Tritax Symmetry (Hinckley) Limited

HINCKLEY NATIONAL RAIL FREIGHT INTERCHANGE

The Hinckley National Rail Freight Interchange Development Consent Order

Project reference TR050007

Post hearing submission ISH1 and CAH1 [Appendix B Energy Note]

Document reference: 18.1.2

Revision: 01

10 October 2023

Applicant's Post Hearing Submissions: ISH1

Appendix B - Energy Note

1. This post-hearing submission note summarises the Applicant's submissions made in response to the following agenda item raised at ISH1 on the draft DCO (document reference: 3.1, APP-085):

> *The Applicant will be asked to explain why in legal terms it considers the energy generation elements of the Proposed Development should be restricted, with particular reference to this element being "associated development" and section 120 and paragraph 5 of Schedule 5 of the Planning Act 2008.*
>
> *The Applicant will also be asked to explain why in policy terms any Requirement to restrict the amount of energy generated would meet the tests for requirements, particularly the tests of necessity and reasonableness, given the overall Government policy of seeking to maximise renewable energy sources*

2. It also addresses the supplemental points raised during the ISH by the ExA and which they invited the Applicant to address in a subsequent note. The points on which the Applicant was invited to comment were as follows:

2.1 Whether the energy generation element constitutes associated development by reference to ss 115, 120 and Schedule 5 of the Planning Act 2008 and associated guidance.

2.2 Whether, in the event that the energy generated exceeded the 50MW threshold under s15 Planning Act 2008 it could nevertheless still be regarded as associated development if the amount of energy generated was less than the consumption requirements of the development and could be regarded as ancillary to the main use.

2.3 In policy terms, is the restriction on generating capacity appropriate? If so, is a proposed requirement an appropriate approach or could this also be achieved by means of an article in the dDCO?

2.4 If generating capacity in excess of 50MW can be considered as associated development how would any restriction on generating capacity be applied.

2.5 Is the proposed capacity stated in AC or DC and is it appropriate to restrict the generating capacity in those terms having regard to the provisions of draft NPS EN-3.

3. Schedule 1 of the dDCO describes the authorised development for the purposes of Article 3. It proposes two elements related to energy generation within Work No. 5 as follows

> (f) roof mounted photovoltaics; and
>
> (k) energy centre;

4. Schedule 1 currently splits the authorised development into two parts. Part 1 comprises both NSIP and associated development whereas Part 2 just comprises associated development. Work No. 5 falls within Part 1 of Schedule 1. There is no express differentiation within the wording of Part 1 as to whether the various elements of the development described therein constitute the NSIP or associated development.

5. The approach to the drafting of Schedule 1 follows other made SRFI DCOs[1] and seeks to include where possible, a comprehensive list of the works that will be undertaken in a particular works package within the corresponding work number shown on the Works Plans (document reference 2.2A, AS-003; document reference 2.2B, AS-004; document reference 2.2C, APP-010; document reference 2.2D, AS-006). This approach means that

[1] East Midlands Gateway Rail Freight Interchange and Highway Order 2016 (S.I. 2016 17), Northampton Gateway Rail Freight Interchange Order 2019 (S.I. 2019 1358), West Midlands Interchange Rail Freight Interchange Order 2020 (S.I. 2020 511)

where works might be considered as "ancillary" to a particular work package, they are noted within the relevant work number regardless of whether that particular element of the work falls within what is defined as the NSIP or is associated development.

6. The roof mounted photovoltaics are described within paragraph 3.6(d) of Chapter 3 of the Environmental Statement (document reference: 6.1.3, APP-112) as follows:

> *up to 850,000 square metres (gross internal area or GIA) of warehousing and ancillary buildings with a total footprint of up to 650,000 square metres and up to 200,000 square metres of mezzanine floorspace, including the potential for some buildings to be directly rail connected if required by occupiers. These buildings might incorporate ancillary data centres to support the requirements of HNRFI occupiers and operators. They will also incorporate roof-mounted photovoltaic arrays with a generation capacity of up to 42.4 megawatts (MW), providing direct electricity supply to the building or exporting power to battery storage in the energy centre;*

7. The energy centre is described within paragraph 3.6(e) of Chapter 3 of the Environmental Statement as follows:

> *an energy centre incorporating an electricity substation connected to the local electricity distribution network, battery storage (adjacent to each unit and at the energy centre) and a gas-fired combined heat and power plant (designed to be ready for 100% hydrogen in the grid gas supply) with an electrical generation capacity of up to 5 megawatts (MW). Total electricity generation capacity at the Main HNRFI Site is therefore 47.4 MW*

8. The Applicant can confirm that the capacity figures stated in the Environmental Statement are AC capacity.

9. The roof mounted photovoltaics and the energy centre are therefore intended to operate as part of an integrated holistic system to partially meet the electricity demands of the development. This system therefore comprises a "generating station"[2].

