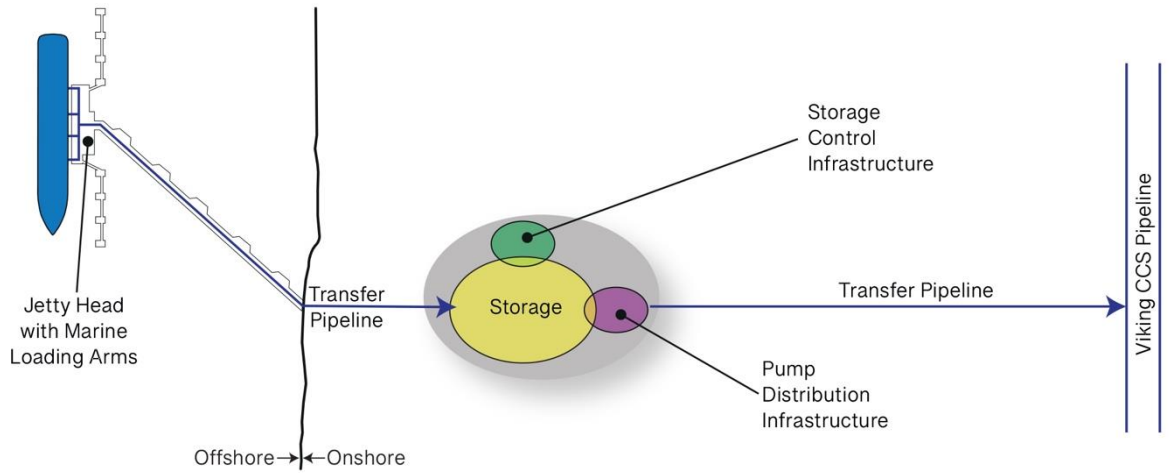
(iii) *Appropriate storage control infrastructure* – consisting of appropriate infrastructure to ensure that the carbon dioxide when stored remains in its correct state. This could, for example, include refrigeration and compression related infrastructure.

(iv) *Appropriate distribution infrastructure* – likely to consist of pump infrastructure with the ability to transport the carbon dioxide away from the storage facility to its next destination. This destination for carbon dioxide is likely to be the Viking CCS pipeline, which is currently the subject of a separate DCO application.

(v) *Appropriate transfer infrastructure* – likely to consist of a transfer pipeline or pipelines linking the storage infrastructure to its next destination and connected to the relevant distribution infrastructure referred to above. Depending on routeing, these could be either above or below ground pipelines and would not be dissimilar in terms of size to pipelines which are utilised generally to distribute liquid bulk products from a storage site to its next destination.

For some liquid bulk products, transfer infrastructure can also consist of appropriate road loading facilities where HGV road tankers are filled with the liquid bulk product before being driven to their next destination.

Figure 1



(Note: For the avoidance of doubt, the Offshore (marine side) elements illustrated are include within the Project DCO. The Onshore (landside) elements illustrated would require separate additional consents and approvals.)

Action Point 6

Agenda Item 4 Climate Change

Submit a note explaining the extent to which the proposed development can be retrofitted outside the express planning consent regime.

1. This note provides a response to both ISH6 Action Point 6 and ISH7 Action Point 5. In responding to these action points the Applicant has also taken the opportunity to address related matters concerning the consents required for the handling of other liquid bulk products (including Carbon Dioxide) and the application of the Environmental Impact Assessment ("EIA") regime to those consents.

2. The response is structured into three sections as follows:

Section (a) This section considers the issues around the extent to which the proposed development that would be authorised by the DCO could be subsequently retrofitted or altered without the need for further express consents or approvals.

Section (b) This section considers the extent to which operational land status would be created by the DCO across the land within the Order Limits, and also explains the position that would occur across such operational land in respect of the subsequent ability to rely upon relevant permitted development rights.

Section (c) This section considers matters relating to the need for further consents for other supporting infrastructure outside of the land within the Order Limits or outside of the scope of what is authorised by the DCO.

3. Within these three sections of the response it is also explained as appropriate how both the EIA and Habitats Regulations Assessment ("HRA") processes would be of relevance and how they would need to be taken account of.

(a) The extent to which the proposed development can be retrofitted

4. In responding on this matter, the Applicant has understood the Examining Authority's use of the word 'retrofitted' to refer to the ability or otherwise for changes to be made to the proposed development that would be authorised by the DCO after it has been constructed so as to enable it to be used in a way that has not been considered at the DCO consenting stage. Construction, use and maintenance of the proposed development in accordance with the terms of the DCO would clearly not involve anything that could properly be described as 'retrofitting', and, therefore, the issue is understood to be the extent to which subsequent works would be possible beyond what has been authorised by the DCO to facilitate such a use without triggering the need for some form of other separate consent or authorisation.

5. What constitutes 'development' (which dictates what, therefore, needs to have some form of planning or consent approval before it can be carried out), is defined by Section 55 of the Town and Country Planning Act 1990 ("the 1990 Act") (the definition is incorporated into the Planning Act 2008 by Section 32). As well as defining what development is, Section 55(2) to (5) of the 1990 Act also sets out those operations and uses of land which do not constitute development, and which, therefore, do not require any form of planning or consent approval before they can be carried out.

6. The definition of development in the legislation includes, amongst other things, "*building operations*", defined so as to include structural alterations of or additions to buildings (defined in the legislation to include "*any structure or erection*"), and "*engineering operations*" (including any operation which would generally be supervised by an engineer – ***Fayrewood Fish Farms Ltd. V SSE***

[1984] JPL 267 – see **Appendix 4** in this document). Any material 'retrofitting' of the proposed development would almost certainly constitute either a building operation and / or an engineering operation and would, therefore, constitute 'development' for the purposes of the legislation.

7. The only exceptions to the definition of development within Section 55(2) to (5) of the 1990 Act that could, in the Applicant's view, in any way be said to be of potential relevance to the future use of the proposed development are:

(i) Section 55(2)(a) – which makes clear that development does not include:

"*the carrying out for the maintenance, improvement of other alteration of any building of works which-*

(i) affect only the interior of the building, or
(ii) do not materially affect the external appearance of the building,

and are not works for making good war damage or works begun after December 5th, 1968 for the alteration of a building by providing additional space in it underground."

and

(ii) Section 55(2)(c) – which makes clear that development does not include:

"*the carrying out by a local authority or statutory undertakers of any works for the purpose of inspecting, repairing or renewing any sewers, mains, pipe, cables or other apparatus, including the breaking open of any street or other land for that purpose;*"

8. It is clear from the above, that any works to the proposed development that could in the future be carried out that would not constitute development are very limited and, in effect, are limited to works of maintenance, inspection and repair that do not affect the external appearance of the proposed development. Any such limited 'non-development' works would clearly not result in any material change to the proposed development authorised by the DCO.

9. In addition, in respect of maintenance matters – which is, in effect, what Section 55(2)(a) and (c) essentially comprise – Article 41(2) of the **draft DCO ("dDCO") [REP1-016]** makes it clear that such maintenance works are not authorised by the DCO in circumstances where they are likely to give rise to any materially new or materially different effects that have not been assessed in the Environmental

Statement. Therefore, even if somehow future 'retrofitting' could be said to constitute 'maintenance' of the proposed development, which is unlikely, the scope to which this would in fact be authorised by the DCO is heavily constrained.

10. ***Summary:*** For the reasons set out above, it is clear that the scope for carrying out of any future works on the proposed development that are not part of the development authorised by the DCO and which would not constitute development would be very limited. Any works of maintenance would not be authorised by the DCO if they would result in any materially new or materially different environmental effects from those assessed. If the development is not authorised by the DCO it would need some other form of consent or authorisation.

(b) Operational land of a statutory undertaker and permitted development rights

11. Section 262 of the 1990 Act sets out the meaning of 'Statutory Undertaker', for the purposes of planning legislation generally. For current purposes it is highlighted that this means "*persons authorised by any enactment, to carry on any …. water transport … dock, harbour, pier or lighthouse undertaking ….*". ABP is such a 'person' so authorised. For example, Section 9 of the Transport Act 1981 makes it clear that it "*the duty of Associated British Ports to provide port facilities at its harbours to such an extent as it may think expedient.*"

12. Sections 263 and 264 of the 1990 Act define what constitutes operational land of a statutory undertaker. In summary, operational land in general terms consists of:

"*(a) land which is used for the purpose of carrying on their undertaking; and*
(b) land in which an interest is held for that purpose"

13. Section 264(3) further explains, however, that in respect of land acquired by the statutory undertaker after 6 December 1968 such land can only become operational land if:

"*(a) there is, or at some time has been, in force with respect to it a specific planning permission for its development; and*
(b) that development, if carried out, would involve or have involved its use for the purpose of carrying on of the statutory undertakers' undertaking."

14. Certain parts of the land within the Order Limits are already operational land of ABP, having been held by them prior to the 1968 date and either used for the purpose of carrying on of ABP's undertaking or held for that purpose. In general terms, all of the land within the Order Limits that is already owned by ABP is operational land with the exception of the West Site.

15. In respect of land that is not currently operational land, as a result of Article 55(1), the DCO would constitute a 'specific planning permission' for the purposes of Section 264(3)(a) of the 1990 Act. In respect of Section 264(3)(b), the Applicant considers that the development that would be authorised by the 'specific planning permission' that is the DCO would involve the use of the land for the purpose of carrying on of its undertaking.

16. ABP's undertaking can be summarised as the carrying out, in the manner required, of the various responsibilities, duties and obligations set out in the various public and local enactments that brought the Port of Immingham into existence and those contained in general legislation relating to ABP and its powers and duties. Such general legislation includes, for example, the Transport Act 1981 which – as already indicated above –sets out what the overarching general duty of ABP is in Section 9. The relevant enactments and legislation give ABP a wide discretion as to how it satisfies its responsibilities, duties and obligations, and to do so, it is provided with a broad range of powers (as made clear in Section 8 and Schedule 3 of the Transport Act 1981).

17. In respect of its operational land, ABP specifically benefits from the permitted development rights detailed under Part 8, Class B of the Town and Country Planning (General Permitted Development) Order 2015 (as amended) ("the GPDO"). Article 55(3) of the **dDCO** confirms that the use of such permitted development rights would not constitute a breach of the DCO.

18. It is, however, important to understand that Part 8, Class B rights (a copy of which is provided for ease of reference at **Appendix 5** of this document) are only applicable to certain types of development and are also subject to various controls and conditions, as now explained.

19. ***First***, Part 8, Class B rights only permit development which:

    (i) Occurs on land that is operational land
    (ii) Is undertaken by the statutory undertaker, a lessee of the statutory undertaker or an agent of development of the statutory undertaker
    (iii) Is required-

    (a) "*for the purposes of shipping,*

(b) *in connection with the embarking, disembarking, loading, discharging or transport of passengers, livestock or goods at a dock, pier or harbour, or with the movement of traffic by canal or inland navigation or by any railway forming part of the undertaking, or*
(c) *in connection with the provision of services and facilities.*"

20. ***Second,*** development is not permitted by Part 8, Class B if it consists of or include any of the matters detailed in paragraph B.1 of Class B.

21. ***Third,*** Part 8, Class B rights cannot be used if any of the restrictions or controls set out in Article 3 of the GPDO (a copy of which is also provided for ease of reference at **Appendix 5** of this document) apply. Although there are various restrictions and controls on the use of permitted development rights set out in Article 3, the following two are, for present purposes, specifically noted:

(i) *Article 3(1)* – which, by reference to the Habitats Regulations and the processes set out in those regulations, removes the ability to use Part 8, Class B rights in circumstances where the development proposed is considered likely to have an adverse effect on the integrity of a European site.

(ii) *Article 3(10)* – which, by reference to the Town and Country Planning (Environmental Impact Assessment) Regulations 2017 ("TCP EIA Regulations"), removes the ability to use Part 8, Class B rights in circumstances where the development proposed requires environmental impact assessment.

22. Development meeting the description of development set out in Schedule 1 of the TCP EIA Regulations (i.e. development for which EIA is automatically required) cannot, therefore, under any circumstance be undertaken by reliance upon Part 8, Class B permitted development rights. In respect of development that is not Schedule 1 development two questions need to be addressed in terms of considering whether the envisaged development is EIA development for which it is not possible to use Part 8, Class B rights. Those two questions are considered below:

(1) *Does the development in the first instance constitute a Schedule 2 development, i.e. does it fall within any of the descriptions of development and meet corresponding qualifying thresholds or criteria set out in Schedule 2 of the TCPA EIA Regulations?*

23. Although each envisaged development needs to be considered on a case-by-case basis in this respect, the relevant Schedule 2 development qualifying criteria in the case of stand-alone 'harbour and port installation developments' is whether "*the area of the works exceeds 1 hectare.*" In circumstances where such a development could also be argued to be a change or extension of an

existing authorised or executed EIA development an additional Schedule 2 development qualifying criteria also requires consideration in respect of the envisaged development, namely whether the authorised or executed EIA development "*as changed or extended* [by the envisaged development] *may have significant adverse effects on the environment*".

24. If relevant Schedule 2 qualifying criteria are not met in respect of the development envisaged then it is not a Schedule 2 development. The Article 3(10) EIA restriction on the use of permitted development rights does not apply to a development that does not in the first instance constitute a Schedule 2 development as defined in the TCP EIA Regulations – the legislation and the process it sets out, in effect, proceeds on the basis that such development will not be likely to generate any significant environmental effects (see ***R(Candlish) v Hastings BC*** [2006] Env. LR 13 at Paragraphs 62 to 71 – see **Appendix 6** of this document).

    (2) *If the proposed development is a Schedule 2 development, is it then likely to have significant effects on the environment by virtue of factors such as its nature, size or location and, therefore, constitute EIA development?*

25. To formally determine the answer to this question in respect of an envisaged development that qualifies in the first instance as a Schedule 2 development, either a screening opinion needs to be sought from the relevant local planning authority or a screening direction from the Secretary of State. As Article 3(10) of the GPDO makes clear, development that is Schedule 2 development can only take place by reliance upon Part 8, Class B permitted development rights in circumstances where either a screening opinion or a screening direction has been issued or made that the development is not EIA development (emphasis added).

26. ***Fourth,*** having considered all of the above matters and determined that Part 8, Class B rights can be relied upon, the statutory undertaker is then required in any event – by virtue of Condition B1.A of Class B – to consult with the local planning authority in advance of the carrying out of any development pursuant to those rights, other than in some very limited exceptions. Such consultation, in the Applicant's experience, sets out for the planning authority's consideration at an appropriate level of detail the reasons as to why the Part 8, Class B permitted development rights can be relied upon.

27. ***Summary:*** As a result of the DCO coming into effect the land within the Order Limits would, in the Applicant's opinion, all become operational land of a statutory undertaker to which Part 8, Class B permitted development rights would be available. These rights are, however, subject to relevant controls and restrictions, a key one being that those rights do not authorise development which would be likely to generate significant environmental effects and, therefore, require environmental impact assessment. In such circumstances, separate express consents would be required before such development could take place – matters which are considered further in the following section.

(c) Consents for other supporting infrastructure and the application of the EIA regime

28. As the Applicant has made clear in its submissions to the Examination (see, for example, the Speakers Notes at the Appendix to **REP1-064**) the use of the proposed jetty for the handling of carbon dioxide or another liquid bulk product, will require some form of additional supporting landside infrastructure development which will require some form of further consent, separate to the consent granted by the DCO. For completeness, the Applicant sets out below some further information on this matter, including how the EIA regime would apply to the process of obtaining such further separate consents.

29. Whilst the appropriate separate consent route could only be determined once the details of the further infrastructure was known, in general terms there are considered to be three main consent routes that could potentially be used:

30. ***Consent route 1: Use of permitted development rights*** – If the landside infrastructure development fell within the scope of available permitted rights then it may be possible to consider the use of permitted development rights. It is, however, considered likely that the only permitted development rights potentially available in this respect are those detailed in Part 8, Class B of the GPDO which could, in any event, only be exercised on operational land and are subject to the other controls and conditions which have already been analysed in detail in the preceding section of this note.

31. In terms of EIA matters, it is again highlighted that, by virtue of Article 3(10) of the GPDO, development requiring Environmental Impact Assessment cannot be undertaken by reliance upon Part 8, Class B rights, and to determine this requires appropriate steps to be taken under the EIA regime.

32. ***Consent route 2: Planning permission from the local planning authority*** – If landside infrastructure development could not be undertaken in reliance upon either the Project DCO or permitted development rights and also did not constitute an NSIP in its own right (a matter returned to below) then it would require an express grant of planning permission from the local planning authority – North East Lincolnshire Council. Planning permission could only be granted if the relevant environmental assessment regime steps had been undertaken. At the very least it would be necessary to consider whether the development required EIA and, again, if it was determined that no such assessment was required then this would mean that the proposed development was one which did not generate likely significant environmental effects. Determining whether the envisaged development required EIA would require considerations of whether the envisaged development was a Schedule 1 or Schedule 2 development and, in respect of a qualifying Schedule 2 development whether, through a formal screening process, the development was EIA development.

33. If the envisaged development was a Schedule 1 development or a Schedule 2 development considered likely to generate significant environmental effects, the development would be EIA development, i.e. one where EIA (the findings of which would need to be reported in an ES) would be required as part of the process of obtaining the separate further planning permission.

34. Finally, for completeness, it is also highlighted that the requirements of the Habitats Regulations would apply to and need to be taken account of as appropriate as part of any such application for planning permission.

35. ***Consent route 3: DCO from the relevant Secretary of State*** - If the envisaged landside development fell in its own right within a relevant NSIP category and met the relevant threshold to qualify as an NSIP, then the corresponding required DCO approval, as with planning permission, could only be granted if the appropriate environmental assessment and HRA steps had been undertaken and satisfactorily addressed. Under such a scenario, therefore, environmental assessment and HRA matters would be appropriately taken account of.

36. For any of the consent routes identified above, it would be necessary to consider likely cumulative and in-combination effects as part of any environmental assessment considerations. This would, therefore, involve consideration of the Project the subject of the current DCO as appropriate. Furthermore, having regard to the *Gateshead* principle it has to be assumed that these separate statutory approval processes – including in respect of the decisions that would need to be taken by the relevant decision maker(s) in respect of EIA and HRA matters – would operate correctly and effectively.

37. ***Summary:*** For the reasons set out above, it is clear that the need for further consents for infrastructure associated with the handling of carbon dioxide or any other liquid bulk product would require the consideration of environmental assessment matters as appropriate. There is no avenue available whereby future development could somehow get round having to consider and address relevant environmental assessment matters.

Although each development proposal would need to be considered on a case-by-case basis, the above analysis demonstrates that it is highly likely that applications for further consents for supporting infrastructure would need to be accompanied by a full EIA of the effects of the envisaged development. Alternatively, if no such full EIA were provided, this would only be in circumstances where the relevant EIA process considerations had been carried out in advance of the application and it had been determined that such a full EIA was not required.

Action Point 7

Agenda Item 5 Decommissioning
Provide response to query regarding possible future baseline in relation to potential future ecology and landscape that has developed over the 25-year period.
With regard to landscaping and the associated grassland, hedgerow, shrub and tree planting established during the construction phase as part of the Project, at the point of decommissioning, the planting established will be retained in situ as far as possible. The **Outline Decommissioning Environmental Management Plan** ("Outline DEMP") **[APP-222]** secured under Requirement 18, states that '*[v]alued trees, woodland, existing vegetation and other landscape features would be protected from decommissioning works and retained wherever possible, in accordance with BS5837:2012 Trees in relation to design, demolition and construction. An additional Arboricultural Impact Assessment would be required prior to decommissioning to identify which trees or vegetation are to be kept and protected during decommissioning and which may be removed. Trees would be clearly fenced or marked so that site operatives are in no doubt as to which ones are to be kept and protected'.* Therefore, the **Environmental Statement** identifies that the future baseline as regards landscaping and associated ecological receptors will have developed at the point of decommissioning. The timing of decommissioning does not change or have any impact on the effects reported in the **Environmental Statement** on the basis that valued trees and vegetation that exist at that time will be protected and retained as far as possible in accordance with the **Outline DEMP** [APP-222]. The conclusions on environmental effects in this regard would therefore not vary if the operational life of the hydrogen production facility were to be any different to the design life assumed as the basis of assessment in the **Terrestrial Ecology Chapter** of the **Environmental Statement** [APP-050].
Action Point 8
Agenda Item 5 Decommissioning
Provide the detail of how decommissioning was described in the Scoping Report.

Decommissioning is described within **Chapter 2 (The Project) paragraphs 2.4.44 to 2.4.49** of the **Scoping Report** [APP-167]. To inform scoping, a description of the key decommissioning elements is provided. The overall approach to decommissioning, as the basis for the assessments and to enable provision of an informed Scoping Opinion, is set out. A description of the landside decommissioning activities is provided in the **Scoping Report [APP-167]** along with associated proposed commitments for consideration in the assessments and inclusion in the DCO and associated control documents, in relation to re-use and recycling, reinstatement and production of an Outline Decommissioning Strategy (approval and compliance with the final decommissioning environmental management plan is secured as requirement 18 of the draft DCO). Each of the nineteen discipline scoping chapters (Chapters 5 to 23) then set out the respective approach to the decommissioning assessment scope, identify potential effects (where relevant) and identify those elements scoped in or out. The **Scoping Report [APP-167]** together with the **Scoping Opinion** [APP-168] and ongoing consultation provide the basis for the assessments undertaken, as provided in the Environmental Statement. The Applicant has now followed up with NELC, the Environment Agency and Natural England to confirm if they have any comment on the **Operating Life Technical Note [REP1-036, Appendix 1]** which was provided at Deadline 1 in response to written questions regarding operating life and decommissioning provisions. The Environment Agency provided a written response on 30th April 2024 (**Appendix 7** of this document) confirming they are satisfied with the Technical Note. Natural England provided an email on 25th April 2024 which set out 'Natural England have reviewed the Operational Life Technical Note and have no comments to make'. Consultation with NELC is ongoing. Should written comments be provided, these will be submitted at Deadline 4.

Action Point 9

Agenda Item 5 Decommissioning

In relation to Queens Road properties, add to the note (Action Point 5, ISH5) regarding the potential situation at the point of decommissioning and how the properties would be treated.

This action is addressed in the response to **Action Point 5** in the **Applicant's Response to the Examining Authority's Action Points from Issue Specific Hearing 5 (ISH5) [TR030008/EXAM/9.54]**.

Action Point 11

Agenda Item 6 Socio-Economic Effects

Provide a note on the cumulative impact of the IERRT and Viking CCS applications in relation to private rental housing.

The cumulative impact of IEERT and Viking has been assessed in relation to labour supply and construction worker accommodation and a Technical Note has been provided. The Technical Note, including assessment and conclusions with regard to effects is provided within the response to **Action Point 9** in the **Applicant's Response to the Examining Authority's Action Points from Issue Specific Hearing 5 [TR030008/EXAM/9.54]**.
Action Point 12
Agenda Item 6 Socio-Economic Effects
Submit plan and explanatory note produced by Gateley Hamer (Applicant's land agents) regarding use of private roads within the Order Limits.
The Applicant's land agent, Gateley Hamer, has prepared a set of plans showing the private roads located within the Order limits (and are attached at **Appendix 7** of this document). The plans show six private roads, five of which (Roads A, B, C, D and F) are owned by ABP and one (Road E) by Elba Securities Limited.

2. Appendices

Appendix 1: Supplement to the Applicant's transcript of ISH1

Summary of Applicant's Oral Submissions made at Issue Specific Hearing 1 relating to Nationally Significant Infrastructure Project ("NSIP") and Associated Development ("AD") split

1 PURPOSE OF NOTE

1.1 At Issue Specific Hearing ("ISH") 6, commencing at 10:00 on 16 April 2024 concerning "Landside Issues and Strategic Matters including draft Development Consent Order", in relation to Agenda Item 3 ("Strategic Matters including but not limited to Nationally Significant Infrastructure Project Thresholds and Need Assessment") sub-issue (i) ("operative wording under s24(2) of the Planning Act ("PA 2008") and whether the Proposed Development has the handling capability to embark or disembark the relevant quantity of material", the Applicant referred to previous submissions made at ISH1 also relating to the relevant sub-issue.

1.2 These previous submissions were made in relation to Agenda Item 3(ii) at ISH 1, which took place on Tuesday, 20 February 2024 commencing at 14:00 and addressed "Strategic Overview of the Proposed Development" and were made in response to Agenda Item 3 ("Overview and Operation of the Proposed Development"), sub-issue (ii) ("Components of the Proposed Development that comprise the Nationally Significant Infrastructure Project (NSIP), including reference to the relevant criteria under Section (s)24 of the PA2008").

1.3 These submissions were inadvertently omitted from the Written Summaries of the Applicant's Oral Case at ISH 1 [**REP1-064**], and as a result the Applicant indicated that it would submit a summary of these submissions at Deadline 3, being 3 May 2024.

1.4 This note provides a summary of the Applicant's submissions made in response to Agenda Item 3(ii) of ISH 1. For the avoidance of doubt, the written summary of the Applicant's submissions made in relation to Agenda Item 3(i) at ISH 6 is provided separately at Deadline 3 as part of the composite Written Summary of the Applicant's Oral Submissions made at ISH 6.

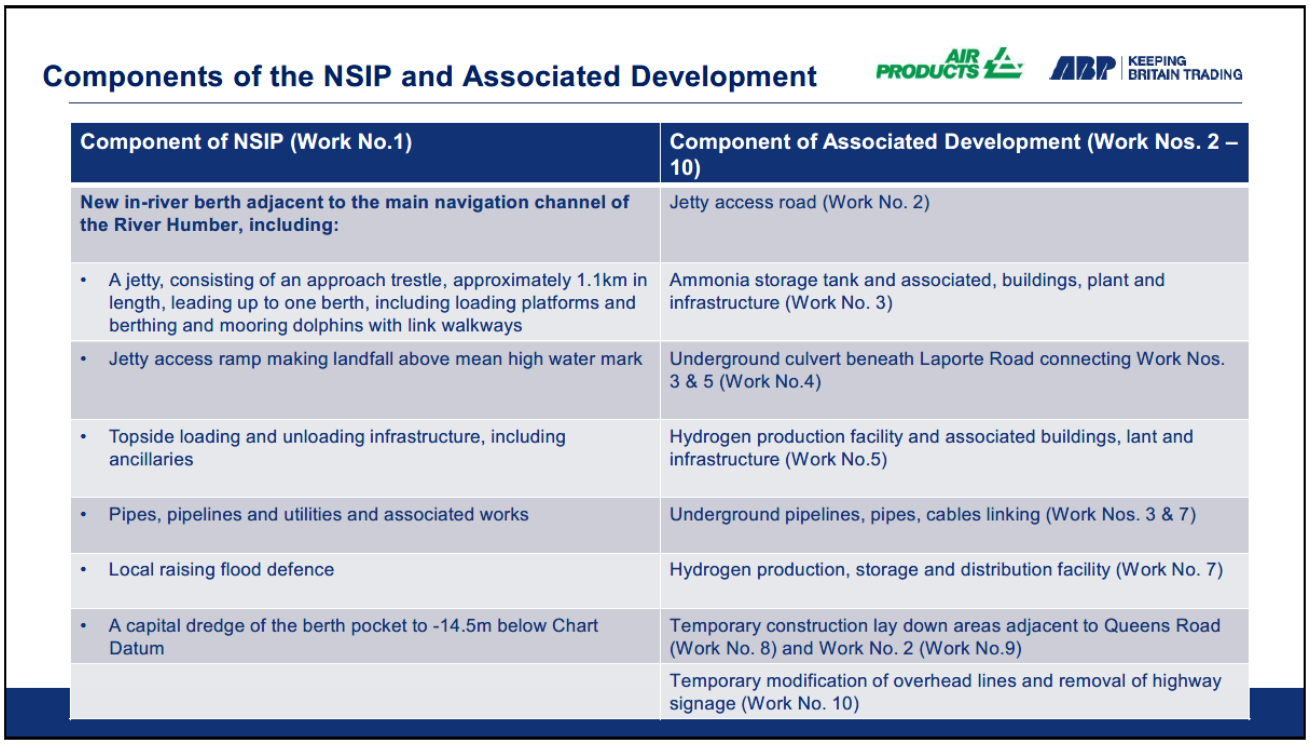
2 SUMMARY OF THE APPLICANT'S SUBMISSIONS IN RELATION TO ISH 1 AGENDA ITEM 3(II)

2.1 Applicant's submissions at ISH 1

2.1.1 The Applicant made submissions at ISH 1 explaining the division between the NSIP and the AD in the components of the Proposed Development. The Applicant commented that while a detailed description of the components of the Proposed Development could be found at Chapter 2 of the Environmental Statement ("ES") [**APP-044**], the submissions would focus on the legal status of these components. The Applicant referred to the slide reproduced below in making these submissions, which has already been submitted as an appendix to the Written Summary of the Applicant's Oral Case at Issue Specific Hearing 1 [**REP1-064**] but is also included here for ease of reference.

2.1.2 The status of the Immingham Green Energy Terminal (the "**Terminal**") as an NSIP terminal is addressed in the Explanatory Memorandum [**REP1-004**] on pp. 11-2 [2.12]-[2.14.4]; and the Planning Statement [**APP-226**] at sections 1.3 (pp. 4+), 4.2 (pp. 20+) and 4.5 (pp. 25+).

2.1.3 As those documents explain the harbour facility comprises the new Terminal, namely the in-river jetty with one berth together with its integral landside access ramps and topside loading and unloading infrastructure, pipes, pipelines and other utilities connecting the NSIP to the hydrogen production facility (which itself forms a part of the AD and is referred to at paragraph 2.1.8 below.)



Components of the NSIP and Associated Development

Component of NSIP (Work No.1)	Component of Associated Development (Work Nos. 2 – 10)
New in-river berth adjacent to the main navigation channel of the River Humber, including:	Jetty access road (Work No. 2)
• A jetty, consisting of an approach trestle, approximately 1.1km in length, leading up to one berth, including loading platforms and berthing and mooring dolphins with link walkways	Ammonia storage tank and associated, buildings, plant and infrastructure (Work No. 3)
• Jetty access ramp making landfall above mean high water mark	Underground culvert beneath Laporte Road connecting Work Nos. 3 & 5 (Work No.4)
• Topside loading and unloading infrastructure, including ancillaries	Hydrogen production facility and associated buildings, lant and infrastructure (Work No.5)
• Pipes, pipelines and utilities and associated works	Underground pipelines, pipes, cables linking (Work Nos. 3 & 7)
• Local raising flood defence	Hydrogen production, storage and distribution facility (Work No. 7)
• A capital dredge of the berth pocket to -14.5m below Chart Datum	Temporary construction lay down areas adjacent to Queens Road (Work No. 8) and Work No. 2 (Work No.9)
	Temporary modification of overhead lines and removal of highway signage (Work No. 10)

2.1.4 The NSIP is comprised in Work No. 1 in Schedule 1 (Authorised Development) to the draft Development Consent Order ("**dDCO**") [**REP1-016**]. Those elements comprising AD are in Work Nos. 2 – 10 of Schedule 1.

2.1.5 The Applicant explained that the division between the NSIP and the AD occurs broadly where the jetty touches the land and as is often the case there is an element of judgment involved as to where the division lies, but it is of no consequence for the purposes of decision-making provided that each element is either part of the NSIP or the AD.

2.1.6 The Terminal itself constitutes an NSIP under sections 14(1)(j), 24(2) and 24(3)(c) of the PA 2008.

(a) S14(1)(j) comprises the construction or alteration of harbour facilities. In this case the Proposed Development applied for constitutes an 'alteration'.

(b) S24(2) provides that the alteration of harbour facilities is within s 14(1)(j) only if:

(i) The Terminal will be wholly in England or in waters adjacent to England (which is the case in relation to the Terminal); and

(ii) The effect of the alteration will be to increase by at least the relevant quantity the quantity of material the embarkation or disembarkation of which the facilities are capable of handling.

2.1.7 S. 24(3)(c) – this is a facility for cargo ships and thus the relevant quantity is 5m tonnes. The capacity of the jetty is in the order of 11 million tonnes of liquid bulk cargo, and therefore well in excess of the relevant quantity.

2.1.8 The main elements of AD in this case comprise the Jetty Access Road connecting the Jetty to the public highway, and the hydrogen production facility including the pipelines, pipes and other utilities which will connect the NSIP to that facility.

2.1.9 The Applicant noted that all these elements are associated with the NSIP and therefore fall within the definition of AD in S.115(2) of the PA2008.

2.1.10 The Applicant then referred to and summarised what is set out in the Explanatory Memorandum [**REP1-004**] at paragraphs 2.16 – 2. 21 which addresses the core principles set out in paragraph 5 of the Government's "Planning Act 2008: Guidance on associated development ("**AD**") applications for major infrastructure projects" published in April 2013 by the Department for Communities and Local Government (the "**Guidance**"). The Applicant's counsel briefly summarised the Applicant's position on the application of each of the core principles. The Applicant noted that further information in relation to this would be included in the Applicant's responses [**REP1-023**] to the Examining Authority ("**ExA**")'s First Written Questions ("**WQ1**") (c.f.Q1.2.2) [**PD-008**].