10. S14(1)(a) Planning Act 2008 states that the construction of a generating station is a NSIP. S15(2) Planning Act 2008 then refines the scope of section s14(1)(a) to generating stations in England, which do not generate electricity from wind, which are not offshore generating stations and which have a capacity of more than 50MW. Further, proposed revisions to the National Policy Statement for Renewable Energy Infrastructure (EN-3) which was published for consultation in March 2023 clarifies:

> *3.10.42 For the purposes of determining the capacity thresholds in Section 15 of the 2008 Act, all forms of generation other than solar are currently assessed on an AC basis, while a practice has developed where solar farms are assessed on their DC capacity.*
>
> *3.10.43 Having reviewed this matter, the Secretary of State is now content that this disparity should end, particularly as electricity from some other forms of generation is switched between DC and AC within a generator before it is measured.*
>
> *3.10.44 From the date of designation of this NPS, for the purposes of Section 15 of the Planning Act 2008, the maximum combined capacity of the installed inverters (measured in alternating current (AC)) should be used for the purposes of determining solar site capacity.*

[2] For the meaning of "generating station" the Applicant refers the ExA to the discussion at paras 40-48 of the judgment in Durham and Hartlepool v Secretary of State [2023] EWHC 1394 (Admin) attached at Appendix 1 to this note, and adopts the approach of Sullivan J in R (Redcar and Cleveland Borough Council) v Secretary of State for Business, Enterprise and Regulatory Reform [2008] EWHC 1847 that a "generating station" is "…simply … a building or structure where electricity is generated. The nature of the building or structure will depend on the means of generation: wind, water, coal, nuclear power, et cetera"

In summary, the generating station proposed at HNRFI would not therefore be a NSIP.

11. Nevertheless, the Applicant is mindful that photovoltaic technology is advancing at pace. This is recognised in the draft revised energy NPS for renewable energy EN-3 which was published for consultation in March 2023. At paragraph 3.10.8 it states (inter alia):

> *Along with associated infrastructure, a solar farm requires between 2 to 4 acres for each MW of output. A typical 50MW solar farm will consist of around 100,000 to 150,000 panels and cover between 125 to 200 acres. However, this will vary significantly depending on the site, with some being larger and some being smaller. This is also expected to change over time as the technology continues to evolve to become more efficient…*

12. It is therefore theoretically feasible that future advances in photovoltaic technology could enable the installation of more efficient roof mounted panels (or their replacement) within the same roof space which would take the capacity of the generating station over the 50MW threshold. If that were to occur, then the generating station would fall within s14(1)(a) Planning Act 2008 and become a development for which development consent is required for the purposes of s31 Planning Act 2008.

13. Section 115(1) Planning Act 2008 specifies development for which development consent may be granted. This includes:

(a) development for which development consent is required, or

(b) associated development, or

(c) related housing development.

14. Consequently, it is the Applicant's submission that there is a legal distinction between "development for which development consent is required" and "associated development". Since development which falls within the definition of a nationally significant infrastructure project under s14 Planning Act 2008 is development for which development consent is required (s31 Planning Act 2008), it cannot also be associated development.

15. It is not the Applicant's intention to seek consent for a generating station within the meaning of s14(1)(a) Planning Act 2008 within the current application. Indeed, such an application would have needed to be submitted jointly to the Secretary of State for Energy Security and Net Zero and have been accompanied by a statement as referred to in Regulation 6(1)(a) of the Infrastructure Planning (Applications: Prescribed Forms and Procedure) Regulations 2009. The Applicant's submission is therefore that the current application does not purport to seek the construction of a generating station with an installed capacity greater than 50MW.

16. Nevertheless, as explained above, the Applicant is conscious that the wording of Schedule 1 does not expressly state that the generation station is associated development. Therefore the Applicant included a requirement to restrict the scope of the authorised development to that contained in the application. The Applicant does not consider that it is necessary either in legal or policy terms to restrict the generating capacity of the generating station for any other reason other than to make it clear that the Development Consent Order does not consent an energy NSIP. The Applicant believes that would meet the tests of a valid requirement, but having reflected on the matter further since the ISH believes that the same outcome could more effectively be achieved by means of an amendment to article 3 of the dDCO as follows to include new paragraph (2) as follows:

> ***"Development consent granted by the Order***
>
> ***3.*** *(1) Subject to the provisions of this Order and to the requirements, the undertaker is granted development consent for the authorised development to be carried out and used within the Order limits.*

(2) Nothing in this Order grants development consent for the construction of a generating station within the meaning of section 14(1)(a) of the 2008 Act."

17. Finally, the Applicant notes that s120(3) Planning Act 2008 states that a DCO may make provision for the operation of a generating station as noted in paragraph 5 of Schedule 5. The Applicant refers to article 5 of the dDCO which authorises the operation of Works Nos 1 to 7 for the purposes of a rail freight terminal and warehousing, and any purposes for which such parts of the authorised development is designed and for any purposes ancillary to those purposes. The Applicant considers that this constitutes the provision contemplated by paragraph 5 of Schedule 5, hence why it seeks to impose a limitation on the generating capacity to ensure that it is clear on the face of the Order that it does not authorise an energy NSIP.

18. Finally, this note considers whether the generating station as proposed may properly be regarded as associated development. Associated Development is defined in s115(2) and *(3)* Planning Act 2008 as follows:

(2) "Associated development" means development which—

(a) is associated with the development within subsection (1)(a) (or any part of it),

(b) does not consist of or include the construction or extension of one or more dwellings, and

(c) is within subsection (3) , (4) or (4A).

(3) Development is within this subsection if it is to be carried out wholly in one or more of the following areas—

(a) England;

(b) waters adjacent to England up to the seaward limits of the territorial sea;

(c) in the case of development in the field of energy, a Renewable Energy Zone, except any part of a Renewable Energy Zone in relation to which the Scottish Ministers have functions.

19. Further explanation is provided in statutory guidance entitled *Guidance on associated development applications for major infrastructure projects (DCLG, April 2013)*. Paragraph 5 of the Guidance sets out various core principle to assist the Secretary of State in determining whether proposals constitute associated development. The Applicant sets these out as follows together with an explanation as to why the generating station proposed accords with them:

(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 generating station supports the operation of the principal development by generating electricity (much of it via renewable energy) for consumption by the various occupiers and users of the rail freight terminal and related warehousing. Further details are set out in paragraphs 3.45 and 3.46 of Chapter 3 of the Environmental Statement (document reference: 6.1.3, APP-112) and in Appendix 18.1: Energy Strategy (document reference: 6.2.18.1, APP-217) which estimates that 83% of the development's energy demand will be able to be met by on-site renewables.

(ii) Associated development should not be an aim in itself but should be subordinate to the principal development.

As explained above, the electricity generated is to serve the principal development.

(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 generating station is not only necessary as an additional source of revenue for the Applicant to cross-subsidise the cost of the principal development.

(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 considers that the generating station is proportionate to the nature and scale of the principal development. It makes use of all available roof space for the installation of solar pv and meets some but not all of the electricity demands of the development.

The Applicant further notes that power generation/distribution plant is included within Annex B of the guidance as an example of associated development (albeit within the context of a waste water treatment plant), and that solar pv formed part of the authorised development in the made DCO's for the East Midlands Gateway, Northampton Gateway and West Midlands Interchange SRFIs.

Conclusion

20. The Applicant's submissions can therefore be summarised as follows:

20.1 Neither the application nor the dDCO seek to authorise an energy NSIP.

20.2 The Applicant considers that it is appropriate to include a provision on the face of the Order making that clear to future occupiers and enforcing authorities. The Applicant does not consider that there is any other legal or policy reason for doing so.

20.3 The Applicant's original proposal was to include a requirement limiting the generating capacity of the generating station, but acknowledges that this may be more effectively achieved by means of an article and has proposed an amendment to article 3 accordingly.

20.4 The Applicant considers that the generating station otherwise meets the requirements for being considered as associated development and notes the precedent from other SRFI's for doing so.