2.1.11 In relation to the Guidance's Core Principle (i) ("*the definition of associated development, as set out in paragraph 3 above, requires a direct relationship between associated development and the principal development. Associated development should therefore either support the construction or operation of the principal development, or help address its impacts*"), the Applicant noted:

(a) The relationship between the AD and the NSIP is 'direct', as in each case the AD either supports the construction or operation of the NSIP or helps to address its impacts. The Applicant noted that any one of those three possibilities is sufficient.

(b) The Applicant then stressed that it is important to understand that Core Principle (i) is not whether the AD is '*strictly necessary*' to the operation of the NSIP, which was a phrase included in ExA's WQ1 Q1.2.2.2(a) and (c), but rather it is simply whether there is a direct relationship with the NSIP and the AD supports its operation.

(c) In this case, as the Explanatory Memorandum [**REP1-004**] sets out at paragraph 2.17, the jetty cannot operate as designed without appropriate landside facilities to receive the cargo that is imported.

(d) In the case of the jetty's first customer, Air Products (BR) Limited ("**Air Products**"), the import of ammonia for the production of hydrogen requires facilities to receive, store and process that ammonia.

(e) Ammonia is a hazardous substance and once imported over the jetty it must be stored and treated in a way that limits the associated toxic risk. That leads to the need for storage and processing facilities close to the point of landing. The pipeline from the jetty to the ammonia storage tank represents the greatest risk of potential damage and accidental leakage and needs to be kept as short as practical. In addition, the further the ammonia is moved in pipes, the greater the loss of refrigeration of the liquid and hence the greater the energy use in maintaining the ammonia at the correct refrigeration temperature.

(f) The hydrogen production facility plainly has a direct relationship with and supports the operation of the jetty by enabling the efficient and effective import of ammonia for production of green hydrogen.

(g) Equally without the jetty enabling a supply of ammonia, the hydrogen production facility would not be constructed because it relies directly on the import of ammonia via the jetty.

(h) For the same reasons, all of the other elements of AD which enable the ammonia to be transported from the incoming vessels to the hydrogen production facility and thereafter transported off-site to end users are part and parcel of the operation of the jetty.

(i) The Applicant explained that this is typical of the way that ports function. It is common for them to provide facilities for customers of the port to store and, where necessary, process the imported cargo for onward transmission to the point of use. The nature of those facilities necessarily varies depending on the cargo in question. The Applicant then made submissions on examples specific to liquid bulks, information on which can be found at page 45 of 64 of the Written Summaries of the Applicant's Oral Case at ISH 1 [**REP1-064**].

2.1.12 In relation to the Guidance's Core Principle (ii) ("*Associated development should not be an aim in itself but should be subordinate to the principal development*"), the Applicant submitted:

(a) The hydrogen production facility (forming part of the AD) is subordinate to the jetty (i.e. the NSIP), and would not be constructed and nor could it operate without the jetty (see also requirement 5 at Schedule 2 ("Requirements") of the dDCO [**REP1-016**] which prevents that from occurring). As explained above, it supports the operation of the jetty.

(b) The subordinate status also needs to be understood by reference to the nature and in particular the capacity of this particular NSIP, and how port facilities are provided, as explained in the National Policy Statement for Ports ("**NPSfP**"):

(i) The NSIP itself (i.e. the jetty) will have a capacity in the order of 11 million tonnes, so the import of ammonia to the hydrogen production facility will only account for a minority of the capacity created. It is anticipated that most of the remaining capacity will be taken up in due course by the import of CO2.

(ii) As such, the relative physical size of the two developments (i.e. the NSIP and the AD) or the area of land occupied by them is not therefore the appropriate metric for considering subordinate status in this context. Rather, it is the functional operational relationship that dictates the subordinate status.

(iii) The Applicant explained that this is typical of NSIPs of this type, where the harbour facility itself might be relatively small (e.g. a new berth) but the additional import capacity that it creates is substantial, and generates a need for much larger areas where the imported cargo can be stored and/or processed. The Applicant illustrated this in more detail at ISH 1 in relation to explanations given of similar facilities for liquid bulks, and further in the Applicant's WQ1 responses [**REP1-023**].

(iv) The Applicant explained how the development of port facilities is undertaken on a commercial basis in response to market demand. Hence the fact that a particular NSIP is brought forward in response to demand from a particular customer needing its own AD so as to facilitate the intended import operation is entirely typical. That commercial relationship does not make the AD '*an aim in itself*' or mean it is not subordinate. It simply reflects the way port development comes forward in a market economy, which the Applicant has also addressed in its response to WQ1.2.2.3 [**REP1-023**].

2.1.13 In relation to the Guidance's Core Principle (iii) ("*Development should not be treated as associated development if it is only necessary as a source of additional revenue for the applicant, in order to cross-subsidise the cost of the principal development. This does not mean that the applicant cannot cross-subsidise, but if part of a proposal is only necessary as a means of cross-subsidising*

the principal development then that part should not be treated as associated development"), the Applicant noted that it is only development that is provided for the sole purpose of cross-subsidy which infringes this core principle.

(a) The Applicant gave as a hypothetical example the development of a casino alongside the jetty which has no functional link at all to the jetty, but is needed to generate sufficient income to make the development commercially viable. That development would be solely for the purposes of cross subsidy and would not be AD. The Applicant confirmed that none of the AD is being provided only to subsidise the cost of the NSIP, so Core Principle (iii) has no application on the facts of this case.

(b) To be clear in terms of the underlying principle, the issue is not whether the port operator would make the commercial decision to develop the NSIP without a customer signed up, (which the Applicant has since addressed in its response to WQ1.2.2.4 [**REP1-023**]), but instead whether the item of development concerned does not directly support the operation of the NSIP and is only being provided as a source of revenue.

2.1.14 In relation to the Guidance's Core Principle (iv) ("*Associated development should be proportionate to the nature and scale of the principal development. However, this core principle should not be read as excluding associated infrastructure development (such as a network connection) that is on a larger scale than is necessary to serve the principal development if that associated infrastructure provides capacity that is likely to be required for another proposed major infrastructure project. When deciding whether it is appropriate for infrastructure which is on a larger scale than is necessary to serve a project to be treated as associated development, each application will have to be assessed on its own merits. For example, the Secretary of State will have regard to all relevant matters including whether a future application is proposed to be made by the same or related developer as the current application, the degree of physical proximity of the proposed application to the current application, and the time period in which a future application is proposed to be submitted*"), the Applicant submitted that:

(a) The nature of the jetty is that it is designed to facilitate the import of liquid bulks, and in particular as a first user liquid ammonia for the production of green hydrogen. The provision of the necessary storage and production facilities to enable this is to be achieved is very clearly proportionate in terms of its nature.

(b) It does not therefore provide any more capacity than is needed to meet the volume of ammonia to be imported through the NSIP. As the Applicant previously explained, the jetty will have substantial residual capacity to embark and disembark significant quantities of other cargoes in addition to that which is capable of being processed by Air Products. The AD is therefore proportionate in scale.

2.1.15 In relation to the Guidance's Paragraph 6 ("*it is expected that associated development will, in most cases, be typical of development brought forward alongside the relevant type of principal development or of a kind that is usually necessary to support a particular type of project, for example (where consistent with the core principles above), a grid connection for a commercial power station.*"), the Applicant submitted that:

(a) Although the import of ammonia for the production of green hydrogen is in itself novel, the underlying nature of the relationship between the jetty and the AD is entirely typical of port NSIPs.

(b) In short, facilities for the storage, processing and onward transport of imported cargo are typical AD for a harbour facilities NSIP. As the Explanatory Memorandum explains at paragraph 2.21 [**REP1-004**] the Ro-Ro terminal and aggregates terminal authorised at

Tilbury 2 [Port of Tilbury (Expansion) Order 2019] had essentially the same relationship with the two berths authorised as NSIPs as the AD proposed in this case.

(c) The fact that the particular cargo and the particular processing facility is in itself novel does not change that. It is an inevitable feature of the fact that the type of cargo imported through ports changes over time in response to changing needs and markets.

2.2 **Responses to Questions from the ExA at ISH 1**

2.2.1 In response to the above submissions, the ExA raised the following questions orally.

2.2.2 Firstly, the ExA queried why the ammonia pipe and pipeline are part of the NSIP rather than the AD, and related to that why the jetty access road was part of the AD and not the NSIP.

(a) The Applicant replied that this is due to the fact that there is a degree of judgment as to where the line between AD and NSIP is drawn (as referred to in paragraph 2.1.5 above), and explained that those pipelines forming part of jetty itself enable the jetty to function, as for the jetty to be able to import liquid bulks, pipelines are needed to get the product from the end of the jetty to the land. On this basis the Applicant took the view that those pipelines are appropriately regarded as part and parcel of the jetty and therefore the NSIP. Once landfall is reached, the pipelines could then be taken in different directions and you may or may not need the same type of pipeline, and in relation to these the Applicant took the view that these would be AD. The Applicant then reiterated that for decision-making purposes, where the division between AD and NSIP lies is of no consequence provided that the components are definitely either NSIP or AD.

(b) The Applicant then addressed the jetty access road. Whilst the road is needed in order to allow the jetty to function, that is typical and indeed is characteristic of AD. The construction of the jetty access road is not in itself the alteration of a harbour facility, whereas the construction of the jetty clearly does constitute the alteration of a harbour facility. The Applicant explained that the purpose of the jetty access road is to enable access to and from the jetty, rather than to take the product from the processing facility onto the public road network. The Applicant acknowledged the line could be drawn differently but that it had taken the judgment that the categorisation of the jetty access road as AD rather than an NSIP is appropriate.

2.2.3 Secondly, the ExA also requested examples of where ports have facilities for processing their cargo landside, and other examples of where a similar development involves AD that is functionally subservient but potentially larger in size and scale and why that is commonplace.

(a) The Applicant addressed this point in relation to liquid bulks later in its submissions (see page 45 of 64 of the Written Summaries of the Applicant's Oral Case at ISH 1 [**REP1-064**]). The Applicant also referred to the fact that non-liquid bulk examples could be provided, including useful ones at the Port of Immingham that could be viewed as part of the accompanied site visit.

2.2.4 Thirdly and finally, the ExA queried what kind of associated facilities potential future customers of the port might require, if they start using the facility, in light of the Applicant's reference to the expected future use for CO2.

(a) The Applicant stated that in relation to CO2 importing, pipelines and necessary associated infrastructure would be required, and noted that it would follow up in further detail in writing, which it has since done with its submission in response to First Written Questions 1.2.1.3 **[REP1-023]** and in submission at Deadline 3.

2.3 **Submissions made by Applicant's counsel at ISH 6**

2.3.1 The Applicant's comments on this topic at ISH 6 are summarised in the Applicant's Written Summaries of its Oral Submissions at that hearing, which are being submitted at Deadline 3 (3 May 2024), and as such are not repeated here.

Appendix 2: Extracts of Court Judgement - Ross vs Secretary of State 2020 EWHC226

Neutral Citation Number: [2020] EWHC 226 (Admin)

Case No: CO/3131/2018

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 07/02/2020

Before :

MR JUSTICE DOVE

- -

Between :

MR BRIAN ROSS AND MR PETER SANDERS (ACTING ON BEHALF OF STOP STANSTED EXPANSION)	**Claimants**
- and -	
SECRETARY OF STATE FOR TRANSPORT	**Defendant**
-and-	
(1) UTTLESFORD DISTRICT COUNCIL	**Interested**
(2) STANSTED AIRPORT LIMITED	**Parties**

- -
- -

Paul Stinchcombe QC and Richard Wald (instructed by **Birketts LLP**) for the **Claimant**
Charles Banner QC (instructed by **Government Legal Department**) for the **Defendant**
Thomas Hill QC and Philippa Jackson (instructed by **Town Legal LLP**) for the **2nd Interested Party**

Hearing dates: 12th-13th November 2019

- -

Approved Judgment

Judgment Approved by the court for handing down.

Mr Justice Dove :

1. This is a claim for judicial review of the decision of the Defendant, the Secretary of State for Transport, proposed development a planning application made by the Second Interested Party to the First Interested Party as being a nationally significant infrastructure project ("an NSIP") in terms of sections 23 and 35 of the Planning Act 2008, and therefore subject to the approval processes required by the 2008 Act, including determination at the national level. The Claimants are Mr Brian Ross and Mr Peter Sanders, both of whom are acting on behalf of the group Stop Stansted Expansion ("SSE"). SSE campaign to ensure that any development of Stansted Airport is sustainable and takes due regard of the natural environment, heritage assets and the quality of life of local residents. As the Defendant did not consider the proposed development to be an NSIP, the Second Interested Party's planning application has fallen to be considered under the terms of the Town and Country Planning Act 1990 by the First Interested Party, in whose administrative area Stansted Airport lies. The First Interested Party had resolved to grant planning permission, but a final decision had not been made at the time of the hearing; as this judgment was in the very final stages of preparation the court was advised that the First Interested Party has decided to refuse planning permission, but since this new turn of events could only impact upon relief it seems sensible to continue to produce a judgment dealing with the substantive issues. The First Interested Party and the Second Interested Party are both joined to this litigation, but only the Second Interested Party participated in the hearing.

2. The planning application made by the Second Interested Party with which these proceedings are concerned involves building two new taxiway links, being a rapid entry taxiway and a rapid exit taxiway, and nine additional aircraft stands. These new developments are planned to take place in four separate locations within the existing footprint of Stansted Airport. It is uncontentious that these developments would increase the use of Stansted Airport's single runway and its potential to handle aircraft movements. The planning application also includes a request for the planning cap of 35 million passengers per annum ("mppa") to be increased to 43 mppa.

3. The Claimants challenge the decision of the Defendant of 28th June 2018 not to treat the planning application as development requiring development consent under the 2008 Act on two grounds. First, it is argued that the proposed developments should have been considered to be an "alteration of an airport" falling within the scope of section 23(4)-(6) of the Planning Act 2008. The effect of these provisions, it is contended, was that it was mandatory for the Defendant to consider that the proposed developments comprise an NSIP within the meaning of the 2008 Act. This is because, on the Claimants' calculations, the proposed developments would increase the "number of passengers for whom the airport is capable of providing air passenger transport services" by at least 10 mppa. Section 23 in effect provides that once this threshold of 10 mppa is passed, the Defendant has no choice but to treat the planning application as an NSIP and decide the planning application at a ministerial level under the framework of the Planning Act 2008.

4. At the hearing, in relation to Ground 1 various arguments were made which are more fully considered below. However, in short, argument centred upon the meaning of "capable" in the phrase "the number of passengers for whom the airport is capable of providing air passenger transport services" in section 23 of the Planning Act 2008.

The Claimants argued that the word "capable" indicated that one must calculate the number of passengers that could be transported through Stansted Airport exploiting the new infrastructure and the aircraft it serves, not limited to what would be likely but examining arithmetically what could be technically possible as a result of the proposed developments. The Defendant and the Second Interested Party argued that the number of passengers capable of being transported should be a judgment calculated by reference to what is a realistic and likely usage of the new runway infrastructure, rather than the most that might be hypothetically feasible. The Second Interested Party also disputed that the proposed structural developments constituted a relevant "alteration" under section 23, as there were no proposed changes to the runway itself.

5. The Claimants' Ground 2 is that, even if the proposed developments at Stansted Airport do not satisfy the NSIP criteria set out in section 23 of the Planning Act 2008, the Defendant should nonetheless have exercised his discretionary power under section 35 of the 2008 Act to treat the developments as nationally significant and therefore subject to the 2008 decision-taking process and a decision at a national level. In support of this ground, the Claimants pointed to, amongst other things, their suggestion that the application was in truth part of a wider project for expansion of passenger throughput in excess of the NSIP definition, and the ramifications of increased carbon emissions as a result of increased air travel which ought to have led to the conclusion that the development should be treated as an NSIP. Again, the Claimants' submissions in respect of this Ground are set out more fully below.

6. This judicial review application came before the court as a rolled-up hearing. Accordingly, it is necessary to consider in this judgment whether the Claimants should be given permission to bring these proceedings on their pleaded grounds, and, if any of those grounds are arguable, whether they should succeed in substance.

The Facts

7. In 1991, Stansted Airport was opened as London's third airport, there having existed a smaller airport on the site since 1942. Stansted Airport is presently the subject of a £600 million capital investment programme to transform passenger facilities. The development programme is being rolled out in three phases. The first phase focuses on improvements to existing terminal facilities: it commenced in January 2018 and is now largely complete. The second phase is the development of a new arrivals terminal, which obtained planning consent from the First Interested Party in 2017. The third phase is the current planning application to increase the passenger movements cap to 43 mppa and for the infrastructure works described above to make best use of the existing runway.

8. Stansted Airport's initial planning approval was for passenger throughput of 8 mppa. However, over time, this planning cap has been incrementally increased. In 1999, it was raised to 15 mppa. In 2003, it was raised to 25 mppa. In 2008, it was raised again to its current cap of 35 mppa. In 2017, Stansted Airport had a passenger throughput of 25.9 mppa. As at December 2018, the total passenger throughput for the year had increased by 8.1% from the 2017 figure to just over 28 mppa.

9. In addition to the passenger throughput cap, Stansted Airport is subject to caps on the total number of flight movements in and out of the airport per year, sometimes

referred to as ATMs. Since 2008, it has had a flight movement limit of 274,000 ATMs per annum. Of that number, up to 243,500 flights may be passenger flights. The remainder are cargo flights and other miscellaneous flights. Currently, 80% of the passenger flights that operate from Stansted Airport are budget airline flights, which generally operate short-haul routes using narrow-bodied aircraft.

10. Stansted Airport is subject to restrictions on the number of night-time flights that may operate to and from it. Accordingly, between the hours of 11:30 pm and 6:00 am the Second Interested Party cannot operate its runway at or near full capacity. The restrictions on night-time flights are not governed by planning regime caps, but rather by a separate regime set out in section 78 of the Civil Aviation Act 1982, which is overseen by the Secretary of State. The current night-time flight restrictions will expire in October 2022, when the restrictions will be subject to review and re-implementation will be considered. The Second Interested Party's planning application does not seek to alter night-time flight restrictions. Instead, the Second Interested Party has said that its forecast increase in passengers and passenger aircraft movements is contained within the daytime period of 6:00 am to 11:30 pm.

11. In March 2015, following consultation, the Second Interested Party published its masterplan for the airport, known as the Sustainable Development Plan ("SDP"). In the "Land Use" section of the SDP, it is provided that:

> "This Land Use Plan identifies the land, the uses and the facilities required to support the maximum capacity of the airport's single runway, up to annual throughput of between 40-45 million passengers and over 400,000 tonnes of cargo.
>
> …
>
> The ultimate capacity of the airport's single runway is likely to be between 40-45 million passengers a year. The exact capacity will be a product of our route network, aircraft size, the spread of traffic through the day and year and the capacity drivers described earlier. However, for the assessment of certain environmental and surface access effects we have used a figure of 43mppa as the maximum throughput the airport could achieve with a single runway; owing to capability limits of the runway and the associated infrastructure.
>
> …
>
> We expect Stansted to be able to reach 35mppa within the current cap of 243,500 PATMs [passenger air transport movements]. Operating at full capacity, we expect the single runway to be capable of handling some 285,000 PATMs, based on current market knowledge and our view of how the market will develop in the future."

12. In the "Economy and Surface Access" portion of the SDP, the current and future economic impact of Stansted Airport is modelled using three sets of alternative figures. The first set of figures uses the 2013 figure of a passenger throughput of 17

mppa. The second set of figures models the economic impact using the figure of 35 mppa. The final set of figures start from the basis of 45 mppa. The use of 45 mppa is subject to the caveat that "the exact maximum passenger throughput figure is likely to be between 40 and 45 million passengers a year and will be a product of our route network, aircraft size, the spread of traffic through the day and year and the capacity drivers described earlier".

13. On 2nd February 2017, the Defendant met with the Second Interested Party in a meeting described as a "quarterly catch-up". In a note of the meeting, it is recorded that the Second Interested Party is "planning for additional growth to 50 mppa in the future". Further the meeting notes record that its "next planning application, expected to be submitted in May, would be to increase its existing planning cap of 35 mppa to 43 mppa". On 10th May 2017, the Defendant and the Second Interested Party met again, but it appears from meeting notes that no mention was made of the 50 mppa figure. The implications of these noted observations are disputed, and the nature of the disputes and the parties' submissions in relation to them are set out fully below. It suffices for the present narrative to observe that the Claimants contend that they demonstrate the clear ambition of the Second Interested Party to develop the capacity of their airport to a level well in excess of that contemplated by the planning application, an ambition which was clearly known to the Defendant. By contrast, in relation to the 50 mppa figure in the notes from 2nd February 2017, the Second Interested Party submits that the reference to future growth to 50 mppa is a reference to projected growth in unconstrained passenger demand.

14. In May 2017 there were two meetings between the Second Interested Party and the First Interested Party, the minutes of which were obtained by SSE by way of an FOI request. On 3rd May 2017, handwritten notes taken at the first meeting by an unknown attendee record "2029 forecast 44 million airport growth". It was also noted that the airport needed to have a policy for growth and that, without constraints, the airport would have a runway capacity of "50-55m". Between the parties it is disputed whether the "m" in this last note refers to "million" passengers per year or, as the Defendant and the Second Interested Party assert, hourly "movements". On 17th May 2017, a handwritten note of a meeting by an unidentified author contains the note "applying for 44½ million as NSIP cap is 45 million". The Claimants submit again that this note demonstrates that the Second Interested Party was deliberately seeking to expand in a way that would avoid the NSIP process, and that this is a relevant consideration when it comes to Ground 2 of their application.

15. On 28th June 2017, the Second Interested Party wrote to the Director-General for International, Security and Environment at the Defendant, notifying her of the intention to apply for planning permission for further works at the airport and, as part and parcel of that, to seek to raise the cap from 35 mppa to 44.5 mppa and allow an extra 11,000 flights. In the letter it was written that:

> "With capacity for almost 45 mppa, Stansted can contribute a further 20 mppa of valuable capacity to the London system at a time when other airports face severe constraints, and benefit consumers by boosting competition and keeping fares low. Stansted's growth will strongly support the achievement of the Government's wider policy objectives, including the principle of making best use of available capacity in the period to 2030."

16. On 4th July 2017, the Stansted Airport Consultative Committee Corporate Affairs Group held a meeting at Stansted Airport to discuss future development at the airport and the annual work programme, including the planning application and the increase proposed to the passenger cap. At that meeting members noted that the increase in the proposed planning cap of approximately 9.5 mppa meant that the application could be determined locally rather than be treated as a NSIP, although there was the option of asking the Secretary of State for Communities and Local Government to call in the application.

17. On 28th July 2017, SSE met with the First Interested Party to discuss the proposed development at Stansted Airport and to make the argument that the development was nationally significant. In particular, the representatives of SSE made points ventilated in the present proceedings in relation to the likely throughput of passengers being understated and the status of the airport as a piece of nationally significant infrastructure.

18. Meanwhile in June 2017, and alongside some of the discussions set out above, the Second Interested Party submitted a request for a Scoping Opinion to the First Interested Party in relation to the proposed planning application, and a response was received on 21st December 2017.

19. In the Scoping Request report submitted for the proposed planning application, the Second Interested Party introduced its planning application in the following manner:

> "Stansted Airport Limited (STAL) intends to submit a planning application to Uttlesford District Council (UDC), to facilitate making the best use of the existing single runway. This will include amending the existing cap on the number of passengers from 35 million passengers per annum (mppa) to 44.5mppa, as well as an associated increase in aircraft movements (passenger and cargo air traffic movements (ATMs), plus General Aviation) from the existing permitted total of 274,000 to 285,000 per annum – representing a net increase of 11,000 movements or 3.9%.
>
> The planning application will seek permission for additional airfield infrastructure. This will comprise two new links to the runway, six additional stands on the mid airfield … and three additional stands at the north eastern end of the Airport…"

20. The Scoping Request report contained forecast annual passenger numbers, calculated both on the basis of the existing 35 mppa passenger cap and an increase of the cap to 44.5 mppa. It was estimated that if the cap was maintained at 35 mppa, then annual passenger throughput would reach that cap by 2024 based upon the Second Interested Party's forecasting data. The existing cap of 274,000 annual aircraft movements would not be exceeded, with there being 247,000 projected aircraft movements in 2029. However, if the passenger cap was lifted to 44.5 mppa then it was forecast that in 2028 there would be 43 mppa, and that the cap of 44.5 mppa would be reached in 2029. The contention based upon these figures was that by lifting the cap on passenger numbers best use could be made of the runway capacity at the airport. It was also projected that if the passenger cap was increased and the aircraft movement

cap was increased, then the total number of annual aircraft movements in 2029 would be 285,000, again reflecting best use of runway capacity.

21. SSE were concerned by the Second Interested Party's stated intention to seek an increase in the annual passenger cap to approximately 44.5 mppa, in particular as they perceived that it was an attempt to game the system by being just below the 10 mppa NSIP threshold provided by s23(8) of the Planning Act 2008. The Scoping Report, and their concerns in relation to it, formed part of the discussions that SSE had with the First Interested Party at the meeting on 28th July 2017.

22. In October 2017, the Defendant published a document entitled "UK Aviation forecasts: Moving Britain Ahead". In this document, the difference between constrained and unconstrained national air passenger capacity forecasts was explained:

> "Forecasts are made for both unconstrained demand and demand constrained by airport capacity limitations. Unconstrained forecasts give a picture of underlying demand while capacity constrained forecasts form the primary basis of the department's appraisal and decision making processes.
>
> …
>
> Without constraints to airport growth, demand is forecast to rise to 355 million by 2030 (central scenario) and 495 million passengers in 2050 within a range of 480 to 535 million. When capacity constraints are taken into consideration, and no new runways are added, national demand is forecast to rise to 315 million by 2030 (central scenario) and 410 million passengers in 2050 within a range of 395 to 435 million passengers."

23. On 18th October 2017, the Second Interested Party wrote a letter to the First Interested Party to alter the request for an EIA Scoping Opinion under regulation 15 of the Town and Country Planning (Environmental Impact Assessment) Regulations 2017. In the letter, it was stated that in the light of community consultation and the 800 consultation responses received, the Second Interested Party would adapt its proposals so that airport growth could be met with the current total aircraft movement limit of 274,000, without the increase in the cap on the number of aircraft movements which had been previously proposed to 285,000. Further alterations as a result of this change were that instead of modelling the forecast number of movements and passengers to 2029 they were now modelled to 2028, and the increase in the cap of the number of passengers per annum was reduced from 44.5 mppa to 43 mppa. The letter explained the implications of these changes as follows:

> "The difference in the forecasting is limited such that we do not consider this change alters the original proposed content of the Scoping Report submitted in June 2017. We believe growth to 43mppa could be reached in 2028 with some 253,000 PATMs. By comparison to our previous forecast tables … in the Scoping Report, the passenger numbers, associated Passenger ATMs as well as Cargo ATMs remain the same in that year. In

> order to maintain a total movement limit of 274,000 it is the Other / General Aviation traffic that becomes constrained as the runway slot availability becomes limited.
>
> For clarity, there is no alteration to the physical development works proposed."

24. In relation to the revised figure of 43 mppa, Mr John Twigg of the Second Interested Party explained in his second witness statement that:

> "The clear message from that consultation was significant public concern at the suggested increase in "aircraft movements per annum" ("atms") from 274,000 to 285,000 a year. The decision to maintain the current limit of 274,000 atms places an inevitable constraint on Stansted's growth, and the forecast effect of this constraint is to achieve a throughput of 43 mppa. This was forecast to occur in 2028. As Stansted's movements would then be capped,… a figure of 45 mppa at 2029 would simply not be achievable."

25. On 9th February 2018, the Defendant met with the Second Interested Party. Minutes of the meeting record that "Future phases of the investment programme, particularly the arrivals terminal, are dependent on successfully raising the planning cap."

26. On 22nd February 2018, the Second Interested Party submitted their planning application to the First Interested Party in relation to the two new taxiway links and nine new aircraft stands. The application also sought to raise the planning cap on passenger throughput from 35 mppa to 43 mppa. The Claimants have emphasised the fact that this application for an increase to 43 mppa is less than the airport's original proposal in the Scoping Report to lift the cap to 44.5 mppa. The Second Interested Party has emphasised that the application did not include a proposal to increase either the aggregate annual limit on flight movements from 274,000, nor the size of the existing noise contour around the airport.

27. The application was accompanied by documents including a Planning Statement, Statement of Community Involvement, Environmental Statement and Transport Assessment. In the Planning Statement, the Second Interested Party wrote that:

> "Stansted has a modern and fully capable runway with a full-length parallel taxiway, but it is currently under-utilised both throughout the day and also its potential hourly capacity. To enable best use of runway capacity, some minor taxiway improvements form part of this application and include a new rapid access taxiway and rapid exit taxiway from the runway. These improvements will reduce runway occupancy times and reduce congestion by improving the sequencing of aircraft to and from the runway. These works will enable us to make best use of the runway's capacity by enabling a greater number of aircraft movements per hour and increasing the runway throughput from 50 to 55 movements per hour."

28. The Planning Statement also stated that the increase of passenger throughput to 43 mppa was in line with the objectives set out in the 2015 SDP. Further, the airfield development works would accommodate the forecast number of 253,000 passenger aircraft movements for the period to 2028. It was noted that the figure of 253,000 passenger aircraft movements took into account expected increases in aircraft size and load factors, which result in a higher number of passengers per aircraft movement and the ability to handle 43 mppa over the next decade.

29. In the Environmental Statement accompanying the application, Stansted Airport's forecast growth to 43 mppa by 2028 was modelled and compared with the forecast if the passenger cap were not lifted. The model was based on constrained, rather than unconstrained, demand. It was predicted that the average passengers per air transport movement (PATM) would grow from the current figure of 160 to 170 by 2028. The prediction that PATM would increase reflected the assumptions that airlines would increase the number of seats per aircraft, more long-haul services would be introduced at the airport, and there would be a small "improvement in load factors". Because of the increases in average passenger loading, ATMs were forecast to grow at a slower rate than passengers, reaching just over 243,000 movements by 2028 if the passenger cap were lifted to 43 mppa. By contrast, without the proposed development and with the passenger cap remaining at 35 mppa, it was predicted that ATMs would reach 212,500 by 2028.

30. The Environmental Statement contained a chapter on socio-economic impacts. In this chapter, it was noted that the proposed expansion would bring national economic benefits:

> "If the figure derived from [Oxford Economic Forecasting] work referred to above is adopted, the wider impacts on the business efficiency and productivity from the proposed expansion at Stansted would produce an increase in annual UK GVA of £1.2 billion. As around 79% of the passengers will be from the East of England and London the impact at that level is estimated to be £0.95 billion.
>
> Were the figures implied by the Oxera work to be adopted, the wider impact would be even greater at around £5.6 billion at the UK level and £4.4 billion at the London and East of England level."

31. On the same day, 22nd February 2018, the Second Interested Party published a press release entitled "London Stansted Airport commits to long-term growth within approved flight and noise limits". The press release contained the following passage:

> "The application seeks permission to make best use of the airport's existing single runway over the next decade, a move which will deliver significant economic benefits to the UK and the vibrant East of England region, create 5,000 new on-site jobs, improve passenger choice and convenience and boost international long-haul routes to fast-growing markets like China, India and the US. The application will also ease pressure

> on the London airport system by unlocking additional capacity at a time when other airports are full."

32. On 13th September 2018, the Second Interested Party published a press release entitled "London Stansted sets sights on long-haul growth". The press release provided that:

> "In the next five years London Stansted is aiming to secure direct services to at least 25 new long-haul destinations around the world, with a strong focus on the Far East, India, North America and the Middle east.
>
> …
>
> As the London area's fastest growing airport and with ambitious plans to maximise the potential of existing runway capacity, Stansted is well placed to meet rising demand from airlines across the world eager to gain access or grow within the London aviation market.
>
> In addition, Stansted already provides the most direct connections to Europe of any UK airport, and this network is set to grow further as the airport works with existing and new carriers to provide even more choice."

33. On 14th November 2018, the First Interested Party resolved to grant planning permission.

34. Earlier in that year, on 19th March 2018, SSE wrote a detailed letter to the Secretary of State for Housing, Communities and Local Government, asking him to intervene in the Second Interested Party's planning application. On 14th June 2018, that request was repeated as a new Secretary of State had been appointed since the previous letter was sent. Many of the points made in the letter of 19th March 2018 reflect the submissions made in the Claimants' application for judicial review, albeit the letter ranged wider in terms of the powers that the Claimants invited the Secretary of State to exercise, and did not contain all of the matters referred to in their submissions in support of this judicial review. On 16th April 2018, the Second Interested Party wrote to the Secretary of State setting out reasons why SSE's request should be rejected.

35. On 21st June 2018, the Secretary of State for Housing, Communities and Local Government wrote to SSE to advise that the issues relating to sections 23 and 35 of the Planning Act 2008 were matters for the Defendant, and only if the Defendant did not exercise his powers under section 23 and 35 of the 2008 Act would the Secretary of State for Housing, Communities and Local Government consider the requests to call in the application under the 1990 Act. On 28th June 2018, the Defendant rejected SSE's request to consider the proposed developments as being an NSIP. This is the decision being challenged in these proceedings, and is explained more fully below.