APPENDIX 1

Judgment - Durham and Hartlepool v Secretary of State [2023] EWHC 1394 (Admin)

Neutral Citation Number: [2023] EWHC 1394 (Admin)

Case No: CO/4780/2022

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 09/06/2023

Before :

MR JUSTICE CHAMBERLAIN

- -

Between :

(1) DURHAM COUNTY COUNCIL **(2) HARTLEPOOL BOROUGH COUNCIL**	**Claimants**
- and -	
SECRETARY OF STATE FOR LEVELLING UP, HOUSING AND COMMUNITIES	**Defendant**
- and -	
(1) LIGHTSOURCE SPV 206 LIMITED **(2) LIGHTSOURCE DEVELOPMENT SERVICES LIMITED**	**Interested Parties**

- -
- -

John Barrett (instructed by **Legal Services, Durham County Council**) for **Claimant (1)**
John Hunter (instructed by **Legal Services, Hartlepool Borough Council**) for **Claimant (2)**
Ryan Kohli (instructed by the **Government Legal Department**) for the **Secretary of State**
Michael Humphries KC (instructed by **Cameron McKenna Nabarro**) for the **Interested Parties.**

Hearing dates: **23 and 24 May 2023**

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Approved Judgment

Mr Justice Chamberlain:

Introduction

1 The claimants are Durham County Council ("Durham") and Hartlepool Borough Council ("Hartlepool"). On 17 June 2020, Durham granted an application by a special purpose company related to Lightsource bp, which specialises in the development and management of solar energy projects. The application was for planning permission for a solar farm with a generating capacity of 49.9 MW, associated infrastructure and an electricity substation at Hulam Farm ("Hulam"). The permission has yet to be implemented.

2 In 2021, a further five applications were made by two further special purpose companies related to Lightsource bp. I shall refer to the applicants together as "Lightsource". These were for planning permission for:

(A) a proposed solar farm with a generating capacity of 49.9 MW at Sheraton Farm occupying an area of approximately 77 ha ("Sheraton");

(B) the construction of underground electricity cables and associated infrastructure;

(C) the construction of underground electricity cables and associated infrastructure to connect the Sheraton solar farm to the primary proposed substation. This proposal is intended to link the substation at Hulam into Sheraton;

(D) the erection of a substation and the installation of a physical cable connection to Hulam and the existing substation to the south of the A179 trunk road. The substation is intended to link into Sheraton; and

(E) the construction of underground electricity cables and associated infrastructure to connect Hulam to the existing substation near Hart.

3 Applications (A) and (B) were made to Durham. Applications (C), (D) and (E) were made to Hartlepool. All were accepted as valid but refused. All were appealed to the Secretary of State under s. 78 of the Town and Country Planning Act 1990 ("TCPA 1990") and referred to the Planning Inspectorate ("PINS"). The appeals are referred to as Appeals A, B, C, D and E.

4 The Inquiry was due to commence on 15 November 2022. On 9 November 2022, PINS wrote to the claimants and Lightsource inviting legal submissions on the following questions:

a) whether any of the five appeals could be considered to be an extension to Hulam by reason of being functionally linked;

b) whether development consent would be required in accordance with the Planning Act 2008 ("the PA 2008") for the resultant generation capacity;

c) whether there were implications related to these issues for any grant of planning permission for these appeals and the Inquiry.

5 The parties provided written submissions on these questions and the Inquiry opened on 15 November 2022. Lightsource's position was that the projects were not a nationally significant infrastructure project ("NSIP"), so development consent under the PA 2008 was not required. Durham and Hartlepool disagreed. In their view, the projects taken together were an NSIP. The Inspector adjourned the Inquiry for reasons she later reduced to writing. In a letter of 17 November 2022, she said that:

a) she had adjourned the Inquiry for a limited period on the understanding that the claimants would issue the present claim for judicial review within a period of two weeks of the receipt of her letter;

b) it was not within her power to make a "definitive ruling" on whether or not the proposed developments comprised an NSIP – this was a matter for the courts;

c) she believed that she had jurisdiction to determine the appeals before her.