36. Shortly prior to the decision under challenge in this case, on 5th June 2018, the Defendant published "Airports National Policy Statement: new runway capacity and infrastructure at airports in south-east of England" (NPS) together with the policy

"Beyond the horizon: The future of UK aviation-Making best use of existing runways" ("MBU"). The NPS provides the basis for decision-taking in relation to future development consent applications relating to what the NPS describes as the North West Runway Scheme at Heathrow Airport ("LHR NWR"), while the MBU policy paper confirms the Government's support for airports beyond Heathrow making "best use" of their existing runways.

37. The MBU policy paper notes that the Government is supportive of airports making best use of their existing runways, including those in the South East other than Heathrow which has its own policy, subject to environmental issues being addressed. In relation to the role of national policy, the MBU policy paper provides:

> "There are, however, some important environmental elements which should be considered at a national level. The government recognises that airports making best use of their existing runways could lead to increased air traffic which could increase carbon emissions.
>
> We shall be using the Aviation Strategy to progress our wider policy towards tackling aviation carbon. However, to ensure that our policy is compatible with the UK's climate change commitments we have used the DfT aviation model to look at the impact of allowing all airports to make best use of their existing runway capacity. We have tested this scenario against our published no expansion scenario and the Heathrow Airport North West Runway scheme (LHR NWR) option, under the central demand case."

38. Under the heading "Role of national policy", the MBU policy included a table from the Defendant's aviation model showing the carbon dioxide emissions from flights departing UK airports, in million tonnes. The table shows that in 2050, it is predicted that under the MBU policy model (including the LHR NWR) there will be 40.8 million tonnes of carbon dioxide emissions.

39. As to the local environmental impacts, the MBU policy paper provides:

> "The government recognises the impact on communities living near airports and understands their concerns over local environmental issues, particularly noise, air quality and surface access. As airports look to make the best use of their existing runways, it is important that communities surrounding those airports share in the economic benefits of this, and that adverse impacts such as noise are mitigated where possible.
>
> For the majority of local environmental concerns, the government expects these to be taken into account as part of existing local planning application processes.
>
> As part [of] their planning applications airports will need to demonstrate how they will mitigate local environmental issues, which can then be presented to, and considered by,

> communities as part of the planning consultation process. This ensures that local stakeholders are given appropriate opportunity to input into potential changes which affect their environment and have their say on airport applications."

40. The MBU policy paper also contains the following policy statements:

> "Airports that wish to increase either the passenger or air traffic movement caps to allow them to make best use of their existing runways will need to submit applications to the relevant planning authority. We expect that applications to increase existing planning caps by fewer than 10 million passengers per annum (mppa) can be taken forward through local planning authorities under the Town and Country Planning Act 1990. As part of any planning application airports will need to demonstrate how they will mitigate against local environmental issues, taking account of relevant national policies, including any new environmental policies emerging from the Aviation Strategy. This policy statement does not prejudice the decision of those authorities who will be required to give proper consideration to such applications. It instead leaves it up to local, rather than national government, to consider each case on its merits.
>
> Applications to increase caps by 10mppa or more or deemed nationally significant would be considered as Nationally Significant Infrastructure Projects (NSIPs) under the Planning Act 2008 and as such would be considered on a case by case basis by the Secretary of State."

41. When developing the MBU policy, modelling was conducted to ascertain the national carbon emission impacts of airports growing in line with MBU. The modelling extended from 2016 to 2050. The 2016 figures were the only figures based on recorded data; the figures for the subsequent years were projections based on the model. The Defendant has filed evidence from Ms Sarah Bishop who was, at the times material to this application, a senior civil servant in the Defendant's department. She explains in her first witness statement that in the MBU modelling it was assumed that the permitted use cap at Stansted Airport would increase to 44.5 mppa, as this was the proposal of the Second Interested Party in the public domain at the time that document was being prepared. Thus the subsequent proposal for it to grow only to 43 mppa fell within the national modelling undertaken.

42. The MBU modelling projected that in 2018 there would be 23,220,944 passengers passing through Stansted Airport. The Claimants emphasise that the actual throughput for 2018 was just under 28 mppa. The MBU modelling predicted that on current trends the airport would have a throughput of 35,491,040 in 2050, or a throughput of 36,074,640 in 2050 if the MBU policy was implemented.

43. In her second witness statement, in relation to national aviation demand forecasts and the impact on associated carbon emissions, Ms Bishop emphasises the interaction

between national demand forecasts, assumed airport planning caps and assumed demand at airports:

> "The Department's aviation model forecast predicts the underlying, total passenger demand for all UK airports in any given year. The distribution of this predicted national demand – where demand arises – is itself subsequently predicted and, in statistical terms 'distributed' geographically and 'allocated' at airport level, taking account of a variety of factors as highlighted in the Department's 2017 Aviation Forecast documentation… The Department's model does not assume that demand at every airport increases to the level of the airport's permitted usage cap… Instead, where demand is statistically distributed depends on a variety of factors including journey purpose, where the passenger would start or end the journey, the level of congestion, and the availability of a suitable service – it is only when an airport's capacity is filled that the model allocates passengers to the next most suitable airport.
>
> … there is inherent uncertainty in any forecast, especially at airport level where there are strong overlapping passenger catchments that may make forecasting demand less predictable (the overlap of Stansted Airport and Luton Airport catchments is a good example of this). However, regardless of whether or not the predicted statistical distribution of passenger demand at a given airport is fully accurate, at national level the predicted overall or total passenger demand is unchanged and will be met by other airports and produce aggregate CO^2 emissions which can be identified with a higher degree of certainty."

44. On 28th June 2018, the Defendant wrote to SSE to inform them of his decision (as set out above) that he did not consider the Second Interested Party's development application to be an NSIP within the terms of section 23 of the 2008 Act and that he would not exercise his power under section 35 of the Planning Act 2008. He wrote in relation to section 23 that:

> "The expected effect of the airport alteration is neither to increase by at least 10 million per year the number of passengers for whom the airport is capable of providing air passenger transport services nor to increase by at least 10,000 per year the number of air transport movements of cargo aircraft for which the airport is capable of providing air cargo transport services.
>
> I am assured by my officials' evaluation of the evidence, including evidence provided by you and by STAL [the Second Interested Party] that the expected effect of the alteration is to increase by 8 million per year the number of passengers for whom the airport is capable of providing air passenger transport services."

45. In relation to section 35 he wrote that:

> "With respect to considerations under s35, I have concluded that the development is not of national significance, either by itself or when considered with other projects or proposed projects in the same field.
>
> …
>
> With respect to national significance, although the development of the airport would play some role in supporting the international connectivity of London and the South East of England, the passenger capacity would still be less than other large single runway airports such as Gatwick. The impacts, mitigations and benefits of STALs application appear to be local in nature, and therefore I believe that adequate mitigation can be agreed between the airport and the council."

46. On 17th July 2018, the Claimants' solicitors wrote to the Secretary of State for Transport to notify him of the Claimants' potential application for judicial review of the decision contained in the letter dated 28th June 2018. As a result of that correspondence the Defendant disclosed the detailed submission (the "Ministerial Submission") which was made to the Defendant by his advisors which contained the recommendation from them which he adopted in taking his decision to decline to deal with the application under the powers in the 2008 Act. The document is dated 14th June 2018. It contains the recommendation that, in effect, the Defendant should refuse SSE's requests.

47. In relation to section 23 of the Planning Act 2008, the Ministerial Submission first sets out the two relevant limbs of the section, namely the "permitted use" threshold in section 23(1)(c) and the "capability" threshold in section 23(1)(b). Any argument based upon the permitted use threshold was shortly dismissed, as the application was for an increase in the cap of 35 mppa to 43 mppa, which is below the 10 mppa threshold required to meet the NSIP criteria. Greater focus was placed on the capability threshold, and whether it could be argued that this threshold had been exceeded. In this regard, the Ministerial Submission contained the following passages:

> "13. To consider capability we need to assess the difference between what the airport would be technically capable of handling pre and post development. This, we believe … [redacted text] … should be assessed as if no planning caps are used.
>
> 14. In terms of passenger numbers, in a response to SSE's letter, MAG [the Second Interested Party] provided evidence that the infrastructure being built as part of the planning application will allow an extra five ATMs per hour to operate off the runway. Using the theoretical operating timeframes presented by SSE, and today's average passengers per plane (which we believe is a reasonable proxy for when the development would complete given the current high load

> factors of STN's [Stansted's] current traffic), the scheme would therefore allow for an additional 5.4 mppa – significantly below the NSIP threshold of 10 mppa.
>
> 15. We have assessed the assumptions used in the calculations. With one exception (55 hourly movements) we have high confidence in MAG's approach to calculating these estimates. Whilst we have not been able to independently validate the increase in maximum runway capacity to 55 hourly movements, the figure is consistent with comparable pieces of infrastructure such as Gatwick Airport runway and therefore we have a reasonable degree of confidence in it."

48. In relation to section 35 of the Planning Act 2008, the Ministerial Submission advised that SSE's request constituted a "qualifying request" under the terms of the Act and so the question for the Defendant was whether to grant the request. The Ministerial Submission then provided responses to particular allegations set out in SSE's request. In answer to SSE's argument that the Second Interested Party was seeking to circumvent the NSIP criteria by applying for an increase in the annual passenger cap slightly below the section 23 threshold of 10 mppa, the following points were made:

> "23. If the works STN present in their planning application form part of a larger scheme with a higher throughput, then they could be directed for development consent under the presumption that they "form part of" a wider NSIP under section 31 PA 2008.
>
> 24. STN's application for planning permission is accompanied by an Environmental Statement (ES) which states "the proposed development …, comprises "Phase 3" of the wider capital investment programme for Stansted. Phase 1 involved internal terminal works, whilst Phase 2 involves the development of the new arrivals terminal both of which we consented to during the 2008 application for planning permission.
>
> 25. Phase 3 is therefore a separate project to increase runway throughput. Given this, and the fact that the previous stages have already received local planning permission and will be implemented before the runway works are undertaken, we do not believe that this application "forms part of" a wider NSIP application when Phases 1 and 2 are also taken into account."

49. The Ministerial Submission went on to note that the development application was in line with Government policy on airports making best use of their existing capacity in the South East. The Ministerial Submission observed:

> "26. STN's planning application proposes the increase of the airport's cap by 8 mppa. Modelling undertaken to consider the policy of making best use of existing runways (which 'allowed'

> STN to increase its planning cap) did not affect the forecasts associated with proposed Heathrow expansion.
>
> 27. STN's application is focused on making the best use of the existing airport capacity and the proposed development is not of the scale or significance of projects considered for the long term by the Independent Airports Commission. Further, Government recently announced its support of airports beyond Heathrow making best use of their existing runways, including this policy in the Airports NPS, referencing the Airports Commission's findings on more intensive use of existing airports.
>
> 28. [S]TN's application therefore is in line with Government policy on airports making best use of their existing capacity in the South East."

50. It was further added, in relation to the contention that the development should be considered to be a piece of strategic economic infrastructure of national importance, that the development "is expected to deliver important, but largely local economic benefits". The fact that the airport had an employment and customer base which extends beyond the local authority was not considered to make the development nationally significant, as this is not a situation specific to Stansted and if the contrary view were taken then "the development of most if not all airports would be nationally significant, including very small schemes".

51. In relation to the environmental impacts of the development, the Ministerial Submission advised that:

> "35. As with any airport development the project is expected to have environmental impacts. Taking into account the likely scale of these impacts judging by STN's description of the development, the continuation of the current ATM cap, and the mitigating measures they have proposed, we believe there is nothing preventing these issues from being tackled satisfactorily at a local level. …
>
> 36. Furthermore, as part of the making best use policy development, modelling was conducted to ascertain the national carbon impacts of airports growing. The modelling showed that an increase in the planning cap at STN, any additional carbon could be adequately mitigated to meet the [Climate Change Committee's] 2050 planning assumption."

52. Finally, in response to SSE's arguments in relation to the size and complexity of the development project, the Ministerial Submission advised that these factors were insufficient to require that the project be deemed nationally significant:

> "37…There is no increase in the number of total aircraft movements already permitted, and no changes to the airport infrastructure in relation to freight.

> …
>
> 39. …The only significant cumulative effect identified is the potential for increased delay and congestion on Junction 8 of the M11 motorway, as a result of additional traffic arising from growth to 43 mppa, along with other development in the area and background traffic growth. This has already been considered in detail by Highways England and to mitigate this STN suggest a direct contribution, committed via a section 106 agreement, if the need to improve the junction is required."

53. Annex E to the Ministerial Submission was provided to address in greater detail the analysis of the extent of increased capacity which could be created by the proposed development, and substantiate the material in paragraphs 13 to 15 of the Ministerial Submission. It set out a table that was provided on behalf of the Second Interested Party in a letter to the First Interested Party regarding the theoretical runway capacity of the airport. The table was designed to illustrate the runway capacity of the airport as a result of the proposed improvements to its physical infrastructure. The table was predicated on the operating hours for the airport remaining as at present, namely 17.5 hours per day, with no additional passenger flights at night. The figure for PATM was also constant at 170 PATM. The differences were the number of hourly movements during the 17.5 hour day, which increased from 50 to 55. This change led to an increase in the number of daily daytime movements of 87.5, an increase in annual daytime movements of 31,937.5 and (taking account of the PATM assumption of 170) an annual increase in passengers of 5,429,375.

54. In relation to this material, it was commented that:

> "Under the calculations, the theoretical maximum number of ATMs will increase by 32,000 and the number of passengers by approximately 5.4 million. We have assessed the assumptions used in the calculations. With one exception (55 hourly movements) we have high confidence in MAG's approach to calculating these estimates. Whilst we have not been able to independently validate the increase in maximum runway capacity to 55 hourly movements, the figure is consistent with comparable pieces of infrastructure such as the Gatwick Airport runway and therefore we have a reasonable degree of confidence in it.
>
> Our analysis shows that, in order for the theoretical capacity of the airport to increase by over 10 mppa, the number of passengers per ATM would need to almost double from 170 now to 313 passengers per ATM. Given the related (typical) figures for Gatwick and Heathrow are between 160 and 170 passengers per ATM we believe that it is unrealistic to expect the theoretical 10 mppa will be breached at Stansted, especially considering their predominately short haul business model which typically makes use [of] narrow body aircraft (80% of Stansted air movements are Ryanair)."

The legal framework

55. When determining an application for planning permission the decision-taker is required by section 70(2) of the 1990 Act to have regard to the provisions of the development plan so far as material to that application. Section 38(6) of the Planning and Compulsory Purchase Act 2004 requires that a determination "must be in accordance with the plan unless material considerations indicate otherwise".

56. Section 77 of the Town and Country Planning Act 1990 allows the Secretary of State for Housing, Communities and Local Government to direct that certain applications, including for planning permission or permission in principle, be referred to him or her instead of being dealt with by local planning authorities. This section 77 procedure is generally referred to as "calling-in" by the Secretary of State.

57. Projects which are deemed to be NSIPs are not to be determined under the Town and Country Planning Act 1990. Instead, they are to be determined by the Secretary of State under the Planning Act 2008. Section 14(1)(i) of the Planning Act 2008, which provides a sequence of types of projects which are to be regarded as within the definition of an NSIP, provides that an "airport-related development" is an NSIP. However, section 23(1) of the Planning Act 2008 provides further definition of which "airport-related development" falls within the definition of an NSIP within the terms of section 14(1)(i). "Airport-related development" is only to be considered within the terms of an NSIP pursuant to section 14(1)(i) if the development is:

> "(a) the construction of an airport in a case within subsection (2),
>
> (b) the alteration of an airport in a case within subsection (4), or
>
> (c) an increase in the permitted use of an airport in a case within subsection (7)."

58. In relation to section 23(1)(b), the term "alteration", in relation to an airport, is defined in subsection (6). This provides:

> "(6) *"Alteration"*, in relation to an airport, includes the construction, extension or alteration of:
>
> (a) a runway at the airport,
>
> (b) a building at the airport, or
>
> (c) a radar or radio mast, antenna or other apparatus at the airport."

59. Subsection (4) provides:

> "(4) Alteration of an airport is within this subsection only if—

> (a) the airport is in England or in English waters, and
>
> (b) the alteration is expected to have the effect specified in subsection (5)."

60. Subsection (5) of the Planning Act 2008 provides:

> "(5) The effect is—
>
> (a) to increase by at least 10 million per year the number of passengers for whom the airport is capable of providing air passenger transport services, or
>
> (b) to increase by at least 10,000 per year the number of air transport movements of cargo aircraft for which the airport is capable of providing air cargo transport services."

61. It is also relevant to note that section 23(7) and (8) give content to the case provided in section 23(1)(c) as follows:

> "(7) An increase in the permitted use of an airport is within this subsection only if—
>
> (a) the airport is in England or in English waters, and
>
> (b) the increase is within subsection (8).
>
> (8) An increase is within this subsection if—
>
> (a) it is an increase of at least 10 million per year in the number of passengers for whom the airport is permitted to provide air passenger transport services, or
>
> (b) it is an increase of at least 10,000 per year in the number of air transport movements of cargo aircraft for which the airport is permitted to provide air cargo transport services."

62. It can be seen from the content and structure of section 23 that section 23(1)(b), together with section 23(4) and (5), create a case or category of airport NSIP derived from alteration of its infrastructure, whilst section 23(1)(c) together with section 23(7) and (8), create a category of airport NSIP derived from increase in permitted use.

63. Provided that the terms of section 23 are satisfied by way of any of the three available pathways set out in section 23(1), then the airport development will be an NSIP and must be considered as such by the Secretary of State. As set out in section 31 of the 2008 Act, development consent is required for a development to the extent that it is, or forms part of, an NSIP. However, even if the terms of section 23 are not satisfied and the project is not an NSIP as therein defined, the Secretary of State may, subject to certain limitations, give a direction under section 35 of the 2008 Act for development to be treated as development for which development consent is required.

64. Section 35(2) of the Planning Act 2008 provides that the Secretary of State may only give such a direction if the development is or forms part of certain types of projects. Relevantly to this case, the list in section 35(2)(a)(i) includes transport projects. Further, the development, when completed, must be wholly within one or more of the areas listed in section 35(3). Section 35(3)(a) provides that one of those areas is England. Section 35(2)(c)(i) also sets out the key requirement that, in relation to transport projects, the Secretary of State must think the project (or proposed project) is of national significance, either by itself or when considered with one or more other projects (or proposed projects) in the same field.

65. The Second Interested Party contends that the proposed works do not amount to an "alteration" within the terms of s23(6). They submit that the works are not to the "runway", and that the term "runway" is to be understood as being distinct from "taxiway". This construction is said to be supported by the provisions of section 9(6) of the Land Compensation Act 1973 which provide as follows:

> "9(6) In this section "runway or apron alterations" means
>
> (a) The construction of a new runway, the major realignment of an existing runway or the extension or strengthening of an existing runway; or
>
> (b) A substantial addition to, or alteration of, a taxiway or apron, being an addition or alteration whose purpose or main purpose is the provision of facilities for a greater number of aircraft."

66. Issues have been raised in the arguments in the case in relation to the correct approach to the standard of review to be applied to the Defendant's decision. As a starting point to this consideration the parties agreed the following as part of a suite of agreed propositions of law prior to the hearing:

> "The parties are agreed that, provided that the Defendant did not misinterpret the relevant legal provisions, took into account relevant considerations and did not take into account irrelevant considerations, his decision was not unlawful unless it was outside the range of reasonable responses to the information and material before him at the time.
>
> In *R (Spurrier) v Secretary of State for Transport* [2019] EWHC 1070 (Admin), the Divisional Court (Hickinbottom LJ and Holgate J) held that the principle set out by Sullivan J in *R (Newsmith Stainless Ltd) v Secretary of State for Environment, Transport and the Regions* [2001] EWHC 74 (Admin) at paras 6-8, namely that a challenge to an evaluative planning judgment on the grounds of irrationality is a "particularly daunting task" and must not be used as a cloak for challenging the merits of a decision or policy, was not confined to challenges to Planning Inspectors' appeal decisions under s 288 of the 1990 Act but was of general application: see paras 171-172. The parties are agreed that this principle applies to the

> consideration of whether the Defendant's conclusion that the proposed development in the present case was not "airport-related development" under s 23 of the 2008 Act was lawful."

67. The parties also agreed that these propositions of law also applied in the context of section 35 of the Planning Act 2008. I endorse the accuracy of these agreed legal propositions.

68. The issues which are raised in relation to both of the Claimants' grounds range beyond questions of statutory construction and into challenges based upon the legality of the judgments reached by the Defendant in taking his decision. It is therefore apposite to provide some observations based upon a review of the relevant authorities in relation to the approach that the court should take to this aspect of the case, and in particular the standard of review which should be adopted in examining the Defendant's conclusions to establish whether or not they contained any error of law.

69. The case of *R (Mott) v Environment Agency* [2016] 1 WLR 4338 is a convenient starting point, in which several of the earlier authorities dealing with the question of the correct approach to resolving contentions that a decision was *Wednesbury* unreasonable when the decision involved the evaluation of technical or scientific evidence, were considered. In *Mott*, an important aspect of the challenge concerned whether the scientific estimates as to the percentage of salmon from the River Severn estuary which were destined to be River Wye salmon and would return to the River Wye were robust enough to provide a rational basis for the Agency's decisions to limit fishing. The decision-taker had to predict what might happen in the future, based on the scientific material available. In his judgment Beatson LJ reviewed the previous cases of *R(British Union for the Abolition of Vivisection) v Secretary of State for the Home Department* [2008] EWCA Civ 417 and *R(Downs) v Secretary of State for the Environment, Food and Rural Affairs* [2010] Env LR 7, which were both cases that, whilst differing in detail on their facts, involved decisions which engaged with technical or scientific evidence. In that case, it was common ground between the parties that in principle the court should afford a decision-taker an enhanced margin of appreciation in cases involving scientific, technical and predictive assessments. The difference between them was the applicability of that approach to the given facts.

70. In *Mott*, Beatson LJ made the following determination regarding the error of law committed by the first instance judge:

> "The judge was very conscious of the fact that Mr Mott's critique of the [scientific report underlying the Agency's decision] was that of a layperson… and that it was likely that a decision-maker could rely on the views of experts who maintained their view despite lay criticism. But he then entered into an analysis of the reliability of the scientific evidence and the models used and undertook calculations of his own. He did so because … he considered the identification of the contradiction between low stocks in the Wye and his assessment that on the material relied on by the agency there would be 55,000 salmon returning to it to spawn, does not require any knowledge of the technical issues relating to the genetic or statistical analysis. That was, in my judgment,

> inappropriate. In the *Downs* case [*R (Downs) v Secretary of State for the Environment, Food and Rural Affairs* [2010] Env LR 7] Sullivan LJ, at para 46, stated that the Royal Commission's critique of the model used by the Secretary of State was the high-water mark of Ms Downs's case. Although he recognised Ms Downs was an experienced campaigner with expertise and knowledge of pesticides, she had no scientific or medical qualifications and he stated that there was no possible basis for accepting criticisms by her that went further than those of the Royal Commission."

71. Beatson LJ went on to add that the first instance judge, after wrongly taking on the task of analysing the reliability of the scientific evidence and models, had erred in his calculations:

> "The judge's detailed critique of the models also proceeded on the basis of some errors… It is also an example of why a judge considering a judicial review of a scientific topic to that effect should not engage in a detailed examination of the merits of an approach and the accuracy of calculations based on models. The second of these [erroneously calculated] figures became a major factor in the judge's conclusion that the decisions were *Wednesbury* unreasonable and irrational."

72. The case of *Downs* was introduced by Beatson LJ in *Mott* in the following way:

> "Ms Downs, an experienced campaigner with expertise and knowledge of pesticides, challenged the United Kingdom's regulatory regime for pesticides on the ground that it did not comply with the provisions of Council Directive 91/414/EEC because it did not properly protect residents in rural areas who were exposed to the effects of crop-spraying. The evidence included criticism by the Royal Commission on Environment Pollution in its 2005 report of a model used by the Advisory Committee on Pesticides on which the Secretary of State had relied. The judgment was given by Sullivan LJ, with whom Keene and Arden LJJ agreed. Sullivan LJ stated, at para 76, that:
>
> "while the [Secretary of State's] decisions in this respect are not immune from judicial review, the hurdle of 'manifest error' in such a highly technical field is a formidable one … [Ms Downs] is not able to surmount that hurdle."

73. In *Downs*, Sullivan LJ said that whether there was evidence that reasonably raised doubts about the safety of pesticides, or whether the risks are purely hypothetical, was pre-eminently a matter for the Department to decide, with the benefit of expert scientific advice. Sullivan LJ further found that:

> "The Report, the Commentary and the RCEP's Response all make it clear that there is no consensus in the scientific

> community that there is "solid evidence" as found by Collins J. In [the Department's] response the Appellant did not accept that there was such evidence… Collins J. was not entitled to substitute his own view for that of the Appellant, and in the absence of such a scientific consensus, had Collins J. applied the "manifest error" test, he would have been bound to conclude that there was no manifest error in the Appellant's approach to the issue of causality."

74. The case of *R (British Union for the Abolition of Vivisection) v Secretary of State for the Home Department* [2008] EWCA Civ 417, 105(18) LSG 24 was, as set out above, also reviewed by the court in *Mott*. That case introduced the issues with the following passage:

> "Some decisions of a public body taken under statutory authority are intrinsically less amenable to a successful judicial review application than others. These proceedings are an illustration of this. …. the nature of the claimants' case is to challenge a composite scientific judgment based more upon an expert analysis of scientific material than upon the application of hard-edged terms of a document amenable to lawyers' construction."

75. The *Vivisection* case concerned a challenge to a decision of the Chief Inspector of Animals that the adverse effects experienced by marmosets as a result of university research tests were "moderate" and not "substantial". The view of the decision-taker that the adverse effects were "moderate" was supported by other experts. The first instance judge had exercised his own judgment that the adverse effects were "substantial", without finding that the original decision-taker's decision that the effects were "moderate" was perverse. Accordingly, the judge erred. It was also observed that:

> "The judge correctly stated that in practice there has to be an exercise of judgment; and that the views of scientists and veterinary surgeons who make the judgment must be given proper respect up to the point at which their judgment can be shown to be vitiated by legal error or clearly wrong."

76. In *Spurrier* the court was concerned with a number of challenges to the designation of an "Airports National Policy Statement" (see above), dealing in particular with the provision of LHR NWR. When considering the standard of review which it was appropriate for the court to adopt, the court noted that the degree of scrutiny involved would depend in particular upon the nature of any right or interest which the decision sought to protect, the process whereby the decision had been reached and the nature of the ground of challenge advanced. Further, the court noted the importance to the standard of review to be deployed in that case of the fact that the decision under challenge related to a policy, and that the making of policy would involve political judgments and would have "a spectrum of finality" in its operation, both of which influencing the standard of review to be applied. Some of the challenges in that case

involved challenges to decisions informed by technical or scientific material and, having reviewed the decision in *Mott*, the court observed at paragraph 179 that:

> "For our part, we consider *Mott* is a helpful reminder of well-established good law: the court should accord an enhanced margin of appreciation to decisions involving or based upon "scientific, technical and predictive assessments" by those with appropriate expertise. The degree of that margin will of course depend on the circumstances: but, where a decision is highly dependent upon the assessment of a wide variety of complex technical matters by those who are expert in such matters and/or who are assigned to the task of assessment (ultimately by Parliament), the margin of appreciation will be substantial."

77. In the light of these authorities, in my view the position in relation to *Wednesbury* based challenges to the legality of decisions which have been informed or influenced by scientific or technical material is well settled. The approach is based upon the fundamental principle that the court is not re-taking the decision: it is not equipped procedurally or substantively to do so. Whilst the court will not abandon all curiosity as to how the decision has been reached, and can (as was emphasised in *Mott*) expect that the decision-taker will provide a full and accurate explanation of the facts and scientific analysis relevant to the decision, nevertheless it is not the role of the court to embark on its own technical appraisal of the issues. The court must recognise and respect the expertise which has been brought to bear in reaching the decision, and appreciate that there may be more than one scientific view of an issue, as well as more than one way of modelling or forecasting an impact or effect. A decision-taker is entitled to give particular weight to a suitably scientifically qualified consultee and rely upon their advice in reaching a conclusion. All of these factors, and no doubt others, comprise the margin of appreciation to which the authorities refer. As Sullivan LJ observed in the case of *Downs*, this does not mean that the decisions are immune from judicial review, but that the hurdle for a claimant to surmount is one which is formidable.

Grounds of the application for judicial review and the submissions

78. As noted above, the Claimants based their application for judicial review upon two grounds. The grounds are sequential, in so far that if they succeed on the first ground there is no need to proceed to the second ground, and the second ground does not arise for consideration unless their first ground fails. Ground 1 is that the Defendant erred in law when deciding that the Second Interested Party's proposed development was not an airport alteration NSIP under section 23 of the Planning Act 2008. Ground 2 is that the Defendant erred in law when determining that the same proposed development was not to be treated as being of national significance under section 35 of the Planning Act 2008. The Claimants' submissions in relation to Ground 2 are made without prejudice to the submissions made in relation to Ground 1, as Ground 2 proceeds on the assumption that the planning application is not an NSIP within the definition of section 23.

79. Starting with Ground 1, the Claimants' first submission is that the developments proposed in the planning application constitute an "alteration" of a "runway" so as to be brought within the definition provided in section 23(6). This is because the two

proposed taxiways serve and conjoin an existing runway and cannot be delivered without alterations to the runway itself. The terms "runway" and "taxiway" are not defined in the Planning Act 2008, but it is submitted that the Defendant was correct to accept that the development involved an alteration on the basis that the new taxiways could only be useful as part of an augmentation of the runway. The Claimants also argued that the definition in section 23(6) had to be approached on the basis that it used the language of "includes" rather than any more definitive language such as "means" and therefore the section was framed to capture proposals designed to increase airport capacity of the kind concerned in the present case.

80. Turning then to the three alternate pathways to satisfying the requirements of section 23(1), it is the second case, being the expected increase in capacity set out in section 23(4) and (5), which the Claimants say is satisfied on the given facts. The Claimants' core argument is that the Defendant misinterpreted section 23(4)(b) and (5)(a) by looking at how the proposed development might affect what was realistically or likely to be achievable by way of passenger throughput at the airport, rather than examining what these provisions in fact required, which was the total passenger capacity which it was theoretically possible might be created by the works. The statute did not call for an analysis of what was the actual or likely new capacity but rather the capacity which the airport could possibly achieve technically and arithmetically with the improvements.

81. In effect, the word "capability" in section 23(5)(a) is interpreted by the Claimants to mean possible technical or arithmetical capability. Mathematically, even deploying the data and forecasts provided by the Second Interested Party to the Defendant, it was easy to demonstrate an increase as a result of the development of in excess of 10 mppa. For instance, assuming an additional 32,000 aircraft movements and a PATM of 313, would lead to an increase in excess of 10 mppa.

82. The Claimants went on to submit that in the event they were wrong in relation to their point of statutory interpretation, and the effect of the language in sections 23(4)(b) and (5)(a) were such as to require a judgment in relation to the likely or foreseeable practical increase, then that was a judgment which had to be reached lawfully, taking account of all material considerations and not leaving material considerations out of account. In that connection the Claimants drew attention to a number of factors that they submitted had been left out of account. Firstly, the Defendant had overlooked the Second Interested Party's clear intention to cultivate long-haul flights (with larger aircraft and higher ATM rates) and maximise the use of its runway evidenced in a press release from the Second Interested Party on 13th September 2018. Long-term trends showed a steady increase in ATMs which was not reflected in the Defendant's assessment. Secondly, the Defendant had placed reliance on figures for Gatwick as a comparator in the Ministerial Submission, but had failed to appreciate that Gatwick has capacity for a significantly higher number of passengers per annum (albeit a number consistent with what the Claimants contend were the Second Interested Party's aspirations in 2017) and had left out of account that sources such as the Gatwick Masterplan 2019 were stating that 60 ATMs per hour were expected by the early 2030s, well in excess of the 55 ATMs per hour accepted by the Defendant. This forecast growth at Gatwick ought to have been included in the analysis. Thirdly, the Defendant left out of account planning caps in undertaking the assessment but ought, in order to have performed the calculation correctly, to have

ignored the night-time flying restriction as well, which would have led to an increase in the calculated number of additional flights over the 24 hour period of 43,800 and the need for a rate of 228 PATM to lead to the exceedance of an additional 10mppa.

83. Ground 2 is that the Defendant erred in law when determining that the same proposed development was not to be treated as being of national significance under section 35 of the Planning Act 2008. The Claimants identified four factors which they say wrongfully underpinned the Defendant's decision not to exercise his powers under section 35. Firstly, the development did not involve additional runways, new terminal or cargo facilities and would take place within the existing footprint of the airport. Secondly, that the environmental impacts of the project could be tackled under the 1990 Act regime – the impacts and mitigations appeared local in nature and could be agreed between the Second Interested Party and the First Interested Party. Thirdly, that the proposals appeared focussed on making "best use" of the existing airport's capacity. Finally, that the proposals were not of the scale or significance of schemes for increasing capacity for the long term.

84. The Claimants submitted that these four factors were wrongly decided for the following reasons. First, so far as the first and fourth are concerned, the Defendant failed to take into account that the proposals were an intrinsic part of a long-term project to expand aviation at Stansted Airport by considerably above the NSIP threshold in the light of the evidence set out above, including the minutes of 2nd February 2017 which revealed a plan to grow to 50 mppa. It is further suggested that the evidence shows the Second Interested Party is purposely trying to grow the passenger throughput in increments that fall under the NSIP threshold.

85. Second, it is submitted that so far as the second reason is concerned, the Defendant wrongly relied on the modelling with regard to carbon emissions which had been prepared alongside the MBU policy in order to inform that policy. The Claimants' attack on the modelling commences with the observation that Ms Bishop's evidence suggests that the MBU modelling was predicated on an assumption that the permitted use of the airport at Stansted would increase to 44.5 mppa. However, notwithstanding this suggestion it is noted that the modelled figure for passenger throughput at Stansted is well below that figure even in the model's predictions for passenger use in 2050. Moreover, the modelled figure for passenger throughput predicted for 2018 is 23,220,944, whereas the actual surveyed figure for passenger numbers for 2018 was 28,001,793. This disparity (and others relating to 2016 and 2017) between the model and reality casts doubt, the Claimants contend, over the predictions of the model in relation to carbon emissions, bearing in mind that there is a linkage in the model between the two. The Claimants also draw attention to the fact that the model appears to predict that there will be a contraction in passenger numbers at times in the future, which is contradicted by the growth in passenger numbers predicted by the Second Interested Party. The Claimants note that the MBU modelling predicts around 1.6mt of carbon being generated by the flights at Stansted airport by 2050, on the basis of a forecast of 204,800 flights arising from the model. This, they submit, clearly contrasts with the 274,000 ATMs on which the planning application is based. It is contended that, for example, the model is forecasting ATMs and passenger throughputs at Luton Airport well below the figures for which that airport has said it is planning. Thus the Claimants contend that the modelling was not a sound basis for decision-taking and in particular concluding that the proposals would not have national significance in

relation to climate change and that the environmental issues involved could be tackled at the local level.

86. Third, in relation to the third reason, it is submitted that the Defendant wrongly decided that the proposals complied with the Government's MBU policy. It is said that the Defendant was wrong to say that the project made best use of the existing runway because he was not informed that the original development proposal had been "trimmed" from 44.5 mppa to 43 mppa and from 285,000 to 274,000 annual aircraft movements. In reality, the proposal had been deliberately designed to avoid scrutiny by artificially supressing the cap for usage.

87. Finally, it is submitted that, more generally, the Defendant failed to take into account the numerous material considerations related to the economic significance of the proposal, when had he done so the only reasonable decision open to him was to exercise the power afforded to him by section 35. The Second Interested Party had emphasised the national significance of the project in its press release of 22nd February 2018 and in its socio-economic assessment submitted with the application. The national significance of London's airports was also highlighted in the Airports National Policy Statement of 5th June 2018.

88. The Defendant submitted in relation to Ground 1 that the correct interpretation of the requirements of section 23 had been applied in arriving at the conclusion that the planning application was not an NSIP. First and foremost, the language of the section called for a judgment by the Defendant. Secondly, that judgment in respect of what passenger throughput the airport would, after the alteration, be expected to be capable of was a judgment about what was realistically achievable disregarding the planning caps, not what its hypothetical arithmetical capacity might be: it did not require all the inputs to any calculation of capacity to be maxima, which was the approach effectively advanced by the Claimants. On behalf of the Defendant it was submitted that to interpret the section as requiring an analysis of a technical or arithmetical possibility would be absurd and divorced from the real world. What the section requires is an examination of what is realistically achievable, not what is arithmetically or technically possible. The exercise in Annex E of the Ministerial Submission faithfully reflects that approach.

89. In relation to the capability threshold, the Defendant submitted that the proper approach is to disregard the current and proposed planning caps, and that the analysis in the Ministerial Submission was made on that basis. The Claimants' four arguments as to why the reasoning Ministerial Submission is said to be incorrect are refuted in turn.

90. Turning to the Claimants' fall-back argument (that even if the Defendant's interpretation of section 23 is correct then, nonetheless, the exercise was flawed by illegality), the Defendant submits that each of the factors relied upon by the Claimants are without merit. Dealing, firstly, with the argument that the application of the average load factor of 170 passengers per plane is said to overlook the ambitions of the Second Interested Party and trends in relation to long-haul aircraft, the Defendant draws attention to references in the Planning Statement and the Environmental Statement accompanying the planning application to the growth of long-haul flights and larger aircraft and their associated trends as underpinning the assumption of 170 passengers per aircraft movement. Secondly, responding to the Claimants' points in

respect of reliance on Gatwick in the Ministerial Submission's calculations, the Defendant contends that Gatwick Airport was simply used as a "sense check" when considering the likelihood that Stansted Airport could reach a runway capacity of 55 air traffic movements per hour.

91. Thirdly, in relation to the Claimants' contention that the Defendant overlooked the potential increases in long-haul flights to and from Stansted, the Defendant submitted that this was essentially the same as the first point in respect of load factors. It is submitted that given that Heathrow Airport and Gatwick Airport both have more long-haul flights than Stansted Airport, but have average load factors of 170 and 160 respectively, the judgment as to load factors that the Defendant reached was entirely rational and lawful.

92. Finally, in relation to the restrictions on night-time flights, the Defendant emphasised that these restrictions are set under section 78 of the Civil Aviation Act 1982 and operate independently of, and cannot be altered by, the planning regime. Whilst it was true to say that they will be reconsidered, following consultation, in 2022, there was no evidence at all to suggest that they would be relaxed. Therefore, it was reasonable in the *Wednesbury* sense to proceed on the basis that the night-time flight restrictions would continue to constrain the capacity at Stansted Airport. This was the approach taken by the Defendant.

93. The Defendant began his submissions on Ground 2 with the observation that section 35 of the Planning Act 2008 confers a power, not a duty, upon the Secretary of State. It is therefore incorrect for the Claimants to assert that the Defendant was "compelled" to make a section 35 direction. The Defendant's consideration of whether a project should be treated as an NSIP involved evaluative and policy judgments, in relation to which he had a broad discretion. The weight that the Defendant gave to the material before him when taking his decision that the proposed development was not of "national significance" cannot be challenged and his judgment was not irrational.

94. In answer to the Claimants' contention that the proposed development formed part of a larger project for Stansted Airport to expand considerably above the NSIP threshold, the Defendant submitted that simply an aspiration to grow the airport in the future is not a "project" or "proposed project" within the meaning of section 35. The Defendant was right to consider that the proposed development was the final phase of a three-phase investment programme, the first two of which had already been constructed and involved separate projects. Accordingly, his judgment that this part of a wider project extending beyond the application was not *Wednesbury* unreasonable.

95. In answer to the Claimants' point relating to carbon emissions, the Defendant submitted that as set out in the Ministerial Submission, carbon emissions had already been taken into account in the MBU policy. The MBU policy incorporated growth at Stansted Airport at levels within which the proposed development falls. Therefore, the proposed development was correctly regarded as within the parameters of what had already been assessed and endorsed by the Defendant in national policy, and therefore, in turn, fell within the planning assumptions of the Committee on Climate Change. Therefore, it was reasonable for the Defendant to consider that resulting carbon emissions did not require him to make a section 35 direction.

96. Insofar as the Claimants are critical of the MBU policy and the carbon emissions modelling underpinning the MBU policy, they misunderstand the MBU policy and modelling. Firstly, in relation to the modelling the Defendant submits that it is important to appreciate that the purpose of the model for which it was designed was to provide evidence for the MBU policy, not the evaluation of this proposal. In that connection the MBU policy is unchallenged, and lawful. What follows from this is that the analysis of the MBU policy based on the model which the Defendant describes as "extensively quality assured and peer reviewed" and "fit for purpose", together with its outputs in relation to passenger numbers and carbon generation forecasts, must be approached as sound and lawful. Further, the substantive policy contained in the MBU is also robust and lawful. At paragraph 1.26 of the MBU policy it notes "We expect that applications to increase existing passenger caps by fewer than 10 million passengers per annum (mppa) can be taken forward through local planning authorities under the Town and Country Planning Act 1990." It goes on to observe that applications to increase caps by more than 10 mppa will be considered as NSIPs on a case by case basis by the Defendant. Thus, the Defendant submits that this aspect of the Claimants' case is in truth an impermissible attack on the MBU policy itself.

97. The Defendant relies upon the evidence of Ms Bishop, who explains in her witness statement that the model is one which, having forecast aviation demand at a national level based on underlying economic drivers, then allocates passengers to individual airports. It is unnecessary to rehearse all the detail contained in Ms Bishop's evidence as to the way in which the model operates: for the purposes of the Defendant's submissions it suffices to say that the model is not designed for detailed short-term forecasts for specific airports but rather for long-term policy making. Thus the modelling is designed to be accurate at a national level and over the period of the model taken as a whole.

98. Turning to the further points taken by the Claimants, the Defendant submits that it was perfectly rational for the Defendant to observe that the proposal was in accordance with the MBU policy. So far as the contention that the Defendant failed to properly take account of the economic significance of the proposal the Defendant submits that it was perfectly legitimate for the Ministerial Submission to conclude that the economic effects of the proposal would be "largely local", in particular bearing in mind that the Defendant had to consider the effects of the proposal itself, and not the airport as a whole.

99. Turning to the Second Interested Party, as set out above they disagree with the view that the two proposed taxiway developments constituted an "alteration of a runway" within the meaning of section 23. In the absence of a definition of "runway" in the Planning Act 2008, it is submitted that the ordinary meaning and usage of the word "runway" should be adopted, so that it is understood as distinct from "taxiway". This approach is said to be consistent with section 9(6) of the 1973 Act set out above, and the Aviation Authority Licensing Manual. In addition, the Second Interested Party submits that the use of the word "includes" applies solely to "construction, extension or alteration" and not "runway", and thus does not enable the works proposed to be brought within the definition. Accordingly, it is said that the first ground fails at the first hurdle as the planning application does not propose any alterations to the runway.

In all other respects the Second Interested Party supported the submissions made by the Defendant to resist Grounds 1 and 2.

Conclusions

100. In relation to Ground 1 it is sensible to start with the Second Interested Party's contention that the proposed works in the planning application do not amount to an alteration within the meaning of section 23(6) of the 2008 Act, since the works proposed do not directly affect the runway, and for the reasons set out above do not fall with the definition in the statute. This is not a submission that I am able to accept. In my view the Defendant was correct, as the Claimants contend, to identify that the works comprised in the planning application were an alteration within the terms contained in section 23(6). Whilst the works do not directly augment the runway, it is important to observe (as DfT officials did within the Ministerial Submission) that the definition is framed in terms of "includes" and as such in my view is clearly capable of capturing improvements to the runway's linkages of the kind proposed which are designed to increase runway capacity. As the Claimants pointed out in the course of argument, the statute uses the word "includes" and not "means", and thus the Defendant was entitled to conclude that the works proposed were included within those which could constitute an alteration for the purposes of section 23, bearing in mind their purpose in enhancing the capacity of the airport and its runway. I do not consider that any material assistance is to be derived in construing the statutory language from the provisions of the 1973 Act or the Aviation Authority Licensing Manual, which arise in a different context and do not serve the same specific purpose as the definition within section 23(6). I am satisfied that the Defendant was correct to go on to consider whether or not the proposal fell within section 23(4) and (5).

101. The first point to resolve is the correct construction of section 23(5)(a). I am satisfied that the submissions of the Defendant in this respect are undoubtedly correct. The language of the statute in relation to whether the alteration will "increase by at least 10 million per year the number of passengers for whom the airport is capable of providing air passenger transport services" requires the Defendant to form a judgment in relation to that question. In my view that judgment is to be formed by asking what increase in capacity could realistically be achieved, not what might technically or arithmetically be possible. It requires an analysis based on how the infrastructure is likely to perform, not a hypothetical approach assuming speculative figures in relation to each aspect of the calculation of capacity to show what might be possible rather than what is likely to occur in practice. I do not consider that the use of the wording "is capable" endorses the Claimants' contentions: it is important that these words are to be read in the context of the language of section 23(4) which speaks of the alteration being "expected to have the effect specified in subsection (5)". The use of the word "expected" is an important qualification which imports the requirement for an assessment which is grounded in the reality of the capacity which might be achieved, rather than one which takes a speculative arithmetical approach to all of the inputs to the calculation. It is clear on this basis that the Defendant's interpretation of the statutory test was one which was sound and a reliable basis for taking the decision as to whether or not the proposal was an NSIP.

102. As set out above, the Claimants make further submissions on the basis that even if the Defendant's interpretation of section 23 was accurate, his decision was nonetheless unlawful on the basis that immaterial considerations were taken into account, material

considerations left out of account and the decision was irrational. The matters relied upon by the Claimants are set out above, and my conclusions are as follows. Firstly, it is clear that the figure of 170 PATM was one which was arrived at bearing in mind long-term trends and increased potential for long-haul flights. As set out above, these factors were included in the assessments of the Planning Statement and the Environmental Statement supporting the application (see paragraphs 28 and 29 above). In terms of the Ministerial Submission, the figure of 170 was supported by a cross reference to the comparative average from Heathrow and Gatwick of 160 to 170: it is beyond argument that these are airports which attract long-haul flights and this comparison provided legitimate support for the Defendant's judgment.

103. The second point relates to the comparison to Gatwick which is made in paragraph 15 of the Ministerial Submission. It is important to note that the comparison in this instance was narrowly related to a sense-check in respect of the number of potential hourly movements on the runway, and as such there is nothing to suggest that this comparison was inappropriate. It related to one component of the calculation, and was not a comparison for the purposes of assessing overall passenger capacity in mppa. Whilst the Claimants have made reference to increases in hourly movements set out in the Gatwick Masterplan that material had not been published at the time and, therefore, as Ms Bishop explains, could not have been taken into account. I do not consider that there is any real substance in this criticism of the Defendant's decision.

104. I am unimpressed by the Claimants' submission that the night-time flying restrictions should have been disregarded in the undertaking of the calculations. Those restrictions were clearly a material consideration to be taken into account in undertaking the realistic analysis which was required by section 23(4) and (5) of the 2008 Act. Whilst those restrictions are reviewed from time to time, there was nothing to suggest that there was evidence to support them being lifted or relaxed.

105. For all of the reasons set out above I am satisfied that whilst the Claimants' case under Ground 1 is arguable, I do not consider that it can succeed and it must be dismissed.

106. Turning to Ground 2 it is necessary to point out that it is clear from the statutory language of section 35 of the 2008 Act that the Defendant is granted a broad discretion as to whether or not to treat an application for development which does not otherwise meet the definitions for an NSIP as a project which requires development consent on the basis of national significance. Bearing in mind the prescriptive nature of the definitions for various types of NSIP contained in the 2008 Act, the discretion under section 35 is a broad one. Given the nature of the Defendant's decision, as one which was exercised using a relatively broad discretion, the task of the Claimants to show that the judgment which the Defendant reached was unlawful is daunting.

107. For the purposes of the Claimants' first contention as to why the Defendant's decision was legally flawed, namely that he failed to appreciate or take account of the fact that the proposal was part of a larger project, it is necessary to examine the disputed documents in relation to the suggested ambitions of the Second Interested Party which support the Claimants' contention that the planning application is in truth a stepping stone to a far greater increase in capacity, and ought to have been considered part of a wider and more extensive project which should have been determined to be an NSIP under section 35 of the 2008 Act. The first of these documents is the note of the

meeting of 2nd February 2017 in which it is stated that the Second Interested Party "are planning for additional growth to 50 mppa in the future." This is relied upon by the Claimants as demonstrating the suggested wider ambitions of the Second Interested Party. Ms Bishop on behalf of the Defendant and Mr Graeme Elliott on behalf of the Second Interested Party, who were present at the meeting, both contend that the reference to 50 mppa was a reference to unconstrained passenger demand at the airport (i.e. the potential pool of passengers within the catchment of the airport who would be likely to fly from the airport, if it had uncontrolled capacity to accommodate them). They draw attention to a graph which accompanies the note in the bundle before the court which illustrates the growth in unconstrained passenger demand at the airport. The observation was not therefore, they contend, an indication of the ambitions for future growth in the airport's passenger cap.

108. The second piece of evidence in time is the meeting between the First Interested Party and the Second Interested Party on the 3rd May 2017 at which it was noted that, as at 2029, forecast airport growth would be "44 million" in one note, or "44m" in another, and further noted "without constraints-runway capacity 50-55m". Again, the Claimants contend that this illustrates the wider ambitions of the Second Interested Party. On behalf of the Second Interested Party, Mr Twigg contends that the "50-55m" is clearly a reference to movements per hour on the runway, and not millions of passengers per annum as suggested by the Claimants.

109. The third piece of evidence is a note of a meeting between the First and the Second Interested Parties on 17th May 2017 in which it is noted "applying for 44½ million as NSIP is 45 million". The Claimants contend that this shows that the Second Interested Party was devising the limits of the application so as to avoid scrutiny under the 2008 regime; the Second Interested Party submit that this observation is wholly consistent with the airport's Sustainable Development Plan 2015 observing as a land-use plan that the maximum capacity of the airport's runway was "up to annual throughput of 40-45 million passengers".

110. Finally, the Claimants relied upon a note of a meeting with the Defendant dated 9th February 2018, in which the Second Interested Party were noted as saying that "[f]uture phases of the investment programme, particularly the arrivals terminal, are dependant on successfully raising the planning cap". The Claimants contend that this shows, again, that the planning application is part of a larger project and a wider ambition to expand the airport well beyond the current proposal and causing the current proposal to need consideration as an NSIP. The Second Interested Party responds by stating that the investment programme referenced in the note is the investment in terminal improvements and the associated improvements to the airport's infrastructure, which is referred to in the Planning Statement at paragraphs 2.89 to 2.96, which it is unnecessary to quote for present purposes, but which references planned improvements to parking and terminal facilities as well as works to the airfield including those comprised in the planning application.

111. It is important to appreciate that it is the decision of the Defendant which is under scrutiny in this application, and therefore it is necessary to focus on material of which he was aware at the time of the decision and not material which was not before him. In relation to this point, the meeting notes of the meetings between the First and Second Interested Party were not before the Defendant and could not properly be said to form part of his decision-taking process. In any event, they are not, in my view,

capable of bearing the forensic weight which the Claimants have ascribed to them. I accept the explanation provided by the Second Interested Party that the note from the 3rd May 2017 meeting was referring to 50-55 movements per hour: that is consistent with the other surrounding documents in relation to the Second Interested Party's proposals such as the Planning Statement accompanying the application which appeared subsequently (see paragraph 27 above). The note of the 17th May 2017 meeting is, as the Second Interested Party noted, consistent with the Sustainable Development Plan current at the time for the airport and to that extent unsurprising in that it refers to anticipating capacity for 40 to 45 mppa (see paragraph 12 above).

112. Turning to the material which was before the Defendant, I have no difficulty in accepting the Defendant and the Second Interested Party's explanation that the note of the meeting of the 2nd February 2017 was referring to unconstrained demand: the explanation is based on the personal recollection of two of the participants at the meeting and is supported by the graph alluded to above. Thus I am unable to accept that the meeting note is evidence of a larger project at the airport. Finally, in relation to the note of the meeting from 9th February 2018, it is clear in my judgment that the reference in that note to future phases of an investment plan is reference to the investment programme outlined in the broadly contemporaneous Planning Statement accompanying the application, as set out above and referenced in paragraphs 24 and 25 of the Ministerial Submission.

113. It follows that I am not satisfied that such of this material as was before the Defendant could have led to him properly concluding that the application he was considering was part of a wider or larger project which, taken together with that which was before him, justified the conclusion that the present proposal should be considered an NSIP on the basis of applying section 35 of the 2008 Act.

114. The next submission that the Claimants make in relation to the need for the Defendant to have exercised his discretion under section 35 of the 2008 Act relates to their criticisms of the Defendant's conclusion that the carbon emissions caused by the proposed development could be properly regarded as within the scope of the MBU policy and its analysis. They submit that the MBU modelling is flawed, and has underestimated the effects of growth in aircraft traffic at Stansted airport for the reasons which have been set out above.

115. In my view there is considerable force in the Defendant's submission that in reality this aspect of the Defendant's decision was essentially based on reliance on the MBU policy, and that the substance of the Claimants' case is in fact a challenge to the legality of that policy in disguise (see paragraphs 95 and 96 above). Certainly, the legality of that policy is now beyond argument. As such I accept that the Defendant was, lawfully, entitled to reach the conclusion which he did, based squarely on the MBU policy that "an increase in the planning cap at [Stansted]…could be adequately mitigated to meet the CCC's 2050 planning assumption". That was a conclusion which applied the provisions of the MBU policy (see paragraphs 38 to 40 above) which had considered that proposals of this scale would not imperil the achievement of climate change targets in the light of the modelling work which had informed the policy. This effectively brings the Claimants' argument in relation to this point to a close. What is set out below is therefore included for the sake of completeness.

116. The Claimants' contentions in relation to the reliability of the model bring into focus the discussion addressing the standard of review set out above. In my view there are formidable difficulties in the way of the Claimants seeking to persuade the court to adjudicate in an application for judicial review on the accuracy or reliability of a predictive model of the kind in question. The court, quite properly, has not heard any expert evidence examining whether the model is based on sound science or technical good practice. The court is not equipped to undertake the kind of scrutiny of this model which would, for instance, be undertaken at a public inquiry in relation to an appeal under section 78 of the 1990 Act, where the tribunal is seized of the merits of scientific or technical evidence of this kind.

117. The Defendant has provided in the evidence a clear and coherent explanation of the purpose of the modelling (namely for long-term forecasting at a national level) and the basis on which it was constructed so as to inform and justify the policy in MBU relating to whether planning proposals at airports could be adequately mitigated and dealt with at the local level. Once this background to the technical work is understood, then it becomes clear that the criticisms of the Claimants, based upon short-term analysis or examination of individual years is without substance. It is not an inaccuracy or flaw that the model is predicting a smaller number of ATMs than the planning cap: this arises because, as set out above, the model is predicting actual demand across the period being modelled. The various detailed points raised by the Claimants do not properly acknowledge the purpose of the model as one which was designed to forecast a national outcome across a lengthy time period. Certainly these points do not, measured against the earlier observations made about cases in which decisions are taken in the light of detailed scientific or technical material (including in particular that the court is not equipped to re-take the decision or determine the merits of the technical or scientific material unlike other forums), reach the threshold of demonstrating that reliance on the model was in all the circumstances unlawful. In my view there is nothing in the Claimants' submissions to substantiate their contention that the Defendant committed an error of law in relying upon the model and the MBU policy based upon it to reach the decision in relation to section 35 of the 2008 Act.

118. The next point raised by the Claimants is the suggestion that the proposal was not consistent with the MBU policy on the basis that it in fact represented a sub-optimal development, which did not make full use of available capacity or potential, as it had been trimmed back to avoid proper scrutiny under the 2008 Act. I am unable to accept this submission: it appears to me both that it was reasonable for the Defendant to conclude that the policy applied to the proposal, and that it was consistent with it. There was nothing to which the court was directed in the policy to require, as the Defendant observed in his submissions, that every last drop of capacity had to be squeezed out of infrastructure so as to ensure it was consistent with the policy. As the Ministerial Submission made clear in its reasons in paragraphs 26 to 28, the proposal is consistent with making best use of its existing infrastructure without being of a scale with wider or long-term implications.

119. Turning finally to the Claimants' submission in relation to the economic significance of the proposed development, in my view the judgment which the Defendant reached that the proposal could be "expected to deliver important, but largely local economic benefits" was one which was reasonable and entirely open to him on the material before him, for instance in the Environmental Statement (see paragraph 30 above).

This material demonstrated that the majority of the economic benefits of the proposal would be felt in London and the East of England. I am unable to accept that the Defendant's judgment in respect of this aspect of the case was unlawful.

120. It follows that it has to be concluded that there is no substance in the complaints raised by the Claimants in respect of the failure of the Defendant to treat the application as an NSIP pursuant to section 35 of the 2008 Act. Whilst I am satisfied, on balance, that the case made by the Claimants under Ground 2 is arguable, it is not made out in substance and this Ground must be dismissed.

121. For all of the reasons which have been set out above, the Claimants' application for judicial review in relation to the Defendant's decision to decline to accept that the development proposed within the Second Interested Party's planning application was an NSIP must be dismissed.

Appendix 3: Extracts from the Tilbury 2 application that illustrate the distinction between the port development and the associated development limits

Tilbury 2 - Extract of Decision Letter from the Examining Authority's Report dated 20 November 2018 (paragraph 4.2.47)

Statement that ultimately the ecologically important area of the Lytag LoWS is significant, regardless of the location of the CMAT.

The CMAT as part of the NSIP

4.2.47. As noted in Chapter 2, when the application was submitted, only the construction of the Ro-Ro berth (Work 1) was described as the NSIP in the draft DCO [APP-016] and Explanatory Memorandum [APP-017]. In response to the Panel's FWQ [PD-007], the Applicant reconsidered the position and concluded that for the purposes of the application, both the construction of the Ro-Ro berth (Work No.1) and construction of the CMAT berth (Work No.2) of Schedule 1 of the draft DCO form the NSIP [REP1-016 Appendix B]. The associated development then comprises construction of the Ro-Ro and construction materials aggregates terminals, internal and external infrastructure. The draft DCO was revised accordingly at Deadline 1 to include Work Nos. 1 and 2 as the NSIP [REP1-003].

Conclusions

4.2.48. In conclusion, there have been very few representations about the policy compliance of the Ro-Ro proposals for Tilbury2 with the NPSP and relevant policy documents. The importation of aggregates or construction materials falls within the category of 'bulk movements' and such importation is already a key part of the existing Port of Tilbury. In this context, the CMAT would help to meet forecast demand for aggregates and production related facilities for London and the Southeast and Eastern regions. The Panel agrees that there are very few opportunities for deep sea aggregates wharves on the river Thames and that the case is made for the location of the CMAT on the particular part of the Tilbury2 site.

4.2.49. The Panel therefore agrees that the application as a whole meets the policy justification required by the NPSP. Finally, the Panel agrees with the explanation and justification for the change of approach treating the CMAT as part of the NSIP itself as set out in Chapter 2 of the CMAT Position Statement [REP1-016 Appendix B] and that the associated development constituting Works Nos 3 to 12 meet the tests of guidance[9].

4.3. DREDGING

Policy Background

4.3.1. Dredging issues are considered in section 5.1 of the NPSP as part of biodiversity and geological conservation. For example, adverse impacts can arise through dredging to maintain declared depths and to deepen

9 DCLG: "Guidance on associated development applications for major infrastructure projects", April 2013

Tilbury 2 - CMAT Position Statement [REP1-016]
(paragraphs 2.1 to 2.45)

2.0 THE CMAT AND 'ASSOCIATED DEVELOPMENT'

INTRODUCTION

2.1 Section 115 of the Planning Act provides that, in addition to the development for which development consent is required under Part 3 of the Act ("the Principal Development"), consent may also be granted for associated development. Associated development is defined in the Planning Act as development which is associated with the Principal Development ("Associated Development"). Sub-sections (2) to (4) of section 115 of the Planning Act set out other requirements relating to Associated Development.

2.2 The Guidance sets out the Associated Development principles which assist in determining what should be considered as Associated Development.

2.3 As set out at the DCO Issue Specific Hearing held on 21 February 2018, the Applicant considers that for the purpose of the Application, both the RoRo (Work No.1) and the CMAT (Work No.2) of Schedule 1 of the dDCO form the Nationally Significant Infrastructure Project (NSIP) or Principal Development for the purpose of the Application.

2.4 When the Application was submitted, only Work 1 was described as the NSIP in the dDCO and Explanatory Memorandum. For the reasons set out below, that was an error and the Applicant will therefore revise the dDCO at Deadline 1 to include Work Nos. 1 and 2 as the NSIP. Such correction of the dDCO does not impact the assessments undertaken for the Application nor the other Application documents which assessed the Scheme. The Scheme was assessed as a whole rather than divided between the NSIP and Associated Development.

EXPLANATION OF WHAT CONSTITUTES THE NSIP FOR THE APPLICATION

2.5 Section 24 of the Planning Act provides that the construction of harbour facilities is a NSIP (for the purpose of section 14(1) (j)) if the harbour facilities are expected to be capable of handling the embarkation or disembarkation of at least the "relevant quantity" of material per year.

2.6 In order to determine which part of the Scheme forms the "harbour facilities" it is necessary to consider the definition of the term.

2.7 'Harbour facilities' is not defined under the Planning Act however 'Harbour' uses the definition in the Harbours Act 1964 which provides: "'*harbour', except where used with reference to a local lighthouse authority, means any harbour, whether natural or artificial, and any port, haven, estuary, tidal or other river or inland waterway navigated by sea-going ships, and includes a dock, a wharf, and in Scotland a boatslip being a marine work, and, where used with reference to such an authority, has the same meaning as in the Merchant Shipping Act 1995*."

2.8 Harbour facilities are therefore simply facilities that provide or enhance a harbour and allow for its fundamental nature as a harbour – essentially things such as docks, wharves, quay-walls, surfacing, jetties, etc. The facilities that allow vessels to moor and load and off-load goods and/or passengers.

2.9 The Guidance sets out in Annex B examples of harbour Associated Development. By definition, such items must not be 'harbour facilities' but are instead Associated Development, they include:

- Lights on tidal works during construction;
- Supplementary harbour works for the benefit of third parties or to assist the Environment Agency;
- Off-site facilities for vehicle safety or security controls;
- Provision of compensatory facilities for commercial or leisure fishing; and
- Development required for the use or disposal on land of dredged arisings.

2.10 Tilbury2 comprises the construction and/or improvement of a number of harbour facilities (jetty, quay wall, surfacing etc). Those harbour facilities will be used for both RoRo and aggregate purposes.

2.11 Section 24 (3) of the Planning Act, which determines whether harbour facilities are a NSIP, contemplates harbour facilities having four types of traffic: container, RoRo, cargo or a mixture of those. It provides that "the relevant quantity" of materials per year which the harbour facilities must be capable of handling in order to be an NSIP is:

(a) in the case of facilities for container ships, 500,000 TEU;
(b) in the case of facilities for ro-ro ships, 250,000 units;
(c) in the case of facilities for cargo ships of any other description, 5 million tonnes;
(d) in the case of facilities for more than one of the types of ships mentioned in paragraphs (a) to (c), an equivalent quantity of material.

2.12 An 'equivalent quantity' of material is determined under subsections (4) and (5) of section 24 of the Planning Act and in this case the harbour facilities would be capable of handling an equivalent quantity of material if the following is true:

$$\frac{R}{250{,}000} + \frac{C}{5{,}000{,}000} \geq 1$$

where '*R*' = the number of Ro-Ro units that the facilities are capable of handling and '*C*' = the number of tonnes of cargo material that the facilities are capable of handling.

2.13 Tilbury2 once fully developed and operational would provide for a Ro-Ro terminal with an initial expected throughput of 360,000 units per annum. The maximum expected operational capacity is 500,000 units and this is the assessed capacity. The CMAT is likely to have a throughput of circa 1.9

million metric tons per annum of bulk product. The Aggregate through the CMAT is 'cargo' (as opposed to container or RoRo) for the purposes of section 24(3).

2.14 Accordingly, the 'equivalent quantity' sum in respect of Tilbury2 is as follows:

$$\frac{360{,}000}{250{,}000} + \frac{1{,}900{,}000}{5{,}000{,}000} = 1.44 + 0.38 = 1.82$$

2.15 As such the harbour facilities, being facilities for more than one type of ship mentioned in section 24(3) (a) to (c) of the Planning Act, are a NSIP as they are capable of handling an 'equivalent quantity'.

2.16 If the harbour facilities were only to handle the expected RoRo traffic, they would nevertheless still be a NSIP as they would then meet the quantity test in section 24(3)(a).

2.17 Consideration is now given specifically to the questions of the Panel, beginning with Associated Development. It is apparent to PoTLL that FWQs 1.14.15 and 1.14.16 can be responded to together as they are interlinked:

FWQ 1.14.15

The NPS for Ports in paragraph 1.2.1 states that it applies, "…wherever relevant, to associated development, such as road and rail links, for which consent is sought alongside that for the principal development. Non-ports associated development should be considered on a case–by-case basis, using appropriate assessment methods consistent with this NPS and with applicable official guidance." How does the Applicant justify the breadth of associated development included within Works 2 to 12 of Schedule 1 of the dDCO, especially Works 2 and 8, relating to the various aspects of the CMAT?; and

FWQ 1.14.16

How does the breadth of Associated Development provided in Works 2 to 8 (especially that in Works 8D (iii)) of Schedule 1 of the dDCO) comply with paragraph 5 of the DCLG guidance on associated development applications for major infrastructure projects? In particular please address how:-

a) the CMAT facilities proposed either support the construction or operation of the principal development, or help address its impacts;

b) the CMAT facilities are not an aim in themselves, but are sub-ordinate to the principal development; and whether the CMAT facilities are only necessary as a source of additional revenue to the Applicant, in order to cross-subsidise the principal development

SPECIFIC WORKS AND HOW THEY CONSTITUTE ASSOCIATED DEVELOPMENT FOR THE PURPOSE OF THE SCHEME

NSIP

2.18 As set out above, Work No. 1 (construction of the RoRo Berth) and Work No.2 (construction of the Construction Materials and Aggregates Terminal) describe the NSIP for the purpose of the Application. For clarity and to aid with consideration, the two different functional natures of the NSIP have been split across two work descriptions.