6 Durham and Hartlepool filed the present claim, seeking three declarations. The third is not now pursued. The first two are:

> "Declaration One: A declaration that the subject matter of the appeal applications comprise a Nationally Significant Infrastructure Project within the meaning of the Planning Act 2008.
>
> Declaration Two: A declaration that the Defendant does not have jurisdiction or is otherwise entitled to determine the appeal applications made under the Town and Country Planning Act 1990."

7 Permission was granted on the papers by Lang J on 22 February 2023. The hearing took place over two days on 23 and 24 May. John Barrett appeared for Durham, John Hunter for Hartlepool, Ryan Kohli for the Secretary of State and Michael Humphries KC for Lightsource. I am grateful to all counsel for their helpful submissions.

8 There are three issues for me to determine today:

a) *Can and should the court determine whether development consent under the PA 2008 would be required for the projects taken together?* Messrs Humphries, Barrett and Hunter submit that I should. Mr Kohli submits that I should not, because that question is allocated by the PA 2008 to the Secretary of State in the first instance and he has not yet determined it.

b) *Are the projects an NSIP?* Messrs Barrett and Hunter say "Yes". Mr Humphries says "No". Mr Kohli says that, although the Secretary of State has not formed a concluded view, his preliminary view is "No".

c) *If the projects are an NSIP, does the Inspector have jurisdiction to consider the appeals?* Messrs Barrett and Hunter say "No", because the regimes under the TCPA 1990 and the PA 2008 are mutually exclusive. Mr Kohli and Mr Humphries submit that the Inspector's jurisdiction to hear the appeals does not depend on whether the projects are an NSIP.

9 The claimants originally invited me to determine another issue: whether, having accepted the planning applications as valid, they were estopped from asserting that the

Inspector lacked jurisdiction to hear the appeals. The third declaration sought (not now pursued) related to this issue. However, both Mr Kohli and Mr Humphries confirmed that they were not suggesting that the claimants were estopped, so the issue does not arise.

The facts

10 Lightsource emphasises the following facts, which are not in dispute.

11 The proposed Sheraton site is over a mile from the proposed Hulam site. From inception the two sites were considered, developed and managed as separate projects. The planning applications were submitted by different special purpose companies. The electricity generated at each site will be transmitted by 33kV underground cables to the proposed Hart Moor substation, which will in fact consist of two side-by-side substations and switch houses, one for each solar farm. The electrical output from the two farms will be separately metered. The proposed Hart Moor substations will then connect via 66kV underground cables to the existing Hartmoor substation, operated by Northern Powergrid ("NPg"), the Distribution Network Operator ("DNO"), and then on to the wider distribution network. It is anticipated that NPg will adopt the proposed Hart Moor substations as part of its DNO network.

12 The claimants, for their part, point out that Lightsource had provided a Technical Note clarifying the inter-relationship between the cable proposals and the solar farms at Sheraton and Hulam. This Note sets out a range of benefits from the location of the proposed shared or "common" substation at Hart Moor and the consequent need for the proposed cable, which had been described as a "necessary piece of related infrastructure". The solar farm at Sheraton consists of four non-contiguous fields each containing an array of photovoltaic panels.

The law

The TCPA 1990

13 Part III of the TCPA 1990 concerns control over "development", which means "the carrying out of building, engineering, mining or other operations in, on, over or under land, or the making of any material change in the use of any buildings or other land", except where the context otherwise requires and subject to ss. 55(2)-(5): s. 55(1).

14 Section 57 provides as follows:

> "(1) Subject to the following provisions of this section, planning permission is required for the carrying out of any development of land.
>
> (1A) Subsection (1) is subject to section 33(1) of the Planning Act 2008 (exclusion of requirement for planning permission etc. for development for which development consent required)."

15 Section 78(1) confers on an applicant a right of appeal to the Secretary of State against *(inter alia)* a refusal of planning permission by a local planning authority. Section 79 empowers the Secretary of State to allow or dismiss the appeal, or reverse or vary any

part of the decision of the local planning authority and to deal with the application as if it had been made to him in the first instance. Section 79(6) provides as follows:

> "(6) If, before or during the determination of such an appeal in respect of an application for planning permission to develop land, the Secretary of State forms the opinion that, having regard to the provisions of sections 70 and 72(1)… planning permission for that development—
>
> (a) could not have been granted by the local planning authority; or
>
> (b) could not have been granted otherwise than subject to the conditions imposed,
>
> he may decline to determine the appeal or to proceed with the determination."