Associated Development

2.19 The Associated Development, being works associated with Works No.1 and 2, comprises (referred to by Work Nos.):

- 3 (construction of the RoRo terminal);
- 4 (construction and laying out of the access road);
- 5 (construction of the operational compound);
- 6 (construction and laying out of storage areas);
- 7 (construction of the warehouse);
- 8 (construction of a construction materials aggregates terminal);
- 9 (construction of the infrastructure corridor road);
- 10 (construction of the road overbridge at Fort Road bridge to facilitate infrastructure corridor road);
- 11 (improvement of the Asda roundabout;) and
- 12 (construction of the infrastructure corridor rail line).

2.20 Work 8D (iii) (as singled out by the ExA in FWQ 1.14.16) is for "*the construction of construction materials and aggregate processing facilities including associated buildings and infrastructure.*"

2.21 Paragraphs 5 and 6 of the Guidance set out the 'Associated Development Principles'. In summary the principles at paragraph 5 require that Associated Development:

(i) has *"a direct relationship between associated development and the principal development";*
(ii) is "*not be an aim in itself but should be subordinate to the principal development";*
(iii) *"should not be treated as associated development if it is only necessary as a source of additional revenue for the applicant, in order to cross-subsidise the cost of the principal development";*
(iv) *"should be proportionate to the nature and scale of the principal development".*

2.22 Further, paragraph 6 of the Guidance requires that such Associated Development will, in most cases, be typical of development brought forward alongside the relevant type of principal development or of a kind that is usually necessary to support a particular type of project.

2.23 The Associated Development works all have a direct relationship with Work Nos. 1 and 2 as set out above and are subordinate to the Principal Development itself. Work Nos. 4, 9, 10, 11 and 12 are transport improvements and / or connections that are necessary to facilitate the movement of goods to and from the harbour facilities NSIP. Work Nos. 3, 5, 6, 7 and 8 are all works necessary for the handling and management of goods being collated at the harbour facilities before export or for the handling and management of goods efficiently before they are forwarded by land into London, the South East and more widely.

2.24 None of those Works are aims in themselves – the aim, as with all ports is the handling and movement of goods. None of them are only necessary as a source of revenue to cross-subsidise the development – they are intrinsic to the goods to be handled at Tilbury2. Once goods land at Tilbury2 then something needs to be done with them in an onward direction to make them ready for market and to move them to the end destination. This requires transportation in and out, storage, processing and warehousing such as is accounted for in the Associated Development for the Scheme in the dDCO. The breadth of Associated Development included within Schedule 1 is entirely proportionate to the nature and scale of RoRo and cargo to be landed at the NSIP and typical of what would be expected at a RoRo and aggregates port as can been seen in numerous examples nationwide (as highlighted in Appendix 3) and as explained in response to FWQ 1.14.17 below.

2.25 Taking all of the above points in relation to the specific example of Work 8D(iii) referred to in FWQ 1.14.16, the construction materials and aggregate processing facilities proposed are:

- directly related to the NSIP - they are for the processing of construction material and aggregate to be landed at the harbour facilities NSIP, as described in Work No. 2;
- subordinate to the NSIP – the processing facilities will have no purpose unless construction material and aggregate is landed at the harbour facilities NSIP, they are by definition therefore subordinate;
- necessary to avoid inefficient double-handling of material whereby it would be landed, handled in bulk, transported elsewhere, handled again in bulk, processed and then onward handled – processing at point of landing avoids such inefficiencies (and their related impacts);
- proportionate in nature and scale to the construction material and aggregate capabilities of the proposed NSIP – they do not, for example, provide for processing capabilities significantly in excess of the quantity of material that could be landed at Tilbury2; and
- are typical development brought forward alongside port development as highlighted in Appendix 2.

2.26 The Panel's FWQ 1.4.3 states:

Does the part of ES paragraph 6.38 (quoted in FWQ 1.4.2) that states that it is PoTLL's investment objectives that are one of two key drivers for the location of the CMAT on the ecologically important areas, confirm that it is

questionable whether these aspects of the Proposed Development should be considered to be 'Associated Development'?

2.27 For the reasons set out above, PoTLL considers Work No.2 to form part of the NSIP as opposed to part of the Associated Development.

2.28 Generally, PoTLL disagrees that the statement in paragraph 6.38 of the ES calls in to question whether the parts of the Scheme located to the north are, in fact, Associated Development. The question conflates a number of different issues.

2.29 First, the location of development, i.e. whether or not it is on an ecologically important area, has no bearing on whether or not that development is Associated Development. Secondly, the investment objectives referred to in ES paragraph 6.38 are the objectives of Tilbury2, as set out at paragraph 2.12 onwards of the Outline Business Case, to meet the key business need identified of a RoRo terminal, a CMAT, a deep-water jetty and storage areas. The ES is therefore explaining at paragraph 6.38 that failing to develop to the north would not meet those needs identified for Tilbury2, described as the 'investment objectives' as part of the need would simply not be met.

2.30 Reference to 'investment objectives' should therefore not be interpreted as suggesting that any particular aspect of the development falls foul of the restriction in the Guidance at paragraph 5(iii) that Associated Development: '*should not be treated as associated development if it is only necessary as a source of additional revenue for the applicant, in order to cross-subsidise the cost of the principal development'.*

2.31 Further, as the statement acknowledges, 'investment objectives' are not the only driver behind this part of the development and it is explicitly stated that the development is '*crucial to the future success of the project*'.

2.32 The statement in the ES paragraph 6.38 goes on to set out the positive social effects that make development in the northern part of the site appropriate from an assessment point of view, but again, that is not a consideration that is relevant to whether or not the development is Associated Development.

NPSP

2.33 As the ExA highlights in FWQ 1.14.15, Associated Development should be considered on a case–by-case basis, using appropriate assessment method. As set out above, the breadth of Associated Development included in the Application is all typical development which is required and is importantly proportionate to the nature and scale of the NSIP.

2.34 The NPSP at 5.2.20 states that:

"Associated development may include facilities that do not have to be located on or close to the port estate."

2.35 Infrastructure works such as road and rail can therefore be located elsewhere and be policy compliant as Associated Development.

FWQ 1.14.17

Paragraph 6 of 'Planning Act 2008: associated development applications for major infrastructure projects' (Published by Department for Communities and Local Government April 2013) explains that associated development will, in most cases, be typical of types of development brought forward alongside the relevant types of principal development or of a kind that is usually necessary to support a particular type of project, for example (where consistent with the core principles above), a grid connection for a commercial power station. Can the Applicant review previous NSIP applications for ports and provide details identifying whether any of the previous port NSIP applications have had any or all of the following accepted as associated development in a made DCO:-

- *Aggregate processing and covered storage;*
- *silo(s) for the storage of cementitious material;*
- *permanent asphalt plant;*
- *permanent concrete plant; or*
- *permanent concrete product manufacturing plant*?

2.36 There have only been two DCOs made by the Secretary of State for harbour facilities.

2.37 **The York Potash Harbour Facilities Order 2016:** The Order granted development consent for a harbour facility at Bran Sands on the south bank of the River Tees to enable the mooring of vessels for the bulk shipping of polyhalite (a natural fertiliser). The NSIP scheme comprised the construction and operation of a quay structure; the dredging of the approach channel and a berth pocket; and the construction of ship loaders and surge bins on the quay. The Order granted development consent for associated development comprising a conveyor system to transport the polyhalite from a Materials Handling Facility within an existing chemicals complex to the harbour.

2.38 **The Able Marine Energy Park Development Consent Order 2014:** The Order granted consent for a quay and reclamation behind it on the south side of the River Humber. The associated development included rail and road improvements, dredging and the provision of onshore facilities for manufacture, assembly and storage of wind turbines.

2.39 These proposals cannot be considered as comparable to Tilbury2 as they were harbour facilities associated with specific terrestrial activities rather than, as is the case at Tilbury2, 'ports' for general cargo handling. Accordingly, PoTLL does not consider that these provide assistance to the ExA by way of addressing the issue in their question regarding the Associated Development proposed at Tilbury2. Neither included the facilities highlighted in the ExA's question as they did not involve aggregate

importation. It is perhaps worthy to note, however, that the Able Marine DCO did include significant associated manufacturing facilities.

2.40 In PoTLL's submission it is more relevant to consider the facilities found either at other Ports or other aggregate wharves as proposed at Tilbury2. In PoTLL's submission, the storage and production facilities highlighted by the ExA are typical and necessary at such installations and will be integral to the operation.

2.41 PoTLL has therefore set out below some information in relation to facilities at ports in other UK locations.

2.42 Tilbury2 includes two principal port uses, one being the creation of a CMAT. This is a typical port operational industry, a standard facility replicated at numerous locations around the UK. It is common practice that the production facilities relying on a predominant raw material supply of aggregate products are located so as to be operationally integral to the port or wharf where the raw material product is landed from vessels.

2.43 This enables functional purpose and supply, whilst allowing port customers to provide value added facilities which minimise repetition of handling and transportation and support the economics of a low value / high volume raw material. There are a number of examples of this around the UK and most specifically on the River Thames. Details of some are highlighted in Appendix 3, including examples within the existing Tilbury Port. As can be seen from these examples the facilities all require direct access to a riverside or port location. It should also be noted the majority of these CMAT facilities are also rail and river connected enabling inter-connectivity of both raw and processed material to inland facilities, hence Tilbury2 will supply not only on-site facilities but also other rail and river linked facilities in London and the South East undertaking cement and concrete production.

2.44 All marine dredged and imported aggregates are landed either at one of the 68 wharves or 45 ports around the UK where direct physical and economic advantage is gained either by access to infrastructure (roads, rail, river) or proximity to market. It is essential that in order to preserve the value of these raw materials and create the most sustainable development outcomes they are processed as close to the first point of rest as possible to limit damage and waste, multiple handling and additional transportation and to ensure that high quality finished products can be manufactured. In addition, due to the low value of the product, economies of scale are needed in transporting these goods which necessitate larger bulk movement by vessel or train.

2.45 Indeed, the above operational relationships are recognised in the NPSP at section 3.1.7 which states: "*By bringing together groups of related businesses within and around the estate, ports also create a cluster effect, which supports economic growth by encouraging innovation and the creation and development of new business opportunities*". It is clear, therefore, that the principle of the CMAT in terms of raw material supply and production in one place is recognised and supported by the NPSP.

Appendix 4: Fayrewood Fish Farms Ltd. V SSE [1984] JPL 267

Case No. CO/859/83

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
(CROWN OFFICE LIST)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 16 December 1983

Before:

D WIDDICOMBE QC
(SITTING AS A DEPUTY JUDGE OF THE QUEEN'S BENCH DIVISION)

- -

Fayrewood Fish Farms Ltd **Appellant**

v

The Secretary of State for the Environment and Another **Respondents**

- -

(Computer aided transcript of the Stenograph Notes of
Marten Walsh Cherer Ltd.,
Midway House, 27-29 Cursitor Street, London EC4A 1LT.
Telephone Number: 071-405 5010
Shorthand Writers to the court.)

- -

J Fulthorpe (instructed by **J M B Turner & Co, Broadstone, Dorset**) for the **Appellant**
S Brown (instructed by the **Treasury Solicitor**) for the first **Respondent**
The **Second Respondent** did not appear and was not represented

- -

Judgment

D Widdicombe QC:

This is an appeal under section 246 of the Town and Country Planning Act, 1971 by Fayrewood Fish Farms Limited against a decision of the Secretary of State for the Environment, upholding an enforcement notice made by Hampshire County Council in respect of a development of the appellant's at Butlocks Heath, Netley, Hampshire. An appeal lies to this court on a point of law.

The enforcement notice, which is dated 13th July, 1982, alleges a breach of planning control by the carrying out of a mining operation, comprising the excavation and removal of topsoil and other materials for the purpose of the extraction of underlying gravel. The notice called on the appellant to cease the excavation and restore the land.

The appellant appealed against the enforcement notice and a local inquiry was held by an inspector appointed by the Secretary of State. He reported to the Secretary of State that, subject to the consideration of the legal issues, the enforcement notice should be upheld. The Secretary of State, in his decision letter, dated 11th July, 1983, upheld the notice, though on reasoning that differed on some points from that of the inspector.

The appellant's case against the enforcement notice was that its operation upon the land had deemed planning permission pursuant to Class VI (1) of Schedule 1 to the Town and Country Planning General Development Order, 1977 - "Agricultural buildings, works and uses". It was said that the excavations were for the purpose of making a fish farm, which was an engineering operation within Class VI. The gravel extraction was merely a necessary incident to the making the fish ponds and production of fish for food was an agricultural use of land. This last point was not in dispute in the case, the issue being whether Class VI conferred planning permission for the operations.

Article 3(1) of the Order provides:

> "(1) Subject to the subsequent provisions of this order, development of any class specified in Schedule 1 to this order is permitted by this order and may be undertaken upon land to which this order applies, without the permission of the local planning authority or of the Secretary of State: Provided that the permission granted by this order in respect of any such class of development shall be defined by any limitation and be subject to any condition imposed in the said Schedule 1 in relation to that class."

Class VI (1), so far as is material, provides:

> "1. The carrying out on agricultural land having an area of more than one acre and comprised in an agricultural unit of building or engineering operations requisite for the use of that land for the purposes of agriculture (other than the placing on land of structures not designed for those purposes or the provision and alteration of dwellings), so long as: ... (c) no part of any buildings (other than moveable structures) or works is within 25 metres of the metalled portion of a trunk or classified road."

The relevant parts of the Secretary of State's decision letter are as follows:

> "6. On ground (b) of appeal against the enforcement notice, although fish-farming could well be an agricultural use covered by Section 22(2)(e) of the 1971 Act, and therefore not amounting to development, the Secretary of State would agree with the

Inspector that, on the facts of the present case, works necessary to construct the fish farm would involve operational development requiring planning permission.

"7. The gist of your client's arguments was that the works being carried out were designed to produce a fish farm and although amounting to development requiring planning permission, they were permitted development under Class VI of the Town and Country Planning General Development Order 1977. As a corollary it was submitted that the notice was wrong to describe the works as a mining operation.

"8. Looking at the arguments involved on ground (b) (and also ground (c)) in Section 88(2), the Inspector concluded: 'What has to be determined next is whether those operations can be considered as permitted development within the terms of Class VI of the General Development Order 1977, and I note that the operations to be considered must be 'building or engineering operations' ie mining operations are excluded. It would seem that what is proposed does not involve building operations in the way that term is normally understood with the exception of the 3 small buildings required as a food store, a staff room and an office.

The principal constructional element of the scheme is the large lake, followed by the small lake and then the holding/rearing ponds which are to be constructed above ground level with earth banks. In the absence of a full definition of 'engineering works' in the 1971 Act it is necessary to find some brief encompassing form of words which may perhaps suffer the defects of such brevity. Nevertheless my conclusions in this case are based on the philosophy that engineering works are the exercise of civil engineering skills in the construction of a specific project which is of sufficient pre-determined size shape that a conception of the finished project can be illustrated on a plan or drawing with, where necessary, explanatory notes. The plan or drawing need not be a skilled draughtsman's exercise provided the intention is made clear.

Considering now the information available in this case in the context of the above. The plan which was given to the contractor for pricing purposes has been 'thrown away' but it was not explained why a copy has not been retained by that contractor for constructional purposes because the work is barely begun. The only other plan (Document 3 - Appendix 4) was that to the county council which was said by Mr. Threadgold to be 'of much the same type as that sent to the contractor's. At this stage I discount the plan (Plan A) which was produced at the inquiry because it was prepared specifically for illustrative purposes at that inquiry. There would be problems for any contractor to construct the fish farm using only the plan and other necessary constructional details concerning pipework runs. Matters would be made easier if Mr. Threadgold were constantly on-site to give instructions concerning his intentions but this would mean a 'piece meal' type of operation much removed from that which I envisage in my definition. Evidence was given that the work began without setting out pegs or profiles which gives the impression of excavation work more akin to a mining or other operation where, in the initial stages, there would not be the same need for a pre-determined plan or for the work to be set out. The only need would be, and this is what is said to have happened, for a machine operator to commence digging and loading the material into lorries. The intention to provide a weighbridge gives strength of a primary use for mineral extraction with an after use as a fish farm. If this be accepted the proposal is not permitted development within Class VI of the General Development Order and ground of appeal 88(2)b will fail.

If the above be not accepted consideration must be given to the words in Class VI 'requisite for the use of that land for agriculture'. Fish farming experts were present at the inquiry and, although some of the details of the proposal were questioned there was no suggestion that the lakes were being dug deeper than necessary for the particular type of trout farming and therefore, on this particular point, I conclude that the works are requisite for the use of that land for agriculture.

No specific submissions were made on ground of appeal 88(2)c and it is difficult to see what arguments could have been adduced because clearly, the breach of planning control, as alleged in the notice, has taken place. Ground of appeal 88(2)c will therefore fail.

Dealing next with one of the more emotive submissions at the inquiry ie that there is no intention to build a fish farm. Having seen and heard Mr. Threadgold on the subject of this fish farm, his obvious enthusiasm leaves me in no doubt that his intentions are just as he described. Whether or not a fish farm of the type envisaged would actually be constructed on this land in the way described is open to some doubt because the project came over to me as badly under-researched. The first essential is an adequate supply of water and yet no hydrological exploratory work was done except the digging of a few holes. Prudence would dictate consultation with the Southern Water Authority on this matter but this was not done. For my part, and from the evidence, I concur with the view of that Authority that there is doubt that a sufficient and constant quantity of water would be available and further exploratory work is necessary. Other points which throw doubt on the viability of the project is the difference of opinion on the stocking density. Mr. Amos, who is a practising fish farmer, believes that the venture could succeed but his view of the likely stocking rate was less optimistic than that of Mr. Threadgold. The view of the Head of the Fish and Shellfish Cultivation Section of the Directorate of Fisheries Research was, by comparison, pessimistic. Another point which remained obscure was why the appellant firm should be paying £102,000 to a contractor who is reserving unto himself the mineral rights. There is little work in the contract which would not come under the heading of earth-moving.

I have dealt with certain points at some length above because they cover matters which were returned to time and again by those opposing the proposal. My explanation of some of the matters which remained obscure is that Mr. Threadgold's enthusiasm for the project is such that the whole has been taken along at too fast a pace for prudent planning.

"9. These conclusions have been considered. However before proceeding to a view on the basis of these conclusions, it is considered that there is one other issue that must also be examined. If advantage is to be taken of a permission that is granted by virtue of Article 3(1) of the Town and Country Planning General Development Order 1977, regard must be had to the limitations imposed in Schedule 1 to that Order in relation to the particular class of development in question. Your client sought to rely upon Class VI but it was admitted on his behalf that the limitation specified in paragraph 1(c) of that Class had not been adhered to. In these circumstances it is considered that, even if the works undertaken by your client could reasonably have been regarded as engineering operations, his claim that these operations were permitted by virtue of

that order would have failed. Nonetheless since particular attention was paid at the inquiry to other arguments on Class VI, it is considered reasonable that they should be considered by the Secretary of State.

"10. For any works to be permitted under Class VI they must be building or engineering operations and not mining or other operations. In practice, your client only sought to argue that engineering operations were involved. The Secretary of State would not entirely accept the conclusions of the Inspector on this issue. In the first place since it is the application of the General Development Order that is under consideration, it is in that Order rather than in the 1971 Act that a definition must be sought. Secondly the Secretary of State does not accept that any evidence of your client's intentions as illustrated by the intended provision of a weighbridge would be relevant to deciding whether engineering operations were involved. In the event the term 'engineering operations' is not defined in the General Development Order, but the Secretary of State would agree with the Inspector, for the other reasons the latter gives, that the operations concerned cannot reasonably be described as 'engineering operations'. The works cannot therefore be permitted under Class VI and since this was the basis of the appeal on ground (b), the appeal must fail on ground (b). If it were necessary to determine the matter, the Secretary of State would take the view that since the works are not associated with any current active use of the land for the purposes of agriculture but relate to a future agricultural use, they cannot be said to be 'requisite for the use of that land for the purposes of agriculture'.

"11. On ground (c) in Section 88(2), the Secretary of State must consider the Council were correct to allege a mining operation. There is no definition of 'mining operations' in the 1971 Act, but the Secretary of State would take the view that the work that has actually been carried out, namely the removal of top soil and other materials, which has included some gravel, could reasonably be so described. The appeal must therefore fail on ground (c) also."

Mr. Fulthorpe, for the appellant, contended that Class VI of the General Development Order applied. He said that the land was in agricultural use for grazing and that there was an engineering operation, namely, the making of the fish ponds. Alternatively, he claimed the works were a building operation. There being no definition of an engineering operation in the Act or Order, he referred to the definition of engineering in the Concise Oxford Dictionary, namely "the application of science for the control and use of power, especially by the use of mechanics." He said that the inspector and the Secretary of State went too far in the requirement of engineering and planning skills. On the facts as found, there was a sufficient engineering or scientific element to satisfy Class VI.

Mr. Simon Brown said that there were three reasons why the works were not permitted development within Class VI(1). First, because part of the works were within 25 metres of the metalled portion of a classified road. The works as a whole were therefore caught by proviso (c) to Class VI(1), as the Secretary of State held in paragraph 9 of the decisions letter. Second, the works were not engineering operations. He said that the Secretary of State had applied the right test to the facts. Third, the land was not in agricultural use when the work began.

On this last point, Mr. Brown informed me that the Court of Appeal had just given judgment on an appeal from a decision of the Lands Tribunal in Jones v Metropolitan Borough of

Stockport 45 P&CR 419 It was held that (1) for the purposes of Class VI(1) there must be a pre-existing agricultural use of the land, but that (2) to be requisite for the use of that land for the purpose of agriculture, the building or engineering operations referred to in Class VI(1) did not have to relate to that pre-existing use. It was sufficient if they related to a proposed or prospective agricultural use. No transcript of the judgment of the Court of Appeal in that case is yet available, but both parties were content that I should proceed to judgment on this appeal on the basis that the Court of Appeal had made the above two rulings. On this basis, Mr. Fulthorpe abandoned ground (e) of the notice of motion.

In reply to Mr. Brown's first point about proviso (c) to Class VI(1), Mr. Fulthorpe said that only ten per cent. Of the works were within 25 metres of the road and that the proviso should be held to apply to only to that part of them, not the whole of them. In reply to Mr. Brown's third point, Mr. Fulthorpe said that it was clear from the inspector's report that the land was in agricultural use before the operation began.

I will deal with the appeal against the Secretary of State's decision as to the meaning of "engineering operations" first. The only definition of "engineering operations" in the Act merely provides that it includes the formation or laying out of means of access to highways. There is no definition in the Order and, as far as I am aware, there is no decision of the courts on the meaning of the phrase. In paragraph 8 of the decision letter, the inspector is quoted as saying that "engineering works are the exercise of civil engineering skills in the construction of a specific project which is of sufficient pre-determined size and shape that a conception of the finished project can be illustrated on a plan or drawing with, where necessary, explanatory notes. The plan or drawing need not be a skilled draughtsman's exercise provided the intention is made clear".

The Secretary of State appears to have approved this test, although he differed somewhat from the inspector on its application to the facts. I do not think the Secretary of State is correct in paragraph 10 of his letter, when he says that it is in the Order rather than the Act that a definition must be sought. The definitions in the Act apply to the Order unless the Order itself makes other provision or the context otherwise requests. As neither the Act nor the Order defines the term, I need say no more on that.

In the absence of a definition, the term "engineering operations", in my judgment, should be given its ordinary meaning in the English language. It must mean operations of the kind usually undertaken by engineers, i.e., operations calling for the skills of an engineer. In relation to land, the engineering skills are likely to be those of a civil engineer, but I do not think that the phrase is limited to that branch of the profession. The definition in the Act shows that the operations of traffic engineers may come within the phrase, and there may be other specialist engineers who apply their skills to land. This does not mean than an engineer must actually be engaged on the project, simply that it is the kind of operation on which an engineer could be employed, or which would be within his purview.

Both counsel accepted that there could be an overlap between building, engineering and indeed mining operations within section 22(1) of the Act. I think that that must be so.

Although I think that the inspector and the Secretary of State are basically right in that they define engineering operations by reference to works calling for engineering skills, I think they go too far in requiring that there be a "specific project which is of sufficient pre-determined size and shape that a conception of the finished project can be illustrated on a

plan or drawing with, where necessary, explanatory notes". No doubt the existence or otherwise of a plan in detail can constitute important evidence as to whether particular operations are the kind of works an engineer undertakes, but they are not essential. I think, therefore, that the Secretary of State has applied too exacting a test, so that on this point, if the matter stood alone, it would have to be remitted to the Secretary of State.

I do not propose to dwell on "building operations". Mr. Fulthorpe said that he did not concede at the inquiry that the works were not building operations, but he has not included that point in the notice of motion. I think he was right not to do so. In my judgment, these excavations are clearly not building operations.

I turn to Mr. Brown's first point about proviso (c) to Class VI(1). The proviso to article 3(1) of the Order says that permission granted by the Order shall be defined by any limitation imposed in the Schedule. I accept Mr. Brown's submission that proviso (c) applies to exclude from Class VI the whole of any building or engineering operations if any part of them is within 25 metres of a classified road. If does not just apply pro tanto. I think this makes sense because the building or engineering operations can normally be expected to comprise a single whole, not readily capable of severance. I think the Secretary of State was correct in law in paragraph 9 of his decision letter.

With regard to Mr. Brown's third point, I am not prepared to disturb the decision on this ground. It appears that this point was in issue at the inquiry (see the report, paragraphs 44 and 87), but there is no express finding or conclusion recorded upon it. However, I think there is a sufficient inference from the inspector's description of the land as "farm land" (report paragraphs 4 and 103(1)) to constitute a finding that the use before the operation began was an agricultural use as defined by the order. There is evidence of an agricultural use in paragraph 9(ii) of the report.

The result is that the appeal succeeds on the point about the meaning of "engineering operations", but the development does not come within Class VI(1) because part of the works are within 25 metres of a classified road.

Having heard counsel on both sides, I think the proper course in these circumstances is to remit the matter to the Secretary of State, that being the view of both parties. I do this without prejudice to the question of whether the court may, in appropriate circumstances, have a discretion as to whether to remit in a case where the decision has been found faulty in point of law, but for other reasons the decision would still stand. That point does not call for decision today and I therefore remit the case to the Secretary of State with the opinion of the court.

Appeal allowed with costs.

Appendix 5: Part 8, Class B of the Town and Country Planning (General Permitted Development) Order 2015

2015 No. 596

TOWN AND COUNTRY PLANNING, ENGLAND

The Town and Country Planning (General Permitted Development) (England) Order 2015

Made	*18th March 2015*
Laid before Parliament	*24th March 2015*
Coming into force	*15th April 2015*

The Secretary of State, in exercise of the powers conferred by sections 59, 60, 61, 74 and 333(7) of the Town and Country Planning Act 1990[1] and section 54 of the Coal Industry Act 1994[2], makes the following Order:

Notes

1 Section 59 was amended by section 1 of, and Schedule 1 to, the Growth and Infrastructure Act 2013 (c. 27); section 60 was amended by section 4(1) of the Growth and Infrastructure Act 2013; section 74 was amended by section 121 of, and Schedule 12 to, the Localism Act 2011 (c. 20), sections 19(1) and 32 of, and Schedule 7 to, the Planning and Compensation Act 1991 (c. 34) and section 344 of the Greater London Authority Act 1999 (c. 29).

2 To which there is an amendment not relevant to this Order.

Extent

Preamble: England

Law In Force

1.— Citation, commencement and application

(1) This Order may be cited as the Town and Country Planning (General Permitted Development) (England) Order 2015 and comes into force on 15th April 2015.

(2) This Order applies to all land in England, but where land is the subject of a special development order, whether made before or after the commencement of this Order, this Order applies to that land only to such extent and subject to such modifications as may be specified in the special development order.

(3) Nothing in this Order applies to any permission which is deemed to be granted under section 222 of the Act (planning permission not needed for advertisements complying with regulations).

Law In Force

3.— Permitted development

(1) Subject to the provisions of this Order and [regulations 75 to 78 of the Conservation of Habitats and Species Regulations 2017][1] (general development orders)[2], planning permission is hereby granted for the classes of development described as permitted development in Schedule 2.

(2) Any permission granted by paragraph (1) is subject to any relevant exception, limitation or condition specified in Schedule 2.

(3) References in this Order to permission granted by Schedule 2 or by any Part, Class or paragraph of that Schedule are references to the permission granted by this article in relation to development described in that Schedule or that provision of that Schedule.

(4) Nothing in this Order permits development contrary to any condition imposed by any planning permission granted or deemed to be granted under Part 3 of the Act otherwise than by this Order.

(5) The permission granted by Schedule 2 does not apply if—

(a) in the case of permission granted in connection with an existing building, the building operations involved in the construction of that building are unlawful;

(b) in the case of permission granted in connection with an existing use, that use is unlawful.

(6) The permission granted by Schedule 2 does not, except in relation to development permitted by Classes A, B, D and E of Part 9 and Class A of Part 18 of that Schedule, authorise any development which requires or involves the formation, laying out or material widening of a means of access to an existing highway which is a trunk road or classified road, or creates an obstruction to the view of persons using any highway used by vehicular traffic, so as to be likely to cause danger to such persons.

(7) Any development falling within Class A of Part 18 of Schedule 2 authorised by an Act or order subject to the grant of any consent or approval is not to be treated for the purposes of this Order as authorised unless and until that consent or approval is obtained, except where the Act was passed or the order made after 1st July 1948 and it contains provision to the contrary.

(8) Schedule 2 does not grant permission for the laying or construction of a notifiable pipe-line, except in the case of the laying or construction of a notifiable pipe-line by a gas transporter in accordance with Class A of Part 15 of that Schedule.

(9) Except as provided in Classes B and C of Part 11, Schedule 2 does not permit any development which requires or involves the demolition of a building, but in this paragraph "building" does not include part of a building.

[(9A) Schedule 2 does not grant permission for, or authorise any development of, any new dwellinghouse—

(a) where the gross internal floor area is less than 37 square metres in size; or

(b) that does not comply with the nationally described space standard issued by the Department for Communities and Local Government on 27th March 2015[4].

(9B) The reference in paragraph (9A) to the nationally described space standard is to that standard read together with the notes dated 19th May 2016 which apply to it.][3]

(10) Subject to paragraph (12), Schedule 1 development or Schedule 2 development within the meaning of the [Town and Country Planning (Environmental Impact Assessment) Regulations 2017][5] ("the EIA Regulations") is not permitted by this Order unless—

(a) the local planning authority has adopted a screening opinion under [regulation 6][6] of those Regulations that the development is not EIA development [within the meaning of those Regulations][7][8];

(b) the Secretary of State has made a screening direction under [regulation 5(3)][9] of those Regulations that the development is not EIA development [within the meaning of those Regulations][7]; or

(c) the Secretary of State has given a direction under [regulation 63(1)][10] of those Regulations that the development is exempted from the application of those Regulations.

(11) Where—

(a) the local planning authority has adopted a screening opinion under [regulation 6][6] of the EIA Regulations that development is EIA development [within the meaning of those Regulations][11] and the Secretary of State has in relation to that development neither made a screening direction to the contrary under [regulation 5(3)][12] of those Regulations nor directed under [regulation 63(1)][10] of those Regulations that the development is exempted from the application of those Regulations; or

(b) the Secretary of State has directed that development is EIA development [within the meaning of those Regulations][11],

that development is treated, for the purposes of paragraph (10), as development which is not permitted by this Order.

(12) Paragraph (10) does not apply to—

(a) development which consists of the carrying out by a drainage body, within the meaning of the Land Drainage Act 1991[13], of improvement works within the meaning of the Environmental Impact Assessment (Land Drainage Improvement Works) Regulations 1999[14];

(b) development for which permission is granted by Class E of Part 6, Class K of Part 7, Class B of Part 12, Class A(a) of Part 15, Class D, E or I of Part 17 or Class A of Part 18 of Schedule 2;

(c) development for which permission is granted by Class F,H or K of Part 17 of Schedule 2 where the land in, on or under which the development is to be carried out is—

(i) in the case of Class F of Part 17, on the same authorised site,

(ii) in the case of Class H of Part 17, on the same premises or, as the case may be, the same ancillary mining land,

(iii) in the case of Class K of Part 17, on the same land or, as the case may be, on land adjoining that land,

as that in, on or under which development of any description permitted by the same Class has been carried out before 14th March 1999;

(d) the completion of any development begun before 14th March 1999;

(e) development for which permission is granted by Class B of Part 9 of Schedule 2.

(13) Where a person uses electronic communications for making any application required to be made under any of Part of Schedule 2, that person is taken to have agreed—

(a) to the use of electronic communications for all purposes relating to that person's application which are capable of being effected using such communications;

(b) that the address for the purpose of such communications is the address incorporated into, or otherwise logically associated with, that person's application; and

(c) that the deemed agreement under this paragraph subsists until that person gives notice in writing revoking the agreement (and such revocation is final and takes effect on a date specified by the person but not less than 7 days after the date on which the notice is given).

Notes

1 Words substituted by Conservation of Habitats and Species Regulations 2017/1012 Sch.6(2) para.52 (November 30, 2017)

2 S.I. 2010/490.

3 Added by Town and Country Planning (General Permitted Development) (England) (Amendment) Regulations 2020/1243 Pt 2 reg.3 (April 6, 2021: insertion has effect subject to transitional and saving provisions specified in SI 2020/1243 reg.12(1) and (2))

4 "Technical housing standards – nationally described space standard" – https://www.gov.uk/government/publications/technical-housing-standards-nationally-described-space-standard a copy of which can be inspected at the Planning Directorate, the Ministry of Housing, Communities and Local Government, 2 Marsham Street, London SW1P 4DF. A copy in different formats (including braille) and in languages other than English is available on request.

5 Words substituted by Town and Country Planning (Environmental Impact Assessment) Regulations 2017/571 Pt 12 reg.73(2)(a) (May 16, 2017)

6 Words substituted by Town and Country Planning (Environmental Impact Assessment) Regulations 2017/571 Pt 12 reg.73(4)(a) (May 16, 2017)

7 Words inserted by Town and Country Planning (Environmental Impact Assessment) Regulations 2017/571 Pt 12 reg.73(2)(b) (May 16, 2017)

8 See regulation 2 of S.I. 2011/1824 for the definition of "EIA development".

9 Words substituted by Town and Country Planning (Environmental Impact Assessment) Regulations 2017/571 Pt 12 reg.73(4)(b) (May 16, 2017)

10 Words substituted by Town and Country Planning and Infrastructure Planning (Environmental Impact Assessment) (Amendment) Regulations 2018/695 reg.4(2) (October 1, 2018)

11 Words inserted by Town and Country Planning (Environmental Impact Assessment) Regulations 2017/571 Pt 12 reg.73(3) (May 16, 2017)

12 Words substituted by Town and Country Planning and Infrastructure Planning (Environmental Impact Assessment) (Amendment) Regulations 2018/695 reg.4(3) (October 1, 2018)

13 See section 72 for the definition of "drainage body", was amended by Schedule 22 to the Environment Act 1995 (c. 25); there is another amendment which is not relevant to this Order.

14 See regulation 2 for the definition of "improvement works"; the definition was amended by S.I. 2005/1399. There are other amendments not relevant to this Order.

Commencement

art. 3(1)-(13)(c): April 15, 2015

Extent

art. 3(1)-(13)(c): England

Law In Force

4. Directions restricting permitted development

(1) If the Secretary of State or the local planning authority is satisfied that it is expedient that development described in any Part, Class or paragraph in Schedule 2, other than [Class DA of Part

(c) includes premises which have changed use under Class T of Part 3 of this Schedule (changes of use) to become a state-funded school **[…]**[2] ; and

"warehouse" means a building used for any purpose within Class B8 (storage or distribution) of **[** Schedule 1 **]**[3] to the Use Classes Order but does not include a building on land in or adjacent to and occupied together with a mine.

Notes

1 Words substituted by Town and Country Planning (General Permitted Development etc.) (England) (Amendment) (No. 2) Order 2021/814 art.6(8)(a) (August 1, 2021: substitution has effect subject to savings and transitional provisions specified in SI 2021/814 art.13 and Sch.1)

2 Possible drafting error - words purportedly revoked in (a) and (b) however the words "or registered nursery" do not exist in (a) therefore amendment applied to (b) and (c) by Town and Country Planning (General Permitted Development etc.) (England) (Amendment) (No. 2) Order 2021/814 art.6(8)(b) (August 1, 2021: revocation has effect subject to savings and transitional provisions specified in SI 2021/814 art.13 and Sch.1)

3 Words substituted by Town and Country Planning (General Permitted Development etc.) (England) (Amendment) (No. 2) Order 2021/814 art.6(8)(c) (August 1, 2021: substitution has effect subject to savings and transitional provisions specified in SI 2021/814 art.13 and Sch.1)

Commencement

Sch. 2(7)(ClassN) para. O definition of "industrial building"- definition of "warehouse": April 15, 2015

Extent

Sch. 2(7)(ClassN) para. O definition of "industrial building"- definition of "warehouse": England

PART 8

Transport related development

Class A

railway or light railway undertakings

Law In Force

A. Permitted development

Development by railway undertakers on their operational land, required in connection with the movement of traffic by rail.

Commencement

Sch. 2(8)(ClassA) para. A: April 15, 2015

Extent

Sch. 2(8)(ClassA) para. A: England

Law In Force

A.1. Development not permitted

Development is not permitted by Class A if it consists of or includes—

(a) the construction of a railway;

(b) the construction or erection of a hotel, railway station or bridge; or

(c) the construction or erection otherwise than wholly within a railway station of—

(i) an office, residential or educational building, or a building used for an industrial process, or

(ii) a car park, shop, restaurant, garage, petrol filling station or other building or structure provided under transport legislation.

Commencement

Sch. 2(8)(ClassA) para. A1(a)-(c)(ii): April 15, 2015

Extent

Sch. 2(8)(ClassA) para. A1(a)-(c)(ii): England

Law In Force

A.2. Interpretation of Class A

For the purposes of Class A, references to the construction or erection of any building or structure include references to the reconstruction or alteration of a building or structure where its design or external appearance would be materially affected.

Commencement

Sch. 2(8)(ClassA) para. A2: April 15, 2015

Extent

Sch. 2(8)(ClassA) para. A2: England

Class B

dock, pier, harbour, water transport, canal or inland navigation undertakings

Law In Force

B. Permitted development

Development on operational land by statutory undertakers or their lessees [or agents of development (including the erection or alteration of an operational building)][1] in respect of dock, pier, harbour, water transport, or canal or inland navigation undertakings, required—

(a) ***for the purposes of shipping, […][2]***

(b) ***in connection with the embarking, disembarking, loading, discharging or transport of passengers, livestock or goods at a dock, pier or harbour, or with the movement of traffic by canal or inland navigation or by any railway forming part of the undertaking [, or][3]***

[(c) in connection with the provision of services and facilities. **][3]**

Notes

1 Words inserted by Town and Country Planning (General Permitted Development etc.) (England) (Amendment) Order 2021/428 art.10(2)(a) (April 21, 2021: insertion has effect subject to saving and transitional provision specified in SI 2021/428 art.15)

2 Word revoked by Town and Country Planning (General Permitted Development etc.) (England) (Amendment) Order 2021/428 art.10(2)(b) (April 21, 2021: revocation has effect subject to saving and transitional provision specified in SI 2021/428 art.15)

3 Added by Town and Country Planning (General Permitted Development etc.) (England) (Amendment) Order 2021/428 art.10(2)(c) (April 21, 2021: insertion has effect subject to saving and transitional provision specified in SI 2021/428 art.15)

Commencement

Sch. 2(8)(ClassB) para. B(a)-(b): April 15, 2015

Extent

Sch. 2(8)(ClassB) para. B(a)-(c): England

Law In Force

B.1. Development not permitted

Development is not permitted by Class B if it consists of or includes—

(a) the construction or erection of a hotel, or of a bridge or other building not required in connection with the handling of traffic; or

(b) the construction or erection otherwise than wholly within the limits of a dock, pier or harbour of—

(i) an educational building, **[…][1]**

(ii) a car park, shop, restaurant, garage, petrol filling station or other building provided under transport legislation **[** , or **][2]**

[(c) where the development falls within paragraph B(c)—

(i) the erection of a building other than an operational building; or

(ii) the alteration or reconstruction of a building other than an operational building, where its design or external appearance would be materially affected.

][2]

Notes

1 Word revoked by Town and Country Planning (General Permitted Development etc.) (England) (Amendment) Order 2021/428 art.10(3)(a) (April 21, 2021: revocation has effect subject to saving and transitional provision specified in SI 2021/428 art.15)

2 Added by Town and Country Planning (General Permitted Development etc.) (England) (Amendment) Order 2021/428 art.10(3)(b) (April 21, 2021: insertion has effect subject to saving and transitional provision specified in SI 2021/428 art.15)

Commencement

Sch. 2(8)(ClassB) para. B1(a)-(b)(ii): April 15, 2015

Extent

Sch. 2(8)(ClassB) para. B1(a)-(c)(ii): England

Law In Force

[B.1A.— Condition

(1) Development is permitted by Class B subject to the condition that the relevant statutory undertaker consults the local planning authority before carrying out any development, unless that development falls within the description in paragraph B.3.

][1]

Notes

1 Added by Town and Country Planning (General Permitted Development etc.) (England) (Amendment) Order 2021/428 art.10(4) (April 21, 2021: insertion has effect subject to saving and transitional provision specified in SI 2021/428 art.15)

Extent

Sch. 2(8)(ClassB) para. B1A(1): England

Law In Force

B.2. Interpretation of Class B

For the purposes of Class B—

(a) references to the construction or erection of any building or structure include references to the reconstruction or alteration of a building or structure where its design or external appearance would be materially affected, and

(b) the reference to operational land includes land designated by an order made under section 14 or 16 of the Harbours Act 1964 (orders for securing harbour efficiency etc., and orders conferring powers for improvement, construction etc., of harbours)[1] , and which has

come into force, whether or not the order was subject to the provisions of the Statutory Orders (Special Procedure) Act 1945[2].

Notes

[1] relevant amendments are made by Schedules 6 and 12 to the Transport Act 1981 (c. 56), section 46 of the Criminal Justice Act 1982 (c. 48), Schedule 3 to the Transport and Works Act 1992 (c. 42), Schedule 2 to the Planning Act 2008 (c. 29), Schedule 21 to the Marine and Coastal Access Act 2009 (c. 23) and S.I. 2006/1177 and 2009/1941.

[2] An order is subject to special parliamentary procedure under the Act if it is one which the Secretary of State makes which authorises the compulsory purchase of land (see paragraph 22 of Schedule 3 to the Harbours Act 1964).

Commencement

Sch. 2(8)(ClassB) para. B2(a)-(b): April 15, 2015

Extent

Sch. 2(8)(ClassB) para. B2(a)-(b): England

Law In Force

[B.3.—

Development falls within this paragraph if—

(a) it is urgently required for the efficient running of the dock, pier, harbour, water transport, canal or inland navigation undertaking, and

(b) it consists of the carrying out of works, or the erection or construction of a structure or of an ancillary building, or the placing on land of equipment, and the works, structure, building, or equipment do not exceed 4 metres in height or 200 cubic metres in capacity.

][1]

Notes

[1] Added by Town and Country Planning (General Permitted Development etc.) (England) (Amendment) Order 2021/428 art.10(5) (April 21, 2021: insertion has effect subject to saving and transitional provision specified in SI 2021/428 art.15)

Extent

Sch. 2(8)(ClassB) para. B3(a)-(b): England

Class C

works to inland waterways

Appendix 6: *R(Candlish) v Hastings BC* [2006] Env. LR 13

R. (ON THE APPLICATION OF CANDLISH) v HASTINGS BC

QUEEN'S BENCH DIVISION (ADMINISTRATIVE COURT)

(Davis J.): July 14, 2005

[2005] EWHC 1539 (Admin); [2006] Env.L.R. 13

LT Construction projects; Development; Environmental impact assessments; Planning permissions

H1 *Environmental impact assessment—judicial review—planning permission granted for first phase of a project—single phase not required to undergo EIA—whether need for EIA to be considered in relation to overall project—whether "development" related to actual application or overall project*

H2 The claimant (''C'') was a local resident who applied for judicial review of the decision by the defendant (''H'') to grant planning permission, subject to conditions, for phase one of a two-phase development project undertaken as part of the Millennium Communities Programme. The overall project covered 67ha and consisted of 700 residential homes, business offices, retail use and other ancillary developments. The first phase consisted of the infrastructure development of a spine road, associated mini-roundabout and surface water attenuation works. That application acknowledged that a separate planning application was required for the second phase of the project, and that the second phase would require an environmental impact assessment, which would also include phase one. H took the view that no EIA was required; the proposed development being less than one hectare, and no part of the development falling within a ''sensitive area'' as defined in the Town and Country Planning (Environmental Impact Assessment) (England and Wales) Regulations 1999. Whilst accepting that there was no deliberate ploy to avoid the carrying out of an EIA, C submitted that the grant of planning permission had been unlawful in that it had been in breach of the requirements of the 1999 Regulations, arguing that, as phase one was part of an overall project with no independent existence of its own, the application for planning consent had to be treated cumulatively as part of that overall project, so that phases one and two combined were an ''EIA development'' for the purpose of Sch.2 of the Regulations. H submitted that the assessment of whether the application for planning permission was an EIA development under Sch.2 of the Regulations was to be decided by reference to the application itself, and not the overall project. Although neither party wished the application to be decided upon this point, and no prejudice was alleged other than by the interested party, the question of the promptness of the application was also raised in the proceedings.

H3 **Held,** in dismissing the application:

H4 1. Whilst it had been unfortunate that the interested party had not been copied in to correspondence, there had not been an unreasonable delay in bringing proceedings, and there had not been such a degree of lack of promptness as to warrant a refusal to grant permission.

H5 2. There was no justification for treating the word ''development'' in the Regulations as though it meant ''project'' of some wider kind (*Bund Naturschutz in Bayern BV v Freistaat Bayern* (Case C-396/92), applied), it being plain that the Regulations were directed towards the actual application for planning permission. H's decision that this was not an EIA development, by reference to the phase one planning application, was in accordance with the wording of the Regulations, the wording and purpose of Directive 85/337/EEC, and European and English case law. The issue of cumulative impacts had been taken into account by the Secretary of State in setting the thresholds and criteria in Sch.2, and Sch.3 required consideration of cumulative development in selecting projects for screening.

H6 3. Accordingly the application was refused and it was not appropriate to direct a reference to the European Court of Justice on this issue.

H7 **Legislation referred to:**

Supreme Court Act 1981, s.31.

Directive 85/337/EEC (Environmental Impact Assessment), Arts 1, 2, 3, 4 and 6 and Annexes I and III.

Town and Country Planning (Assessment of Environmental Effects) Regulations 1988 (SI 1988/1199), Regs 2, 3, 4, 5, 6, 7 and 8 and Schs 1, 2 and 3.

Directive 97/11/EC (amending the Environmental Impact Assessment Directive)

Town and Country Planning (Environmental Impact Assessment) (England and Wales) Regulations 1999 (SI 1999/293)

Civil Procedure Rules 54.5 and 54.6.

H8 **Cases referred to:**

Aannamaersbedrijf PK Kraaijveld BV v Gedeputeerde Staten van Zuid-Holland (Case C-72/95) [1996] E.C.R. I-5403; [1997] Env. L.R. 265.

Berkeley v Secretary of State for the Environment, Transport and the Regions (No.1) [2001] Env. L.R. 16.

Berkeley v Secretary of State for the Environment, Transport and the Regions (No.3) [2001] EWCA Civ 1012; [2002] Env. L.R. 14.

Bund Naturschutz in Bayern B.V. v Freistaat Bayern (Case C-396/92) [1994] E.C.R. I-3717.

Commission of the European Communities v Ireland (Case C-392/96 [1999] E.C.R. I-5901; [2000] Env. L.R. D15.

Marleasing SA v La Comercial Internacional de Alimentacion SA (Case C-106/89) [1990] E.C.R. I-4135.

R. (on the application of Goodman) v Lewisham LBC [2003] EWCA Civ 140; [2003] Env. L.R. 28.

R. v Swale BC, Ex p. Royal Society for the Protection of Birds (1990) 2 Admin. L.R. 790
World Wildlife Fund (WWF) v Autonome Provinz Bozen (Case C-435/97) [1999] E.C.R. I-5613; [2000] Env. L.R. D14.

H9 *Dr D. Wolfe*, instructed by Public Interest Lawyers, for the claimant.
Mr H. Phillpot, instructed by the Borough Solicitor, for the defendant.
Mr R. Harwood, instructed by Hammonds, for the interested party.

JUDGMENT

DAVIS J.:

Introduction

1 The principal, although not only, point in this case involves an issue of interpretation of the Town and Country Planning (Environmental Impact Assessment) (England and Wales) Regulations 1999 (''the 1999 Regulations''). The issue perhaps can be put compendiously in this form: where an application for planning permission is for a development which, taken on its own by reference to the application, would not require an assessment of the likelihood of significant effects on the environment, is such an assessment nevertheless required if at the time that development is prospectively part of a wider development?

The factual background

2 The point arises in this way.

3 The Claimant, Mrs Carol Candlish, lives at an address in Hastings, East Sussex. Her home is near to a site on which had stood in days gone by the former Mount Pleasant Hospital, which was demolished in the 1990's. The land had long since been regarded as having potential for housing development: in fact planning permission for that purpose had previously been granted, albeit it had since lapsed.

4 In 1997 the Millennium Communities Programme was launched. One selected Millennium Community proved to be Hastings and Bexhill. As part of that programme a plan, known as the Hastings and Bexhill Five Point Plan, was approved in 2002, with an initial financial allocation of £38 million: the aim being to provide regeneration to the area. A company called Hastings and Bexhill Renaissance Limited (which trades under the name ''Sea Space''), a subsidiary of the South East of England Development Agency, was established for that purpose. One major aspect of the Five Point plan was to propose development of an area in the Ore Valley, sited on the north-eastern edge of Hastings Borough: that area including the Mount Pleasant site. The area in question covered about 67ha: and the proposals were for a mixed development, prospectively involving 700 residential homes; 4,000m^2 of business offices (Class B1); 1,500m^2 of retail (Class A1/A3); as well as open spaces and other ancillary developments.

5 As was predictable, the proposals have attracted both support and opposition. Those in support will doubtless have welcomed the potential boost to housing and employment in the area. Supporters currently include Hastings BC. Those in opposition will have had concerns about the disruption caused by major construction works; environmental and ecological issues; objection in principle to the further concretisation, if such a word be permitted, of the South-East of England; and the like.

6 The proposal advanced by Sea Space was that the Ore Valley Project should proceed in 2 phases. Phase 1 would be the submission of a detailed planning application for infrastructure proposals, and associated surface water attenuation measures, for part of the Mount Pleasant site. Phase 2 would be the subsequent submission of an outline planning application for the wider Ore Valley project.

7 In due course, on the August 13, 2004 Sea Space submitted a Planning Application with regard to part of the Mount Pleasant site (the application site amounting, as I was told, to 1.9ha). The proposal was stated to be for a ''Spine Road and associated mini-roundabout and surface water attenuation works''. The application was accompanied by a lengthy Planning Statement (dated August 12, 2004) by Gerald Eve, on behalf of Sea Space. It was entitled ''Hastings Millennium Community: Ore Valley: Phase I Planning Application''. At the outset of that statement it was stated: ''This planning application . . . represents the first of two planning applications that seek to obtain permission for the Hastings Millennium Community Proposals in Ore Valley.'' A little later on it was stated ''This detailed planning application . . . represent[s] Phase 1 of the Millennium Community Proposals and form[s] part of the wider Ore Valley proposals that will be submitted for outline planning permission in Autumn 2004''. It was stated that, to meet deadlines, it had ''been necessary to bring forward Phase 1'', which was described as a ''key element'' of the proposal, prior to the submission of the wider Ore Valley proposals; and that development of the spine road would enable the first phase of the residential development, being part of the ''wider Millennium Community Proposals'', to be brought forward.

8 A detailed Ecology Report relating to the application site, supporting the planning application, was also produced. That report in terms acknowledged that there would be a separate application with regard to Phase 2, supported by an Environmental Statement and that there would have to be an Environmental Impact Assessment (''EIA'') with regard to Phase 2: which EIA would also include Phase 1. In fact Gerald Eve had previously submitted in July 2004 a Scoping Report (as permitted by the 1999 Regulations) with a view ultimately to obtaining a Screening Opinion from the Local Authority with regard to Phase 2. In addition to the Ecology Report, other reports were also prepared and before the Council in connection with the Phase 1 planning application. These included a Reptile Mitigation Strategy; a Design Statement (relating to contaminants); and a Badger Report.

9 On October 13, 2004 the Borough Planning Officer reported to the Planning Board of Hastings BC with regard to the planning application, referring to the proposal as being ''to serve Housing Development Site'' (that, as counsel before me agreed, referring to prospective housing on the Mount Pleasant site itself).

The report in fact stated that ''it is anticipated that the surrounding land will be developed for housing'' and mentioned that the Mount Pleasant site was shown as allocated in the local plan as a housing site to accommodate 45 dwellings. It said: ''In the unlikely event of [the road] not extending further into the Millennium Community site the road would still be required to serve residential development on the Mount Pleasant Hospital site . . .'' The report, reflecting the planning statement of Gerald Eve, described the application as representing the first phase of the Ore Valley Millennium Community project. The report also referred to various issues, including ecology issues. There was, among other things, discussion of issues concerning badgers and surface water drainage with regard to contaminated soil. The report concluded that the application was a ''welcome first phase of the Millennium Community Scheme in this area . . .''; and recommended the grant of permission, subject to conditions.

10 Mrs Candlish opposed the planning application. She wrote vigorous letters to object. Her points among other things included the raising of concerns as to badgers with setts in and near the application site and as to contamination. She also lodged a petition, which presumably is that referred to in the Planning Officer's report, which recorded that four letters and a Petition of Objection had been received.

11 In the event, planning permission was granted on the October 15, 2004, subject to conditions.

12 On the December 14, 2004 a fax was received by the Council from solicitors acting for the Claimant specifically querying whether the conditions had been met so as to permit the commencement of operations on the site; and also saying they had been instructed to consider the possibility of a judicial review challenge to the grant of the planning permission. On the December 15, 2004, an application for an injunction was threatened; and the question of the need for EIA also was raised. On the December 24, 2004 the Council responded, among other things, stating that no EIA was required and that the proposed challenge was ''fundamentally misconceived''. The letter also stated that the proposed development was not part of a larger scheme and that the Council had carried out an ''informal EIA'' in any event. There was further correspondence; and in the event the Claim Form was issued on the January 13, 2005, just within the three-month limit laid down in CPR 54.5. No letter before the Claim Form had been sent to Sea Space.

13 No application for planning permission in respect of Phase 2 has to date been made.

The procedural history

14 The Claim Form raised four grounds of claim. The first, and principal, ground was that in granting planning permission the Council had breached the requirements of the 1999 Regulations. The other grounds asserted a failure to take into account the issues relating to the wider scheme, and a failure properly to consider the issues relating to badgers and to contamination. In argument before me, Mr Wolfe (appearing on behalf of the Claimant) abandoned the last three

grounds, which he said were in any event subordinated to his first ground. The sole ground pursued, therefore, related to the application of the 1999 Regulations. It is accepted that the Claimant has sufficient standing to bring such a claim.

15 On the February 11, 2005 Collins J. granted permission, saying that the point about the 1999 Regulations seemed to him to be arguable, and also, albeit expressing scepticism, indicating that the other points (specifically the badger point) could be pursued. He also said this: ''While there has been delay, the IP [Sea Space] has not suggested that it will be prejudiced and no prejudice is relied on in the Acknowledgement of Service''. It is correct that Hastings Borough Council, the named Defendant, has never sought to argue prejudice arising from any delay that had occurred: although it did and does nevertheless object to the grant of permission on the ground of lack of promptness. But the Interested Party, Sea Space, had lodged an Acknowledgement of Service, taking the point about lack of promptness and relying on specific prejudice allegedly resulting to it. That latter Acknowledgement of Service, through administrative oversight, had not been drawn to the attention of Collins J. In the light of further representations made, Collins J. then revoked his earlier grant of permission, and by order of February 17, 2005 directed an oral ''rolled-up'' hearing, to enable the delay point to be argued but on the footing that (as Collins J. expressed it) ''otherwise the matter will be treated as if permission had been granted''.

16 The matter was listed for hearing with a time estimate of two days; and the argument took place over such a time period, detailed written arguments having been lodged in advance. Mr Wolfe appeared for the Claimant; Mr Phillpot appeared for the Council; and Mr Harwood appeared for Sea Space.

17 The structure of the written arguments of each party was to deal with the issue of delay at the end; and when Mr Wolfe opened his address to me he did so by reference to the 1999 Regulations. I then queried with him and Mr Phillpot and Mr Harwoood whether the question of delay should not be dealt with first at the hearing, since the question of the grant of permission depended on that. (I add that neither the Council nor Sea Space has sought to rely on delay as a ground for withholding relief if the claim were otherwise established: see s.31 (6) of the Supreme Court Act 1981). They replied that they did not wish that course to be adopted: indeed all counsel before me made it clear that they did not relish an outcome whereby, if the promptness point was decided adversely to the Claimant, there would be no adjudication on the underlying substantive issue under the 1999 Regulations.

18 All the same, having regard to the way in which this matter came before me and having regard to the order of Collins J. of February 17, 2005, I do think it appropriate to deal with the issue of promptness first.

Promptness

19 Rule 54.6 provides that a claim for Judicial Review must be issued promptly and in any event within 3 months of the date of the decision challenged. As already noted, this claim was issued (just) within the three-month period.

Although some queries have been raised in some quarters as to whether the requirement of promptness, as stipulated by the rule, is sufficiently certain it is, on binding authority, clear that the courts must apply the words of the rule to the facts of each case.

20 In the field of planning it seems to me to be of the greatest importance that challenges should be notified at the earliest practicable moment. It is not necessarily sufficient or appropriate to defer the intimation or issue of a claim to the end of the three-month period mention in the Rule. As often as not, perhaps more often than not, developers wish, for commercial and financial reasons, to press on with a development as soon as planning permission has been obtained. That, I think, is a general consideration I should bear in mind here.

21 In the present case, so far as prejudice is concerned the Council does not assert any prejudice to it arising from any want of promptness. But Sea Space does. The prejudice which it says arises is financial in nature. In his first witness statement dated February 3, 2005, Mr James Saunders, manager of Sea Space, stated that following the grant of planning permission Sea Space commissioned wildlife mitigation works which were, he said, an ''essential precursor'' to the implementation of the planning permission. Generally, the expenditure incurred after the grant of planning permission he identifies (perhaps on a non-exhaustive basis) as Engineering Design Fees (£69,300); Planning Consultant's Fees (£3,000); Safety Audit (£1,000); Fencing (£29,173); Topsoil Strip (£8,091); Consultant Ecologists Fees (£17, 581); and Sett Closure Fences (£930): a total of £129,075. Precisely when those works were undertaken, or expenses actually incurred, is not spelled out.

22 In a further witness statement dated March 22, 2005, Mr Saunders explained that there had been an error in his first witness statement, in so far as it said that the wildlife mitigation works had been commissioned after the grant of planning permission. He said that the contract for such works had in fact been ''let'' (in his word) before the grant of planning permission. He says however that that expenditure was actually incurred after the grant; and that ''it is likely that a significant part of those costs could have been avoided'' following a prompt notification of a challenge to the grant of planning permission. He makes the like suggestion with regard to the Engineering Design Fees, Safety Audit Works, Planning Consultant Fees and Ecologists Fees. In correspondence, the Claimant's solicitors suggested that earlier letters had suggested that much, if not all, of this work had been undertaken prior to the grant of planning permission and that those works had simply then carried on after the grant. They asked for disclosure of all relevant contracts and invoices: which the solicitors for Sea Space declined to produce.

23 In dealing with the issue of delay, no witness statement on behalf of the Claimant had been put in to explain her position. When I queried this with Mr Wolfe, he maintained that she was not required to (which is true) and in any case did not need to (which is altogether more debateable). He asserted that on their own evidence the Council and Sea Space had not shown any lack of promptness or any sufficient prejudice such as to justify the refusal of permission. Mr Wolfe maintained that stance to the end. However, perhaps appreciating that such an approach was not being received altogether favourably by the Judge he was

addressing, he on the morning of the second day of the hearing sought to put in a witness statement prepared overnight by the Claimant's solicitor. I gave leave to him to adduce it, Mr Phillpot and Mr Harwood very fairly indicating that they did not object.

24 That statement does provide material relevant to the issue of promptness. It explained that the Claimant, who is a pensioner with severe mobility difficulties, first sought legal advice about the planning permission on the November 4, 2004, consulting the local Citizens' Advice Bureau. The CAB considered it too complex a matter for them and gave her a list of names of local solicitors. She felt that many would be compromised (as having acted in the past for the Council on other matters) and one firm she did approach said it had no relevant expertise. After carrying out some enquiries, she on November12, 2004 contacted Mr Wolfe at Matrix Chambers. He very properly referred her to solicitors, suggesting Public Interest Lawyers, a firm based in Birmingham. Papers were then obtained and were considered by that firm at the end of November 2004. There were telephone conversations with the Claimant, she complaining that in her view planning conditions were being breached. In addition, the question of Legal Aid had to be addressed. A conference in due course took place on 13th December 2004 at the Claimant's home and further papers were provided. Letters of objection on behalf of the Claimant were then faxed by the solicitors to the Council on December 14 and 15, 2004. As to the failure to send copies of such correspondence to Sea Space, and in particular to send a copy of the pre-action protocol letter, dated December 15, 2004, the solicitor concerned very fairly accepts responsibility for this. She accepts that such a letter should have been sent; but that was not done, in part due, as she explained, to various pressures. She suggests, however, that it is surprising that the Council—given its close relationship with Sea Space on this matter—had not informed Sea Space. As to that, Mr Saunders in his first witness statement says that he had in fact been told by the Council in December 2004 that it was being said on behalf of the Claimant that the development was being commenced in breach of the planning conditions. He says in para.9 of that statement that Sea Space was entirely confident that was not so, since "the development had not commenced", and so did not need to take any action in response. However he says that Sea Space did not know and had not been told by the Council that there was a challenge to the lawfulness of the grant of planning permission until notified on the telephone by the Council on January 17, 2005: the day before Sea Space itself received the claim form.

25 I think it understandable, and reasonable, for the Claimant to have taken some time to consider her position; and also she did reasonably have to spend time in finding a suitable firm of solicitors who would act for her. It was then reasonable for the solicitors to spend some time in investigating what was potentially quite a complex matter and to arrange to see the Claimant at her home. I accept, therefore, that some elements of the time-frame involved can not fairly be attacked. Even so, I do think that, in the circumstances of a potential challenge to the implementation of a planning permission and where (as was known to the Claimant) at least some works were continuing on the site, a delay of some 2 months

before the intimation of any challenge (on December 14, 2004) was unduly long. Thereafter, I do not think there was any unreasonable delay before this claim form was issued on January 13, 2005, in the light of the intervening correspondence: but it was unfortunate, to say the least, that Sea Space had not by this time been brought in by the Claimant's solicitors on the correspondence.

26 The issue of prejudice is clearly of great significance in this context. The prejudice argued for on behalf of Sea Space is financial in nature. But it seems to me on the evidence that a significant part of the expenditure identified in Mr Saunders' statement relates to works undertaken in the immediate aftermath of the grant of planning permission (in some respects, indeed, pursuant to a contract pre-dating the grant) and which is not shown, in causational terms, to be linked to undue delay on the part of the Claimant in first intimating a challenge. Further, Mr Saunders himself did not regard such works as the commencement of the development. Moreover, there is no breakdown of the periods in which the various items of expenditure were incurred; and it seems that some were incurred even after December 15, 2004 (when Sea Space itself knew of a potential challenge, at least by reference to the planning conditions). Indeed, given that—as Mr Saunders accepts—the challenge by reference to the conditions was regarded as no deterrent to Sea Space in continuing its works (since Sea Space was confident of its position) I rather think that Sea Space might not have been deterred from continuing such works even had it been told (as it should have been by the Claimant's solicitors) that there was a challenge, on environmental impact grounds, to the lawfulness of the grant of planning permission. For the position both of the Council and of Sea Space always has been to assert confidence in their position on this point also, and to regard the present claim as misconceived and unarguable. In fact, it is to be noted that Mr Saunders' witness statement is phrased very cautiously in this regard: he says on more than one occasion in his second statement that costs ''could have been'' avoided following prompt notification of a challenge to the grant of planning permission by way of judicial review. Nowhere does he in terms say they *would* have been.

27 As to the failure to notify Sea Space of the letter of December 15, 2004 that was an error, and a significant one—after all it was Sea Space which was the beneficiary of the grant of planning permission and Sea Space which was undertaking the site works. But it remains of relevance that Sea Space did at least know in December 2004 that a challenge of some kind to the implementations of the planning permission was being made, albeit by reference to the conditions; and that it was unmoved by that. I also have some sympathy with the suggestion of the Claimant's solicitor that it might have been expected, in view of the effective communality of interests on this particular matter, that the Council would have apprised Sea Space of the development with regard to the EIA claim: although that is not an entire justification, as is accepted, for the failure to send Sea Space direct a copy of the pre-action letter.

28 In all the circumstances, and considering the explanations advanced on behalf of the Claimant and the issue of prejudice to Sea Space, I do not consider that there has been such a degree of lack of promptness here as to warrant a refusal to grant permission.

29 It follows, in the light of the order of Collins J. of February 17, 2005, that permission is granted. I therefore go on to consider this matter as a substantive claim for Judicial Review.

Legal Background

30 It is necessary to set out, in some degree of detail, the legal background to the 1999 Regulations.

31 The 1999 Regulations are designed to implement Council Directive 85/337/EEC which was substantially amended (in ways important to this present claim) by Directive 97/11/EC.

32 In its original form the Directive had been stated to apply to the assessment of the environmental effects of those public and private projects which were likely to have significant effects on the environment (Art.1). Article 2 provided for Member States to adopt all measures necessary to ensure that, before consent was given, projects likely to have significant effects on the environment by virtue, inter alia, of their nature, size and location were made subject to an assessment with regard to their effects: those projects being defined in Art.4. Article 4 provided (broadly) that projects specified in Annex I must have such an assessment; whereas those specified in Annex II should be subject to such an assessment where Member States considered that their characteristics so required. Article 4 of the unamended Directive goes on to provide as follows:

> "To this end Member States may, inter alia, specify certain types of projects as being subject to an assessment or may establish the criteria and/or thresholds necessary to determine which of the projects and classes listed in Annex II are to be subject to an assessment in accordance with Articles 5–10".