16 Section 336(1) provides that "planning permission" (except in so far as the context otherwise requires and subject to the following provisions of s. 336) "means permission under Part III of section 239 but does not include permission in principle".

The PA 2008

17 Part 3 of the PA 2008 created a new development consent regime for major projects in the fields of energy, transport, water, waste water and waste. Under this regime, "development consent" is required "to the extent that the development is or forms part of a nationally significant infrastructure project": s. 31. "Development" has the same meaning as in the TCPA 1990, subject to s. 32(2) and (3) (which are not material here): s. 32(1). An NSIP is defined in s. 14 as a project which consists of any of a list of specified kinds of development, including "(a) the construction or extension of a generating station". However, this is subject to s. 15, which provides insofar as material as follows:

> "(1) The construction or extension of a generating station is within section 14(1)(a) only if the generating station is or (when constructed or extended) is expected to be within subsection (2), (3), (3A) or (3B).
>
> (2) A generating station is within this subsection if—
>
> (a) it is in England,
>
> (aa) it does not generate electricity from wind,
>
> (b) it is not an offshore generating station, and
>
> (c) its capacity is more than 50 megawatts."
>
> (Subsections (3), (3A) and (3B) are not material.)

18 Section 235(1) (Interpretation) provides materially that:

> "'extension', in relation to a generating station, has the meaning given by section 36(9) of the Electricity Act 1989 (and 'extend' must be read accordingly);
>
> …
>
> 'generating station' has the same meaning as in Part 1 of the Electricity Act 1989 (see section 64(1) of that Act)"

19 Section 33 provides insofar as material as follows:

> "(1) To the extent that development consent is required for development, none of the following is required to be obtained for the development or given in relation to it—
>
> (a) planning permission;
>
> …
>
> (d) authorisation by an order under section 4(1) of the Gas Act 1965 (c. 36) (storage of gas in underground strata)…
>
> (2) To the extent that development consent is required for development, the development may not be authorised by any of the following—
>
> …
>
> (b) an order under section 4(1) of the Gas Act 1965 (order authorising storage of gas in underground strata);
>
> …
>
> …
>
> (4) If development consent is required for the construction, improvement or alteration of a highway, none of the following may be made or confirmed in relation to the highway or in connection with the construction, improvement or alteration of the highway…"

20 An order for development consent can only be made if an application is made to the Secretary of State: s. 37(1) and (2).

21 Section 51 empowers the Secretary of State to make regulations about the giving of advice about applying for an order for development consent or making representations about such an application.

22 Where an application purporting to be an application for development consent is made, the Secretary of State must within 28 days decide whether or not to accept it: s. 55(2). Section 55(3) provides:

> "(3) The Secretary of State may accept the application only if the Secretary of State concludes—
>
> (a) that it is an application for an order granting development consent,
>
> (c) that development consent is required for any of the development to which the application relates,
>
> (e) that the applicant has, in relation to a proposed application that has become the application, complied with Chapter 2 of Part 5 (pre-application procedure) and
>
> (f) that the application (including accompaniments) is of a standard that the Secretary of State considers satisfactory."

(Sub-paragraphs (b) and (d) were repealed by the Localism Act 2011.)

23 Section 120 provides that an order granting development consent may impose requirements in connection with the development, which include but are not limited to requirements corresponding to conditions which could have been imposed on the grant of any permission, consent or authorisation which, but for s. 33(1) would have been required for the development.

24 Section 160 makes it an offence to carry out or cause to be carried out development for which development consent is required at a time when no development consent is in force in respect of the development. Section 161 makes it an offence to carry out or cause to be carried out development in breach of the terms of an order granting development consent or otherwise fail to comply with the terms of such an order.

25 Section 171 empowers a local planning authority to apply to the High Court or a county court for an injunction "if it considers it necessary or expedient for any actual or apprehended prohibited activity to be restrained by injunction". "Prohibited activity" means activity that constitutes an offence under ss. 160 or 161 in relation to land in the area of the local planning authority.

The Electricity Act 1989

26 Section 36(1) of the Electricity Act 1989 ("the EA 1989") requires consent from the appropriate authority for the construction or extension of a generating station. However, by s. 36(1A), this is subject to s. 33(1) of the PA 2008. Section 36(9) provides:

> "In this Part 'extension', in relation to a generating station, includes the use by the person operating the station of any land or area of waters (wherever situated) for a purpose directly related to the generation of electricity by that station and 'extend' shall be construed accordingly."