Effect was given in England and Wales to that Directive by the Town and Country Planning (Assessment of Environmental Effects) Regulations 1988.

33 Amending Directive 97/11 was adopted on March 3, 1997 and came into effect on the March 3, 1999. The detailed recitals to that Directive include the following:

> "(7) Whereas projects of other types may not have significant effects on the environment in every case; whereas these projects should be assessed where Member States consider they are likely to have significant effects on the environment;
>
> (8) Whereas Member States may set thresholds or criteria for the purpose of determining which such projects should be subject to assessment on the basis of the significance of their environmental effects; whereas Member States should not be required to examine projects below those thresholds or outside those criteria on a case-by-case basis;
>
> (9) Whereas when setting such thresholds or criteria or examining projects on a case-by-case basis for the purpose of determining which projects should be subject to assessment on the basis of their significant environmental effects, Member States should take account of

the relevant selection criteria set out in this Directive; whereas, in accordance with the subsidiarity principle, the Member States are in the best position to apply these criteria in specific instances.''

34 The recitals to Directive 85/337, in its amended form, include a recital to the effect that development consent for public and private projects which are likely to have significant effects on the environment should be granted only after prior assessment of the likely significant environmental effects of those projects. Another recital states that ''projects of other types may not have significant effects on the environment in every case and . . . those projects should be assessed where the Member States consider that their characteristics so require.''

35 Article 1 of the Directive in part provides as follows:

''Article 1

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

2. For the purposes of this Directive:

'project' means:

the execution of construction works or of other installations or schemes,

other interventions in the natural surroundings and landscape including those involving the extraction of mineral resources;

'developer' means:

the applicant for authorization for a private project or the public authority which initiates a project;

'development consent' means:

the decision of the competent authority or authorities which entitles the developer to proceed with the project.''

. . .

Article 2.1 provides as follows

''Member States shall adopt all measures necessary to ensure that, before consent is given, projects likely to have significant effects on the environment by virtue inter alia, of their nature, size or location are made subject to an assessment with regard to their effects. These projects are defined in Article 4.''

Article 3 provides for the content of an EIA. Article 4 then provides as follows:

''1. Subject to Article 2 (3), projects of the classes listed in Annex I shall be made subject to an assessment in accordance with Articles 5 to 10.

2. Subject to Article 2 (3), for projects listed in Annex II, the Member States shall determine through;

(a) a case-by-case examination,

or

(b) thresholds or criteria set by the Member State

whether the project shall be made subject to an assessment in accordance with Articles 5 to 10.

Member States may decide to apply both procedures referred to in (a) and (b).

3. When a case-by-case examination is carried out or thresholds or criteria are set for the purpose of paragraph 2, the relevant selection criteria set out in Annex III shall be taken into account.

4. Member States shall ensure that the determination made by the competent authorities under paragraph 2 is made available to the public.''

Article 6.4 provides that, where there is to be an EIA, public consultation must take place before the decision is taken on development consent. It is not necessary specifically to refer to other provisions in the Directive or to the Annexes: save that it is to be noted that Annex III includes, as one relevant characteristic of a project to be considered, ''the cumulation with other projects''.

36 That Directive (in both its unamended and amended form) has attracted litigation, leading to decisions of the European Court of Justice relevant to the issue arising in the present case.

37 In *Aannemersbedrijff PK Kraaijeveld BV v Gedeputeerde Staten van Zuid-Holland* [1997] 3 C.M.L.R. 1, there was an issue as to whether certain proposed dyke works fell within the ambit of the Directive (in its unamended form) and as to the effect of the regulations passed in the Netherlands designed to implement the Directive. The Court referred, in the course of its judgment, to the provisions of Art.4.2 of the Directive permitting Member States to provide criteria or thresholds. As to that, the Court said this at [49] of its judgment.

''49 The interpretation put forward by the Commission, namely that the existence of specifications, criteria and thresholds does not remove the need for an actual examination of each project in order to verify that it fulfils the criteria of Article 2(1), would deprive Article 4(2) of any point. A Member State would have no interest in fixing specifications, thresholds and criteria if, in any case, every project had to undergo an individual examination with respect to the criteria in Article 2(1).''

Then, having referred to Art.2.1, the Court proceeded to say this:

''52 In a situation such as the present, it must be accepted that the Member State concerned was entitled to fix criteria relating to the size of dykes in order to establish which dyke projects had to undergo an impact assessment. The question whether, in laying down such criteria, the Member State went beyond the limits of its discretion cannot be determined in relation to the characteristics of a single project. It depends on an overall assessment of the characteristics of projects of that nature which could be envisaged in the Member State.

. . .

53 Thus a Member State which established criteria or thresholds at a level such that, in practice, all projects relating to dykes would be exempted in advance from the requirement of an impact assessment would exceed the

limits of its discretion under Articles 2(1) and 4(2) of the directive unless all projects excluded could, when viewed as a whole, be regarded as not being likely to have significant effects on the environment.''

38 As I see it, there are two clear implications from these passages in the judgment. First, the Court was in principle approving the right of Member States to impose criteria and thresholds and thereby upholding the proposition that there was not required to be an individual examination of each project in each case to assess whether or not there would be significant effects on the environment. Secondly, however, thresholds and criteria generally speaking could not properly be set so as to provide, in practice, an effective exemption from EIA to all projects of a certain type.

39 An example of the working of the *Kraaijeveld* principles can be found in the case of *Commission of the European Communities v Ireland* [1999] E.C.R. I - 590, also a decision on the Directive in its unamended form. The facts were complex. It involved a complaint by the Commission that Ireland had not correctly transposed the provisions of Art.4(2) of the Directive, Ireland having imposed absolute thresholds for certain kinds of project, including afforestation/land reclamation and extraction of peat. The Commission said that some sites potentially involved were particularly sensitive, and might be national heritage areas. Further, it was said that a number of separate projects individually might not exceed the relevant thresholds (and so not require EIA); but taken cumulatively such projects might have significant environmental effects. So far as afforestation was concerned, Ireland (in the light of previous challenge by the Commission) had in fact reduced its previously set threshold from 200ha to 70ha. The Commission regarded that as an improvement but still inadequate; and the complaint continued to be that the Irish legislation still failed to take sufficiently into account the potential cumulative effect of projects. The (main) response of Ireland to such a complaint in summary was that it was theoretical and that the use of thresholds had been sanctioned in *Kraaijeveld*.

40 The Court indicated that regard must be had, in laying down criteria or thresholds, not only to the size of projects but also their nature and location (paras 65–70). As to cumulation, this was said;

> ''73 As regards the cumulative effect of projects, it is to be remembered that the criteria and/or thresholds mentioned in Article 4(2) are designed to facilitate the examination of the actual characteristics exhibited by a given project in order to determine whether it is subject to the requirement to carry out an assessment, and not to exempt in advance from that obligation certain whole classes of projects listed in Annex II which may be envisaged on the territory of a Member State (*Commission v Belgium*, cited above, paragraph 42, Kraaijeveld, cited above, paragraph 51, and Case C-301/95 *Commission v Germany* [1998] ECR I-6135, paragraph 45).
>
> 74 The question whether, in laying down such criteria and/or thresholds, a Member State goes beyond the limits of its discretion cannot be determined in relation to the characteristics of a single project, but depends on an overall assessment of the characteristics of projects of that nature

which could be envisaged in the Member State concerned (Kraaijeveld, paragraph 52).

75 So, a Member State which established criteria and/or thresholds at a level such that, in practice, all projects of a certain type would be exempted in advance from the requirement of an impact assessment would exceed the limits of its discretion under Articles 2(1) and 4(2) of the Directive unless all the projects excluded could, when viewed as a whole, be regarded as not being likely to have significant effects on the environment (see, to that effect, Kraaijeveld, paragraph 53).

76 That would be the case where a Member State merely set a criterion of project size and did not also ensure that the objective of the legislation would not be circumvented by the splitting of projects. Not taking account of the cumulative effect of projects means in practice that all projects of a certain type may escape the obligation to carry out an assessment when, taken together, they are likely to have significant effects on the environment within the meaning of Article 2(1) of the Directive.''

The Court, having made some pointed comments to the effect that no project for peat extraction in Ireland ever had been the subject of EIA and, as to afforestation, having made comments concerning the prospect of different adjoining owners implementing afforestation so as to keep within the 70ha limit, decided that the relevant Irish legislation had set thresholds selected for those classes of project without ensuring that the objective of the Directive would not be circumvented by the splitting of projects. It is clear from that decision that objection was not being taken by the Court to the introduction of criteria or thresholds as such; the objection was that the subordinate legislation had not properly implemented the Directive in that the criteria and thresholds for these types of projects had not sufficiently addressed the prospect of circumvention by splitting.

41 It is also plain that if EIA is required then—as the wording of the Directive makes clear—it is required before a decision on the relevant development consent is taken. It is established that where the requisite EIA is not undertaken, it generally is no answer to say that the same conclusion would have eventuated anyway: *Berkeley v Secretary of State for the Environment (No.1)* [2001] 2 A.C. 603.

42 The issue of cumulation was also addressed in the opinion of the Advocate - General in the case of *Bund Naturschutz in Bayern BV v Freistaat Bayern* [1994] E.C.R. I - 3717, by reference to the Directive in its unamended form. In that case, planning consent had been sought (as was the practice) for a section of road: which section was contemplated to form part eventually of an entire road link. One complaint raised was that EIA should have been undertaken for the entire road link and that it was wrong to give consideration only to the specific link for which development consent was being sought. The Advocate General thought that the ''optimal solution'' was for EIA with regard both to the routing of the entire length and to the specific construction projects for each section. But having so stated, he went on to say this:

"67. That is, however, not a solution that the Member States are bound to choose under the EIA Directive. As stated by Freistaat Bayern and the three governments which have submitted observations, it is not possible to interpret the directive to the effect that it makes an environmental impact assessment mandatory for anything other than the specific projects submitted by developers to the competent authorities in order to obtain authorization to carry out construction or other works - even if the actual application relates to only one part of a longer road link which, as normally happens in practice, is to be constructed in stages.

68. The principle underlying the directive is unambiguous: an environmental impact assessment is to be carried out for projects in respect of which the public or private developer is seeking development consent (see on this point Article 1(2), Article 2(1) and (2), Articles 5, 6 and 8 in particular, which all assume that applications have been submitted for consent to a project).

69. That result is confirmed by the difficulties which could arise in laying down what comprises an "entire project" when that concept is not the same as "a specific project in respect of which an application has been submitted". In addition, there might be difficulties in carrying out an environmental impact assessment as provided for in the directive for projects which have not yet been worked out in detail. It must be self-evident that the directive cannot indirectly have the effect of forcing the Member States to depart from the normal practice according to which long road links are executed by constructing sections over staggered periods.

70. It is, however, undoubtedly correct that, as the United Kingdom points out, the purpose of the directive should not be lost by the projects which should be subject to an environmental impact assessment being given a form which renders an environmental impact assessment meaningless. The Member States must ensure that the obligation to carry out an environmental impact assessment is not circumvented by a definition that is over-strict or otherwise inappropriate, in the light of the purpose of the directive, of the projects in respect of which application must be made."

In the event, the Advocate-General (having gone on in para.71 to make some salient observations on the applicable approach where EIA *is* required for specific projects) gave his concluded opinion by reference to other matters: as did the Court, which in consequence did not in its judgment deal with that earlier aspect discussed by the Advocate- General.

43 The need to give effect to the objective of the Directive was also emphasised by the Court in *World Wildlife Fund v Autonome Provinz Bozen* [2000] 1 C.M.L.R. 149. This was said at [45] of the judgment:

"Consequently, whatever the method adopted by a Member State to determine whether or not a specific project needs to be assessed, be it by legislative designation or following an individual examination of the project, the method adopted must not undermine the objective of the Directive, which is that no project likely to have significant effects on the

environment, within the meaning of the Directive, should be exempt from assessment, unless the specific project excluded could, on the basis of a comprehensive assessment, be regarded as not being likely to have such effects.''

The 1999 Regulations

44 The 1999 Regulations were introduced to give effect to the amended Directive. They came into force on March 14, 1999. They superseded previous EIA Regulations.

45 The recital to the Regulations (SI 1999/293) expressly stated that the Secretary of State had taken into account the selection criteria in Annex III to the Amended Directive (cf. Art.4.3 of that Directive).

46 In Regulation 2, which contains definitions, ''EIA application'' is defined as follows:

> ''an application for planning permission for EIA development.''

''EIA development ''is defined as follows:

> ''development which is either
> (a) Schedule 1 development; or
> (b) Schedule 2 development likely to have significant effects on the environment by virtue of factors such as its nature, size or location:''

''Schedule 1 application'' and ''Schedule 2 application'' are defined to mean an application for planning permission for Sch.1 development and Sch.2 development respectively. ''Schedule 2 development'' is defined as follows:

> ''development, other than exempt development, of a description mentioned in Column 1 of the table in Schedule 2 where—
> (a) any part of that development is to be carried out in a sensitive area; or
> (b) any applicable threshold or criterion in the corresponding part of Column 2 of that table is respectively exceeded or met in relation to that development;''

''Screening opinion'' is defined to mean a written statement of the opinion of the relevant planning authority as to whether development is EIA development.

47 Regulation 3 provides that planning permission may not be granted in respect of an EIA application in the circumstances there set out, unless the decision maker had first taken the environmental information (itself defined in reg.2) into consideration. Regulation 4 which provides general provisions relating to screening includes, among other things, the following provisions:

> ''(5) Where a local planning authority or the Secretary of State has to decide under these Regulations whether Schedule 2 development is EIA development the authority or Secretary of State shall take into account in making that decision such of the selection criteria set out in Schedule 3 as are relevant to the development.

. . .

(8) The Secretary of State may direct that particular development of a description mentioned in Column 1 of the table in Schedule 2 is EIA development in spite of the fact that none of the conditions contained in sub-paragraphs (a) and (b) of the definition of ''Schedule 2 development'' is satisfied in relation to that development.''

48 Regulation 5 provides for requests for a screening opinion from the local planning authority; and provides that such opinion is to be produced within three weeks of request. Regulation 6 relates to requests for screening directions from the Secretary of State. Regulation 7 (1) provides as follows:

''Where it appears to the relevant planning authority that—

(a) an application for planning permission which is before them for determination is a Schedule 1 application or Schedule 2 application; and

(b) the development in question has not been the subject of a screening opinion or screening direction; and

(c) the application is not accompanied by a statement referred to by the applicant as an environmental statement for the purposes of these Regulations

paragraphs (3) and (4) of regulation 5 shall apply as if the receipt or lodging of the application were a request made under regulation 5(1).''

Regulation 8 relates to determination of references to the Secretary of State of an application for planning permission. There follow various other detailed Regulations.

49 There then are the Schedules to the Regulations. Schedule 1 (which, of course, covers those cases where there must be an EIA) includes developments such as power stations, motorways, integrated chemical installations and so on. It is not relevant to the present case. Schedule 2 contains the descriptions of developments and applicable thresholds and criteria for the purposes of the definition of ''Schedule 2 development''. Paragraph 1 contains definitions, which include an extensive definition for ''area of the works.'' Paragraph 2 is headed ''The carrying out of development to provide any of the following—'' There follow descriptions contained in the first (left) column and applicable thresholds and criteria contained in the second (right) column. It is to be noted that sometimes the applicable threshold is, for example, set by reference to ''the area of the development''; sometimes to ''the area of the works''; sometimes to ''the area of the floor space''; and so on. Sub-paragraph 10 of para.2 relates to ''infastructure projects''. It includes, at (a), industrial estate development projects. The threshold set out in the second column for that category is an area of development exceeding 0.5ha. (b) relates to urban development projects: the threshold also is an area of development exceeding 0.5ha. (f) relates to construction of roads (unless included in Sch.1): the threshold is an area of the works exceeding 1ha. It perhaps may be noted that sub-para.13 includes, by reference to any change or extension of development, a stipulation in the second column that the thresholds and criteria

are applied to the change or extension, not to the development as changed or extended. As to Sch.3, that contains the selection criteria for screening Sch.2 development. It corresponds to Annex III to the amended Directive. By para.1 the characteristics of development which are required to be considered include the cumulation with other development.

50 It may be noted that, in contrast to the Directive, the word ''project'' does not feature in any significant way in the body of the 1999 Regulations (although mentioned in the recital and in Sch.2). The emphasis in those Regulations is on ''development''. In Art.2 of the Directive, however, the reference is to ''projects'' (as defined in Art.1 and Art.4) which are made subject to a requirement for ''development consent''. In many cases a ''project'' can no doubt be taken as being coextensive with a ''development''. But the wording of the Directive, as I see it, at least gives rise to the prospect that a ''project'' may be more than just a ''development'' for which development consent is sought. One possible example may be a section of road for which development consent is sought but where the practical reality is that (for example) a service station will in due course be needed; another example may be a development for which consent is sought where, in reality, there will have to be significant ancillary works. But this is not the subject of any further definition or explanation in the Directive.

Submissions

51 Against that rather complex legal background, the respective submissions can, I think, be summarised in this way (although I acknowledge that such a summary hardly does justice to the detail and length of the written and oral submission advanced to me).

52 It was common ground before me that the actual ''area of the works'' to which the Planning Application of August 13, 2004 relates was properly assessed as being less than 1ha. (It is said that it could amount to no more than 0.4ha). It was also common ground before me that no part of the development, however that is defined, in this case falls within a ''sensitive area'' as defined in the Regulations. In addition, Mr Wolfe expressly accepted that there is no suggestion that what has been done here was a deliberate ploy designed to evade the impact of the EIA regime. On the contrary, it is evident that there was no such ploy and it is evident that neither the Council nor Sea Space, which has been entirely open about its long-term aims, had considered that the EIA regime could apply to this application for Phase 1. Their understanding was that such regime would only apply at the stage of the Phase 2 application (assuming there was one) and that at that stage EIA would then include within it Phase 1 also.

53 Mr Wolfe's argument was to this effect:

52.1 The 1999 Regulations must be construed and applied so as to give effect to the purpose of the Directive.

52.2 If EIA is required, it must take place before a decision on planning consent is made.

52.3 Phase 1, for which the planning consent was sought, has no meaningful existence on its own. The only rationale for the existence of the

spine road and associated works is to provide access to the contemplated residential development of the Mount Pleasant site and thereafter Phase 2 (the Ore Valley project). In the absence of that, it is a road which has no function or use.

52.4 In the present case, the reality is therefore that Phase 1 is part of an overall ''project''; and, as such, the application for development consent for Phase 1 must be treated cumulatively and as part of that overall project and in conjunction with Phase 2. Were it otherwise, the need for EIA in respect of Phase 1 will have been circumvented by the splitting of the project, and thence the applications for development consent, into two. The 1999 Regulations must therefore be construed and applied so as to extend the EIA regime to such a situation and to give effect to the purpose of the Directive.

52.5 If that is so, then the area of development involved plainly exceeds that set out in the appropriate respects in the second column of Sch.2, in particular by reference to sub-paras 10(a) and (b); and as such is a ''Schedule 2 development''.

52.6 Accordingly, the Council was required, before taking its decision on the planning application, to assess whether the development taken as a whole was ''EIA development'': in particular, whether it was likely to have significant effects on the environment by virtue of factors such as its nature, size or location.

52.7 Since, on its own admission, the Council has made no such assessment—since it took the view that the development for which consent was being sought was *not* Sch.2 development (as defined)—the decision to grant planning permission was unlawful and must be quashed.

54 The arguments of Mr Phillpot and Mr Harwood were to this effect:

53.1 The assessment of whether the application for development consent involved a Sch.2 development (as defined) was to be decided by reference to the application itself.

53.2 On the face of the application, the application was properly determined as not being a Sch.2 development: since no part of it was in a sensitive area and the threshold stipulated for roads (as set out in Sch.2—viz. 1ha) was not exceeded.

53.3 That approach accords precisely with the natural meaning of the 1999 Regulations.

53.4 So far from being contrary to the purpose of the amended Directive, that approach is in fact consistent with it. The 1999 Regulations accord with the provisions of Art.4 (2) of the Directive, as amended: which makes clear that a case-by-case analysis is not required in each case and that thresholds may properly be set, provided the criteria in Annex III were first taken into account: and here the Secretary of State (as confirmed by the recital to the 1999 Regulations) had taken those criteria into account.

53.5 The assertion of ''cumulative effect'' underlying the asserted need for EIA is in any event theoretical only and has no practical bearing on this particular case or generally with regard to the relevant thresholds set out in Sch.2 of the 1999 Regulations.

53.6 Accordingly the Council was correct in considering this not to be a Sch.2 development and the planning permission was lawfully granted.

Disposition

55 I did query with Mr Wolfe what the practical purpose of these proceedings was. It seems clear that the Council and Sea Space had carried out an amount of ecological and environmental assessment with regard to Phase 1 (even if not constituting EIA as such). Further, it was common ground that if the Phase 2 application proceeds—as the Claimant considers is bound to happen—then at that stage there would be EIA extending also to Phase 1. So why these proceedings? Mr Wolfe's answer was to acknowledge that this present claim was founded on procedural matters: but the Claimant was, he said, entitled, before any decision was made on the planning application, to require the correct procedures to be followed, if the Phase 1 application was indeed an EIA application. Further, he submitted that the Claimant retains genuine concerns about the badger and contamination issues by reference to Phase 1 even if taken on its own: those issues (he says) might well have received fuller consideration had there been EIA at this stage; and that also provides justification for this claim. On the whole, although retaining some unease about the practical value of this claim, I am prepared to accept those answers.

56 Mr Wolfe candidly acknowledged that if one took the 1999 Regulations on their own, by reference to the natural and ordinary meaning of the words used, the decision of the Council was ''unimpeachable''. In my judgment, that must be right. Both the structure and the language of the 1999 Regulations are clear. Before consent for development can be given it must first be assessed as either a Sch.1 development or a Sch.2 development. A Sch.2 development is only an EIA development if it is likely to have significant effects on the environment. But the issue of likelihood of significant effects only falls to be considered where the development *is* a Sch.2 development (assuming no sensitive area is involved). There is therefore a two stage process: and the question of whether an application is an EIA application (that is, likely to have significant effects on the environment) only arises if the application has first been assessed as a Sch.2 application (as defined): cf. also *R. (on the application of Goodman) v LB of Lewisham* [2003] E.W.L.R. 28; [2003] EWCA Civ 140 at para.[7] of the judgment. The definition of ''EIA application'' and the wording of, for example, Reg.7 also show that it is the application for planning permission which is to be considered for that purpose.

57 Moreover, such an interpretation and approach is clear and easily workable by planning officials.

58 Mr Wolfe, however, submitted that implementing regulations generally should be construed so as to give effect to the purpose of the particular Directive

requiring implementation: see, for example, *Marleasing SA v La Comercial Internacional de Alimentacion SA* [1990] ECR I-4135. Further, he submitted that this particular Directive had a wide scope and a broad purpose: see [31] of the *Kraaijeveld* judgement. I accept those submissions.

59 Mr Wolfe then submitted that the reality here was that this particular planning application was part of a wider project. The spine road had no meaningful existence on its own: it only had any purpose if there followed residential development of the Mount Pleasant site to be followed in due course thereafter by the totality of the Ore Valley project. In my view, while one cannot predict as a matter of inevitability what will happen, the present indications are that it is probable, although not certain, that eventually there will hereafter be an Ore Valley development of some kind (even if not corresponding entirely to the present proposals); and it is very probable indeed that there will at the least be residential development of the balance of the Mount Pleasant site. Certainly the evidence showed, in my view, that no application would have been made for the Phase 1 development were it not for the proposals with regard to the Phase 2 development: the reports submitted on behalf of Sea Space are quite clear and open about that. Further, the spine road has no function without some further development.

60 Mr Wolfe's position thus was that here there was in substance an application for a wider project than simply the spine road; that that wider project involved an area of development clearly exceeding any applicable threshold (by reference to sub-paras 10(a) and 10(b) of para.2 of Sch.2): and so called for EIA. I might add that that approach could be said—although I did not have any note that Mr Wolfe said it—at least to fit with the title words to the various categories and columns contained in para.2 of Sch.2, viz: ''The carrying out of development to provide any of the following . . .'' It could thus be asserted that the spine road development was being carried out to provide an industrial estate development project and/or urban development project in the form of the Ore Valley project.

61 I cannot, however, accept these submissions. It is plain that the 1999 Regulations are geared to the actual application for development consent. That that is a legitimate approach for a Member State to adopt seems to me to be indicated by the definition of ''development consent'' and the references thereafter to such consent in the amended Directive. It also accords with the observations of the Advocate-General in paras 67–69 of his Opinion in *Naturschutz*. In my view there is no justification for treating the word ''development'', as used repeatedly in the 1999 Regulations, as though it means ''project'' of some wider kind: and the Regulations are clear that the relevant assessment is to be made by reference to the application for planning permission. Indeed were it otherwise, there could be difficulties in any given case in assessing just what ''project'' might be involved or, even if there was some wider project in mind, just what form it might take. These are precisely the considerations alluded to by the Advocate-General in the *Naturschutz* case. In this context, however, I would perhaps not give quite so much emphasis to that particular point as Mr Phillpot and Mr Harwood did. After all, if there *is* a Sch.2 development (as defined) the planning authority in deciding whether such development is EIA development (see

Reg.4 (5)) must do the best it can in assessing, for example, cumulation implications. Even so, this present case illustrates the practical difficulties potentially involved in Mr Wolfe's argument. Here, the planning application for Phase 1 in respect of the spine road (and associated works) was not just ostensibly an application for such development; it was in fact an application for such development. If—as Mr Wolfe's argument connotes—it is nevertheless in some way to be treated as an application for the Ore Valley project then that poses difficulties for the assessment said then to be required: for even if there was a probability that there might be some eventual Ore Valley project there could be no certainty at all as to what eventual size and form (e.g. in the mix of housing, shops, offices etc) it might ultimately take or be permitted to take: assuming planning permission for that project was granted at all.

62 Mr Wolfe's alternative submission (which I think was really a variation of his first submission) then was that the imposition of criteria and thresholds could not be a complete answer when the development which is ostensibly the subject of the planning application has no meaningful existence or purpose independent of a wider project (which wider project would exceed the stipulated thresholds).

63 I had some difficulty with the emphasis that Mr Wolfe placed in this context on a development having no ''independent existence'' (his phrase). Clearly, if that is the case, that is a very strong *factual* pointer to there being a wider project in contemplation. But I cannot see that it necessarily has any *legal* bearing on the interpretation of, or application of, the 1999 Regulations. For example, an urban development project, for which planning consent is sought, may have an area of development not exceeding 0.5ha but may be a perfectly viable and sufficient project in its own right: the developer, however, may openly accept that he would not have sought development consent for that development purely taken on its own and only does so because it would be a good starting point for further development on an adjoining site which he hopes to be able to achieve. On Mr Wolfe's argument, that scenario also must, as I see it, attract the EIA regime: even though the initial application relates to a development having an ''independent existence''.

64 Be that as it may, underpinning Mr Wolfe's submissions was the proposition that the overriding purpose of the Directive is to subject to the EIA regime all projects with the potential for having significant effects on the environment to the EIA regime. It can be accepted that that, broadly, is indeed the purpose (see, for example, *Bozen* at [45]). But to my mind it is self-evident that the Directive (in particular, by Art.4.2) has, by permitting the creation of criteria and thresholds, refined that purpose (in the sense that such criteria and thresholds are, generally speaking, considered permissible and not defeating the principal purpose). Were it otherwise, then, as is pointed out in the *Kraaijeveld* case, such criteria and thresholds would themselves have no purpose. The recitals to Amending Directive 97/11 themselves had made clear that Member States are not required to examine cases falling below the thresholds or outside the criteria on a case-by-case basis. As put by Schiemann L.J. in *Berkeley v Secretary of State for Environment (No.2)* [2002] Env. L.R. 14; [2002] EWCA Civ 1012 at [47]:

> "The amended Directive is not intended to prevent all development which is likely to have a significant effect on the environment. It is intended to improve the quality of the decision making process in a group of cases . . . In relation to developments falling within Annex II the Community has recognised that in some cases it will be desirable to insist that the EIA procedures be gone through but that this will not be desirable in all cases".

65 When it was put to Mr Wolfe in argument that his approach *would* involve every planning authority being required to assess every planning application on a case by case basis (viz. to assess cumulation and to see if a wider project was directly or indirectly involved) he had difficulty in disagreeing. But he asserted that in 9 cases out of 10 there would be no difficulty for a planning authority and in any event in order to achieve the overriding purpose of the Directive a purely mechanistic approach on the part of planning authorities should be avoided. With respect, that submission does not, in my view, give effect to the rationale of the Directive permitting Member States to provide for thresholds and criteria. Further, in *Berkeley No.2* where the main issue was whether it was permissible for this country to establish, by the 1999 Regulations, guidelines which in the relevant respects could be "mechanically applied" (see [3] of the judgment), it was held that it was. The reasons of the court in *Berkeley No.2* (in particular, as set out at [48]–[50]) generally seem to me to be directly in point here and to be contrary to Mr Wolfe's submissions.

> "48. Miss Sharpston submits that the Directive does not permit the setting of thresholds purely by reference to size. We agree that Article 4(3) and Annex III and the case law to which we have referred make it clear that the Member States in deciding upon the criteria will need to take a variety of matters into consideration other than size. However that does not have as its logical consequence that the criteria themselves must refer to each or all of those matters. We reject the submission to the contrary.
>
> 49. The Directive clearly envisages, as the case law confirms, that Member States can establish criteria in advance and that cases on one side of the line do not need to be subject to an EIA assessment. It is manifest that one can always conceive of possible situations in which by an accumulation of notional sites and notional developments a devastating effect on the environment could be produced. Member States are under a duty to consider whether the criteria which they establish will ensure that, before consent is given, projects *likely* to have *significant* effects on the environment (Article 2 with my emphasis) will be subjected to an EIA. They must take into account possible cumulative effects and the criteria in Annex III.
>
> 50. There is no reason to suppose that the Secretaries of State have failed to do this. Nor is the end result on its face irrational or very surprising. The position is quite different from that which appertained in the Ireland case. There it was manifest from the material before the Court that the transposition was not Community Law compliant. In the present case the material

produced by Lady Berkeley does not have that effect and we do not lengthen this judgment by setting it all out''.

Berkeley (No.2), I might add, had involved a challenge raised to an urban development project which did not exceed the specified threshold. It is to be observed that, though the prospect of cumulation had in that case been raised and emphasised by counsel for the Claimant (see [40]), it was found that it could not be held that the development in question might be an EIA development: see [44].

66 In this context, as the Court of Appeal in *Berkeley (No.2)* noted, it is always possible to conceive of a situation where an accumulation of notional developments could produce a devastating effect on the environment. But it is also to be noted that under the Amended Directive (by Art.4.3) Member States are required to take the relevant selection criteria in Annex III into account. Such criteria include cumulation with other projects. In fixing the criteria and thresholds set out in Sch.2, the Secretary of State took the selection criteria contained in Annex III to the Directive into account: see the recital to the 1999 Regulations. Thus the thresholds were chosen with the risk of cumulation having first been taken into account. Mr Wolfe, as a further aspect of his argument, sought to say that the 1999 Regulations had not properly implemented the Directive: specifically, in setting a 1ha threshold for ''roads''. In my view, the wording of the 1999 Regulations belie that submission. Indeed, as I see it, that submission is contrary to the actual decision of the Court of Appeal in *Berkeley (No.2)*. As to that, Mr Wolfe submitted that that case involved an urban development project, not a road. But in my view that is a distinction without a difference: for in that case, as noted by Schiemann L.J., no sufficient material had been produced to show that the transposition (by means of the 1999 Regulations) was not compliant with the Directive. In the present case, likewise, the Claimant has produced no such material. Accordingly it can in this case be shortly stated (as it was by Schiemann L.J. in *Berkeley (No.2)* that the position is quite different to that which appertained in the *Ireland* case.

67 In addition it is, I think, important not to overlook some other factors, quite apart from the factor relating to cumulative impact which the Secretary of State took into account before fixing the thresholds and criteria in Sch.2, which support the view that the 1999 Regulations comply with the Directive. They are these:

67.1 First, even where thresholds are not exceeded, EIA will always be required for development in sensitive areas (as defined).

67.2 Second, even where thresholds are not exceeded, there is the right of a person to request the Secretary of State to make a direction under Reg.4 (8).

67.3 Third, where there is evidence of the possibility of a wider project it is likely that that will feature in the deliberations of the planning authority on purely planning grounds: as in fact happened in the present case.

67.4 Fourth, as pointed out by Mr Harwood, an asserted fear of small projects having an adverse cumulative effect has to be looked at

practically (and as a matter of real risk), not as a matter of theory. That accords with the legal authorities and also with practical reality: for example, for a developer or developers in a context such as the present deliberately to split applications to avoid EIA (and it may be queried how many would even wish to do that) would involve significant practical burdens, in terms of complexity, expense and uncertainty of outcome: quite apart from the requirements of any applicable Strategic Environmental Assessment.

68 There is yet further authority which tells against Mr Wolfe's submissions. It is to be found in the decision of Simon Brown J. in *R. v Swale BC, Ex p. Royal Society for the Protection of Birds* [1991] J.P.L. 39, a case involving, among other things, a consideration of the 1988 Regulations (which had, of course, been implemented in the light of the original Directive). As part of his broad conclusions in that case, Simon Brown J. said this (in the transcript of the report provided to me: cf p.41 of the JPL report) as proposition number 3:

> ''The question whether the development is of a category described in either schedule must be answered strictly in relation to the development applied for, not any development contemplated beyond that. But the further question arising in respect of a Schedule 2 development, the question whether it ''would be likely to have significant effects on the environment by virtue of factors such as its nature, size or location'' should, in my judgment, be answered rather differently. The proposal should not then be considered in isolation if in reality it is properly to be regarded as an integral part of an inevitably more substantial development. This approach appears to me appropriate on the language of the regulations, the existence of the smaller development of itself promoting the larger development and thereby likely to carry in its wake the environmental effects of the latter. In common sense, moreover, developers could otherwise defeat the object of the regulations by piecemeal development proposals.''

69 All counsel before me were agreed that Simon Brown J.'s comments on that he called ''the further question'' were correct. Indeed, as I see it not only do they accord with the comments of the Advocate-General in the *Naturschutz* case (see [71]) but also their correctness has since in effect been confirmed, under the 1999 Regulations, by the provisions of Reg.4 (5): which requires a planning authority, at the stage of considering whether a Sch.2 development is an EIA development, to have regard to the relevant selection criteria set out in Sch.3—and those, of course, include consideration of cumulative development. Mr Phillpot and Mr Harwood submitted that Simon Brown J.'s comments on the first question were also correct, and plainly so. Mr Wolfe on the other hand—who acknowledged that at first blush those comments were (in his phrase) ''dead against me''—submitted that *Swale* was distinguishable, as being a case on the 1988 Regulations under which no thresholds had been laid down in the relevant Schedule. He also pointed out—strictly, I think, correctly—that those observations of Simon Brown J. at [3] of his general conclusions in *Swale* were obiter.

70 In my view, Simon Brown J.'s observations are as much applicable to the 1999 Regulations as to the 1988 Regulations (which earlier Regulations, it is to be noted, were made to implement a Directive which had in principle sanctioned the introduction of thresholds): indeed those observations fit entirely with the actual wording of the subsequent 1999 Regulations. I do not think there is any meaningful distinction to be drawn by virtue of those observations being made in the context of a case involving the 1988 Regulations. Still less do I think that that first sentence somehow lends support to Mr Wolfe's arguments: which he asserted that, on analysis, they did.

71 I am not strictly bound by those observations of Simon Brown J, although on any view they are highly persuasive. As I gather, they have been frequently cited in this field and in the intervening years have been applied by planning authorities: in fact, the decision was cited by the Council here in its response to the letter before action. In such circumstances, I am not sure that it would be right for me not to follow those observations, even if I had doubts as to their correctness. But as it is I agree with those observations.

72 In the result, I do not feel able to accede to Mr Wolfe's arguments. In my judgment, the decision of the Council that this was not an EIA development, by reference to the planning application of August 13, 2004, was in accordance with the wording of the 1999 Regulations, naturally and fairly read; was in accordance with the wording of and purpose behind the Directive (as amended); and was in accordance with authority, both of the European Court and of the English Courts.

Reference to European Court of Justice

73 Mr Wolfe submitted that, were I to be against him on his principal point (as, in the event, I am) I should exercise my discretion to direct a reference to the European Court of Justice. I decline to do so. Overall, I entertain no real doubts as to the community law issues in this case. That in itself would disincline me to direct a reference. But my view on that is in any case reinforced by three further considerations on the facts of this particular matter. First, on the basis that Phase 2 does indeed take place then there will in any case be EIA which would include Phase 1 also; second, no question of a deliberate device or ploy to circumvent the EIA regime arises here; third, in practice there has in fact here been quite a detailed assessment (albeit not by way of EIA) of the environmental and ecological issues relating to Phase 1.

Conclusion

74 The Claim fails and is dismissed.

C1 In one sense, the main issue in this case is that of the risk which a developer is willing to take with regard to a project of this type. It seems that there is no dispute that the development proposed was not "EIA Development" and so, according to the national regulations, an EIA cannot be required. This also seems to be compliant with the Directive and the jurisprudence of the ECJ. What the claimants object to is the development of the overall project—Phase 2—which all parties

seemed to agree would be subject to an EIA. That opinion would seem correct as a matter of law under the domestic regulations and as a matter of European Law-most recently demonstrated by the case of Commission v Spain ((Case C-227/01) [2005] Env. L.R. 20), where the ECJ was clear that projects required to undergo EIA could not avoid that by being split up into a series of smaller projects.

C2 In the present case there does seem to be a conceptual problem with undertaking an EIA which covers both Phase 1 and 2, but only after Phase 1 has been started (and possibly completed), when the requirement is to subject projects to EIA before development consent is given. But an equally difficult concept is subjecting development which is not EIA (Phase 1) to an EIA. when, on its own, it is not ''EIA Development''. Of the two approaches, it does seem that the consideration of the individual application is the best approach as it avoids an attempt to evaluate projects on the most speculative of bases. The risk for the developer is that the assessment of Phase 2 is negative, so that the overall project cannot be undertaken. As the claimants point out, that would make the Phase 1 development pointless. It may well be that it is the fear that the rendering of the infrastructure works purposeless may way heavily on the decision-maker for Phase 2 which is at the root of the attack on Phase 1. One would hope that the requirements in place with regard to the conduct and evaluation of EIAs should make such fears baseless.

C3 The question of delay is considered in the Commentary to *R. (on the application of Hardy) v Pembrokeshire CC*.In the present case, the limited nature and degree of the prejudice to the interested party seems to have been the main factor here, and it is always easier to find that an application has been sufficiently prompt when the substantive application is refused, so that the case is not decided on that point.

Appendix 7: Environment Agency’s written response from 30th April 2024 confirming they are satisfied with the decommissioning Technical Note

Mr Tom Jeynes
Sustainable Development Manager
Associated British Ports
Immingham Dock Office
Alexandra Road
Immingham
DN40 2LZ

Our ref: AN/2023/134941/03-L02
Your ref: TR030008

Date: 30 April 2024

Dear Tom

Decommissioning and temporal scope for assessment of the Immingham Green Energy Terminal Project

Thank you for providing a copy of your response to the Examining Authority's Written Questions (Q1.15 Decommissioning) regarding operating life and the temporal scope of your assessments for us to review.

We have reviewed the parameters you have set out for issues within our remit and confirm that these align with the requirements for the assessment of worst-case scenarios and temporal scope set out in planning policy and guidance. We are satisfied that the corresponding conclusions on adverse effects (in so far as these relate to matters agreed thus far in the Statement of Common Ground) are appropriate.

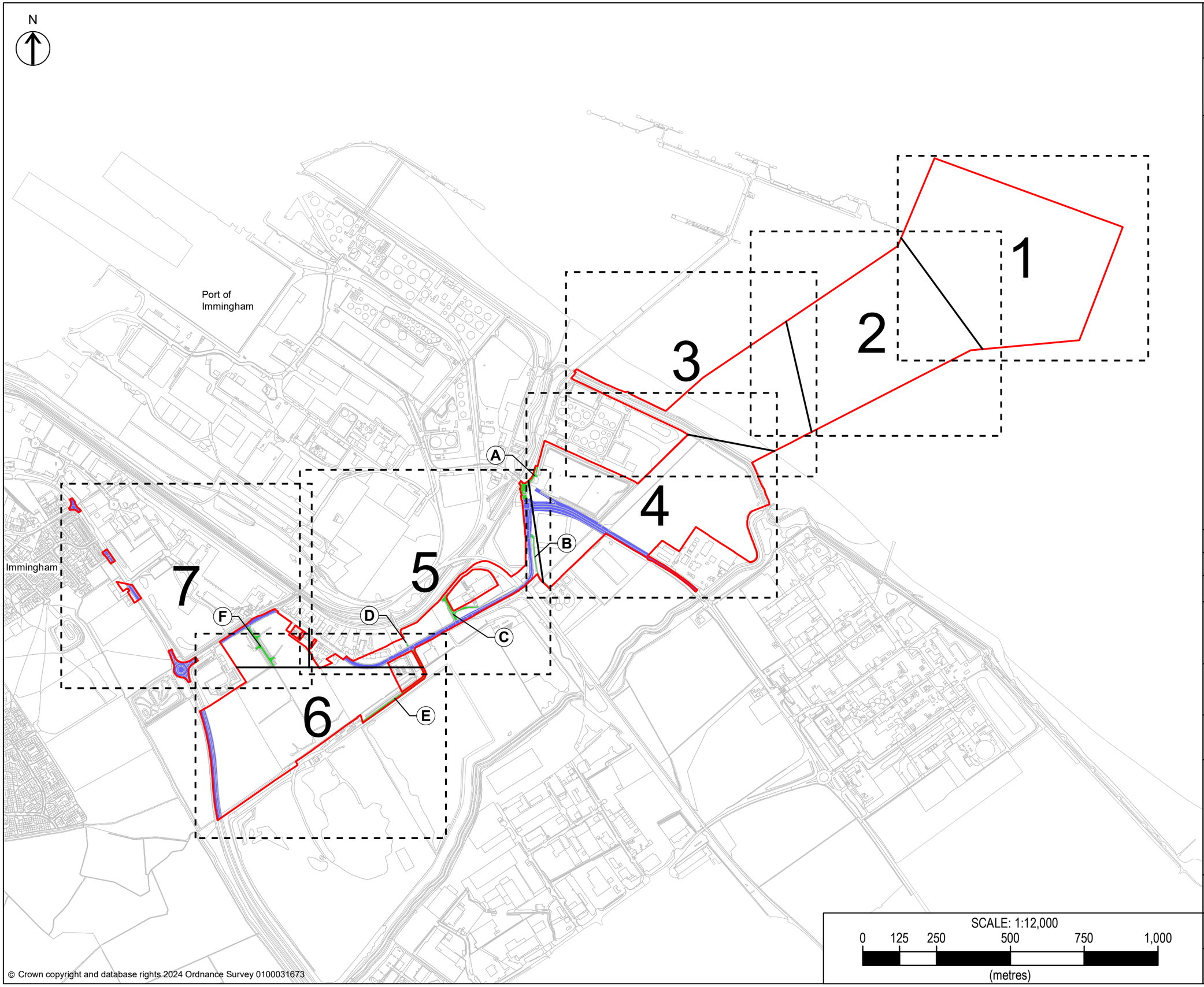
Should you require any additional information, or wish to discuss these matters further, please do not hesitate to contact me at the number below.

Yours sincerely

Annette Hewitson
Principal Planning Adviser

Direct dial [redacted]
Direct e-mail [redacted]@environment-agency.gov.uk

Appendix 8: Plans showing the private roads located within the Order limits



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(metres)

Notes

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2. ALL DIMENSIONS ARE IN METRES UNLESS STATED OTHERWISE
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LEGEND

- Order Limits
- Sheet extent
- Cutline
- Private Road
- Adopted Highway

Rev	Description	Date	By	Check	Approved
P01	First Issue	08/04/24	MB	SM	JD

Purpose of Issue

FOR INFORMATION

Gateley HAMER
One Eleven Edmund Street
Birmingham
B3 2HJ
Tel: 0121 234 0000
Web: gateleyhamer.com

Client

ABP ASSOCIATED BRITISH PORTS
AIR PRODUCTS

Project Title

TR030008 - IMMINGHAM GREEN ENERGY TERMINAL

Drawing Title

PRIVATE ROADS
OVERVIEW PLAN

KEY PLAN

Drawn	Checked	Approved	Date
MB	SM	JD	08/04/24

GH Project Number	Scale at A3
201566.00001	1:12,000

Drawing Number	Revision
GH-20156600001-PR-0	P01

N

River Humber

Posts
phin

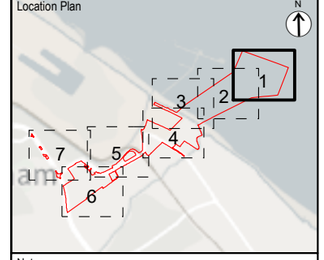
SHEET NOT IN USE

FOR CONTINUATION SEE SHEET 2

River Humber

SHEET 2

Location Plan



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LEGEND

- Order Limits
- Private Road
- Adopted Highway

Rev	Description	Date	By	Check	Approved
P01	First Issue	08/04/24	MB	SM	JD

Purpose of Issue

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Project Title

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Drawing Title

PRIVATE ROADS
OVERVIEW PLAN

SHEET 1 OF 7

Drawn	Checked	Approved	Date
MB	SM	JD	08/04/24

SCALE: 1:2,500

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(metres)

GH Project Number	Scale at A3
201566.00001	1:2,500
Drawing Number	**Revision**
GH-20156600001-PR-1	P01

N

SHEET 1

SHEET 3

River Humber

FOR CONTINUATION SEE SHEET 1

SHEET NOT IN USE

FOR CONTINUATION SEE SHEET 3

SHEET 4

River Humber

River Humber

SHEET 2

SCALE: 1:2,500

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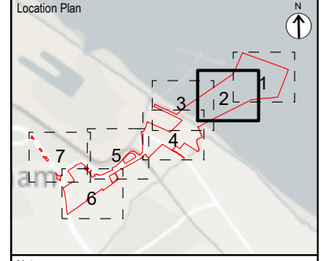
(metres)

Location Plan



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LEGEND

- Order Limits
- Private Road
- Adopted Highway

Rev	Description	Date	By	Check	Approved
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Drawing Title

PRIVATE ROADS
OVERVIEW PLAN

SHEET 2 OF 7

Drawn	Checked	Approved	Date
MB	SM	JD	08/04/24

GH Project Number	Scale at A3
201566.00001	1:2,500

Drawing Number	Revision
GH-20156600001-PR-2	P01

N

SHEET 3

SHEET 2

Navigational Arch

Navigation Light (fixed red)

Navigation Light (fixed green)

Navigation Light (fixed red)

Path And Pipe

Line of Mooring Posts

Mean Low Water

River Humber

Path And Pipe

Mud

8.0m

5.3m

Shingle

Silt

Drain

SHEET NOT IN USE

FOR CONTINUATION SEE SHEET 2

SHEET 4

Pond

Tanks

Depot

Tanks

Tank

Tank

Tank

Tanks

Pond

Drain

Last (Telecommunication)

Drain

5.4m

Mean High Water

Pond

Drain

Outfall

River Humber

Beacon (fixed red)

Groynes

Mean Low Water

Sloping masonry

Sloping masonry

FOR CONTINUATION SEE SHEET 4

Long Strip

Path (um)

SCALE: 1:2,500

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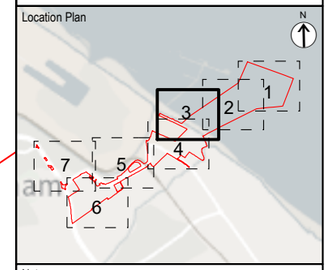
(metres)

Location Plan



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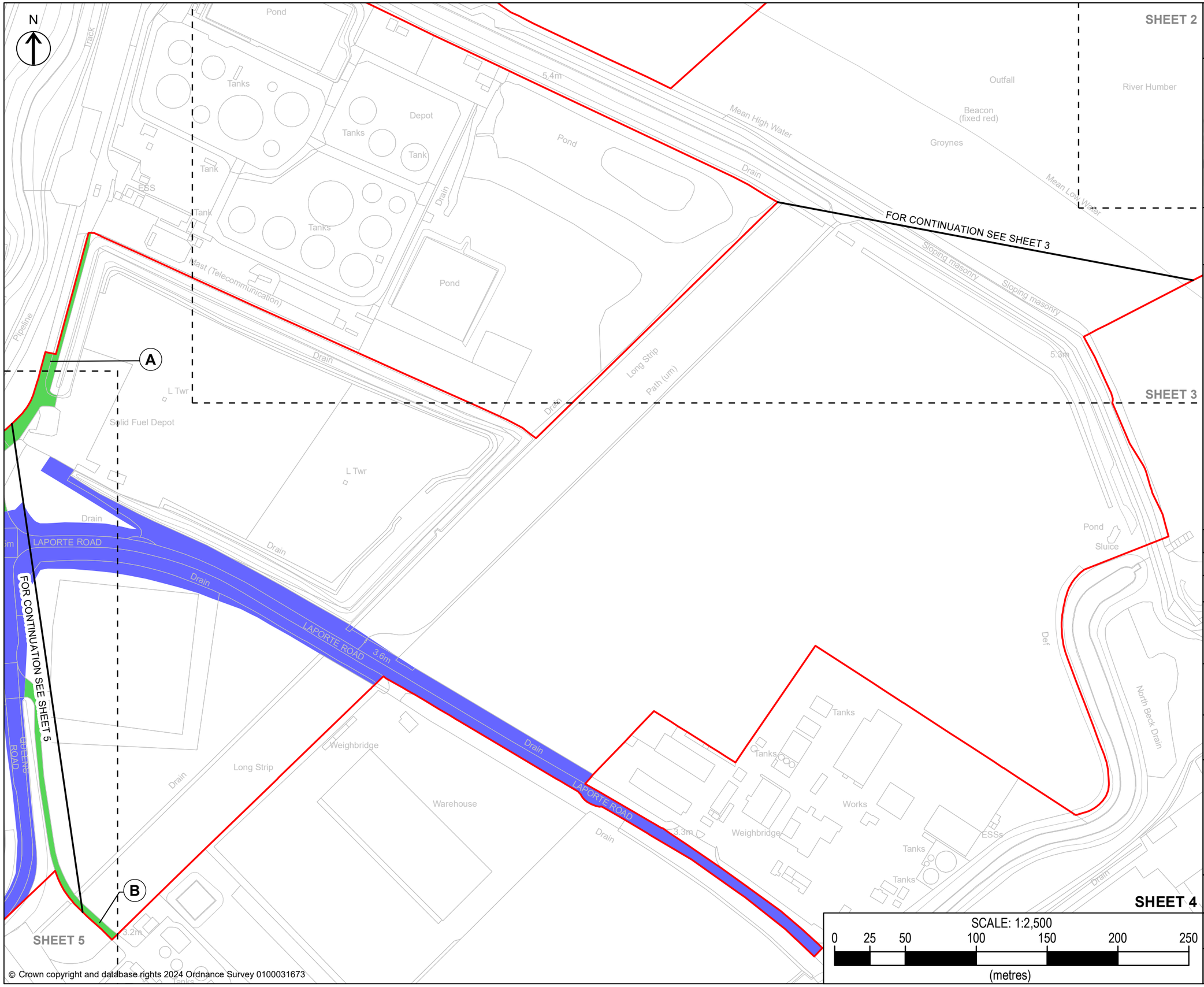
PRIVATE ROADS
OVERVIEW PLAN

SHEET 3 OF 7

Drawn	Checked	Approved	Date
MB	SM	JD	08/04/24

GH Project Number	Scale at A3
201566.00001	1:2,500

Drawing Number	Revision
GH-20156600001-PR-3	P01



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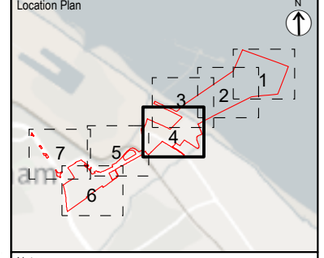

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LEGEND

- Order Limits
- Private Road
- Adopted Highway

SCALE: 1:2,500

0 25 50 100 150 200 250

(metres)

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Drawing Title: PRIVATE ROADS OVERVIEW PLAN

SHEET 4 OF 7

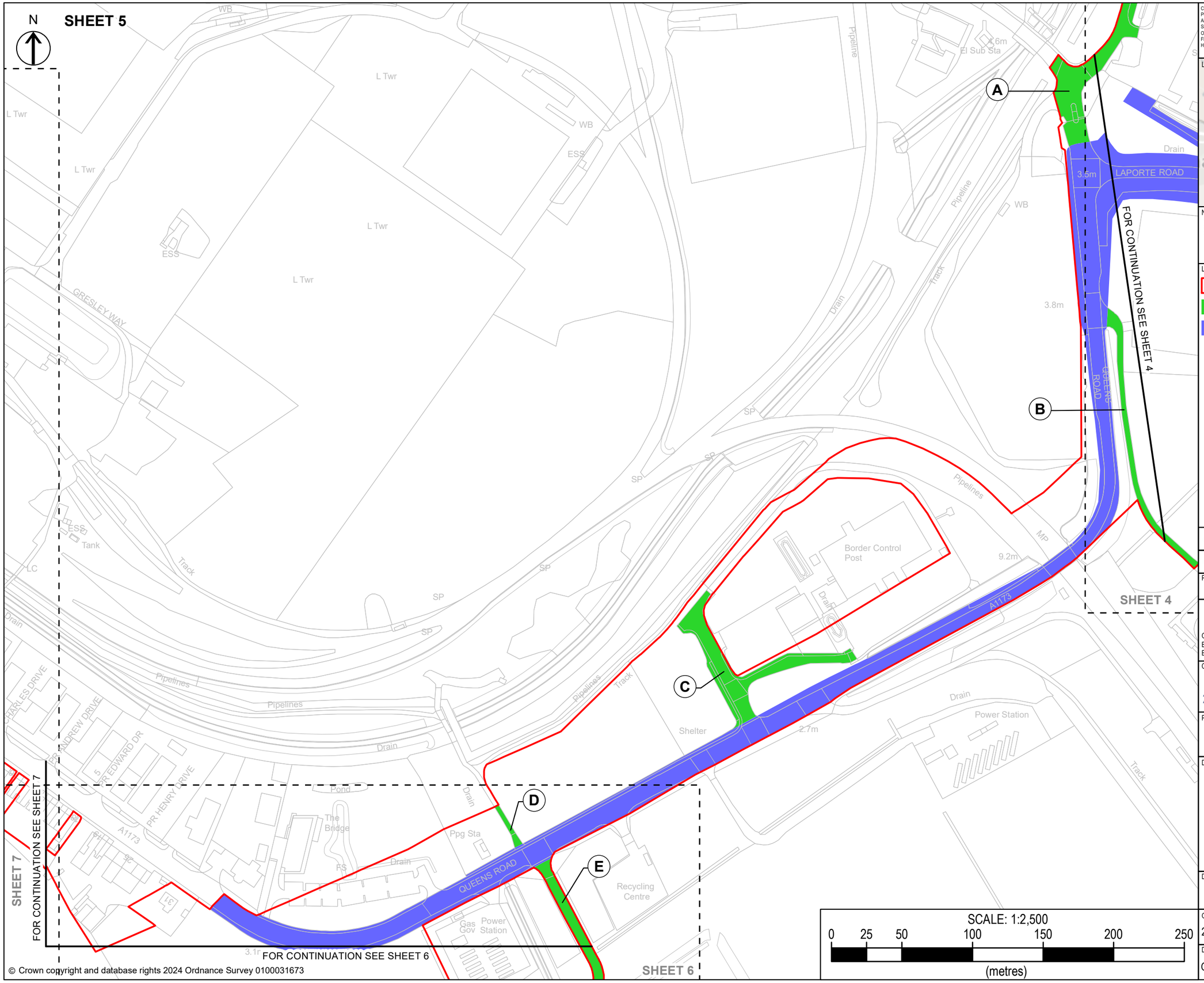
Drawn	Checked	Approved	Date
MB	SM	JD	08/04/24

GH Project Number	Scale at A3
201566.00001	1:2,500

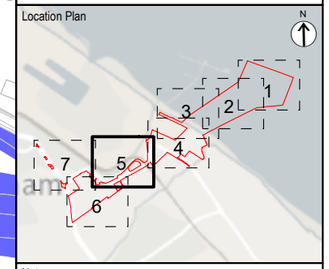
Drawing Number	Revision
GH-20156600001-PR-4	P01

N

SHEET 5



Location Plan



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LEGEND

- Order Limits
- Private Road
- Adopted Highway

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P01	First Issue	08/04/24	MB / SM	JD

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Drawing Title: PRIVATE ROADS OVERVIEW PLAN

SHEET 5 OF 7

Drawn	Checked	Approved	Date
MB	SM	JD	08/04/24

SCALE: 1:2,500

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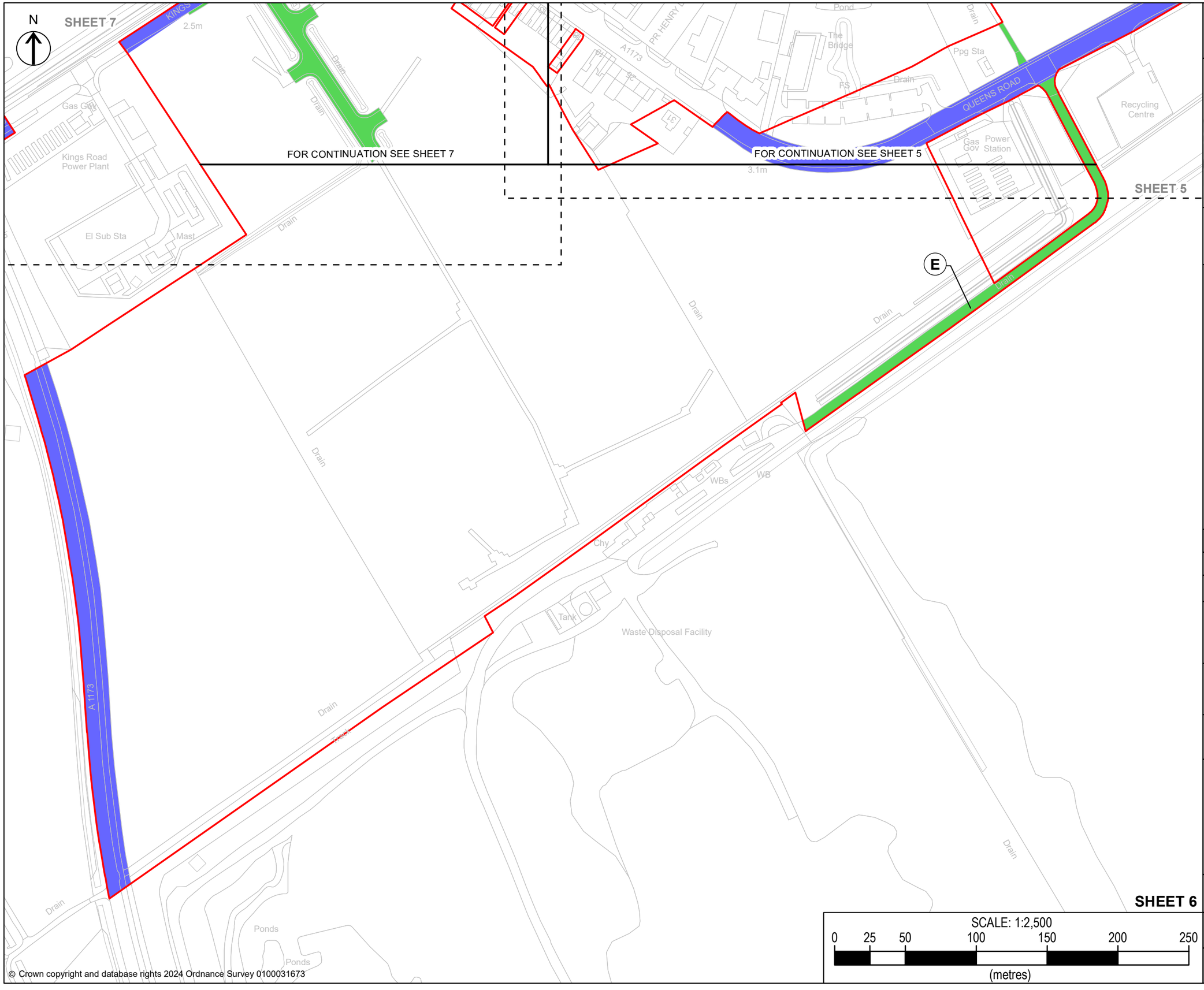
(metres)

GH Project Number	Scale at A3
201566.00001	1:2,500
Drawing Number	**Revision**
GH-20156600001-PR-5	P01



SHEET 6

SCALE: 1:2,500

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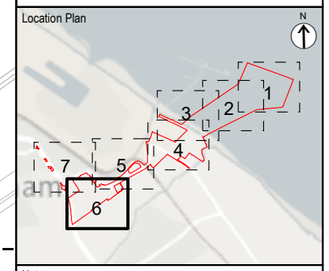
(metres)

Location Plan



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LEGEND

- Order Limits
- Private Road
- Adopted Highway

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P01	First Issue	08/04/24	MB / SM	JD

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Project Title

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Drawing Title

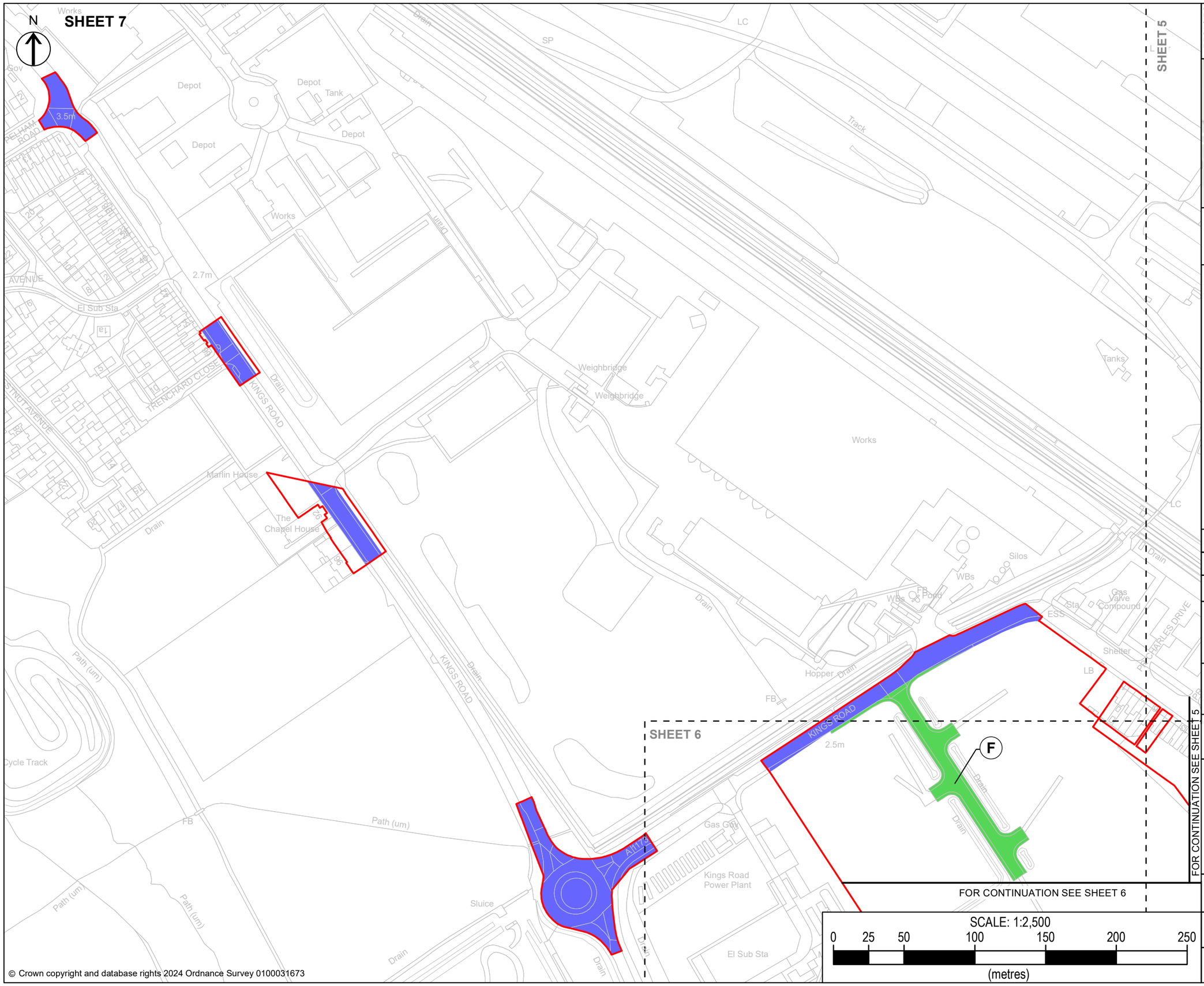
PRIVATE ROADS
OVERVIEW PLAN

SHEET 6 OF 7

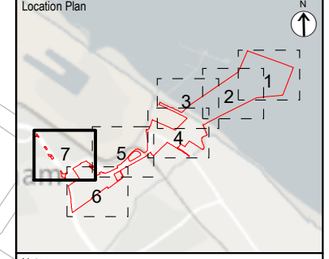
Drawn	Checked	Approved	Date
MB	SM	JD	08/04/24

GH Project Number	Scale at A3
201566.00001	1:2,500

Drawing Number	Revision
GH-20156600001-PR-6	P01



Location Plan



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LEGEND

- Order Limits
- Private Road
- Adopted Highway

SCALE: 1:2,500

0 25 50 100 150 200 250

(metres)

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Drawing Title: PRIVATE ROADS OVERVIEW PLAN

SHEET 7 OF 7

Drawn	Checked	Approved	Date
MB	SM	JD	08/04/24

GH Project Number	Scale at A3
201566.00001	1:2,500

Drawing Number	Revision
GH-20156600001-PR-7	P01