27 "Generating station" is not defined save where it is "wholly or mainly driven by water". In that case, it "includes all structures and works for holding or channelling water for the generation of electricity by that station": s. 64(1).

Issue (a): Can and should this court determine whether development consent under the PA 2008 would be required?

28 Mr Kohli submits that under s. 55(3)(c) of the PA 2008 the function of deciding whether the applications, taken together, constitute an NSIP has been allocated by Parliament to the Secretary of State as primary decision-maker. The question whether the applications, taken together, constitute an extension of the already permitted Hulam generating station (rather than a separate one) is a question of mixed fact and law which turns on the exercise of planning judgment on the basis of, *inter alia*, technical evidence. He relies on *R (Hammerton) v London Underground Ltd* [2022] EWHC 2307 (Admin), [2003] JPL 984, where Ouseley J said that judicial review of London Underground's decision to refuse an undertaking not to demolish a goods yard was inappropriate, because it was for the local planning authority to decide whether to enforce against it – and the court should not usurp the local authority's planning judgment: see at [184]-[189]. In these circumstances, it would be inappropriate for the court, in the exercise of its discretion, to grant a declaration.

29 In my judgment, the *Hammerton* case does not assist. The reason why the relief sought there was inappropriate was that it would have stopped the developer from proceeding when there was no legal prohibition on it doing so. Development in breach of planning control under the TCCPA 1990 is not an offence. It is up to the local planning authority to decide, in the exercise of its planning judgment, whether to enforce. It was inappropriate for the court to grant at the suit of a private individual relief which was tantamount to an injunction to prevent the carrying out of development when the local planning authority had not decided that it was "expedient" to take enforcement action: see at [184]-[185].

30 Mr Kohli's argument depends critically on the proposition that the PA 2008 allocates the decision whether a project requires development consent exclusively to the Secretary of State. Certainly, s. 55(3)(c) of the PA 2008 requires the Secretary of State to consider that question if an application for development consent is made. It may be that the Secretary of State could give advice about it under s. 51 (though the advice would not bind the Secretary of State in the event that an application were made). But this does not mean that the statute allocates the decision about whether a project requires development consent to the Secretary of State alone.

31 If the developer does not apply for development consent, but the local planning authority considers that development consent is required, it can prosecute under s. 160. In that case, as Mr Kohli accepts, a criminal court would have to decide whether the project does or does not require development consent. I can see no reason why a criminal court (whether a magistrates' court or the Crown Court) would be better placed than this Court to reach a view about whether development consent is required. Moreover, the availability of an application for injunctive relief under s. 171 seems to me to indicate that Parliament expressly envisaged the possibility that the High Court (or a county court) might have to decide that question for itself.

32 Mr Kohli did not accept that s. 171 required or permitted the court to determine whether a proposed development required development consent if that question turned on an "evaluative planning judgment". He relied on *South Buckinghamshire District Council v Porter*, where Simon Brown LJ had said that the judge on an application for an injunction under s. 187B of the TCPA 1990 (the analogue of s. 171 of the PA 2008)

was neither required nor even entitled to reach his own independent view of the planning merits of the case: see [2001] 1 WLR 1359, [38]-[40], affirmed by the House of Lords at [2003] UKHL 26, [2003] AC 558, [38] (Lord Bingham).

33 In my judgment, however, nothing in *Porter* supports Mr Kohli's argument. Section 187B of the TCPA 1990 empowers a local planning authority to apply to a court "where they consider it necessary or expedient for any actual or apprehended breach of planning control to be restrained by injunction". In the cases under consideration in Porter, it was common ground that planning permission was required and (at the time when the injunctions were granted) had not been granted: see [6] and [7] of Lord Bingham's opinion in the House of Lords. That was the context for Simon Brown LJ's observation at [38] of his judgment in the Court of Appeal that the judge was required to take the "planning merits" (i.e. whether planning permission should have been, or should be, given) as "decided within the planning process" and "a given".

34 Neither Simon Brown LJ nor Lord Bingham was saying that the court could not or should not decide the threshold question whether the development was an actual or apprehended breach of planning control, if there was a dispute about that. If, for example, it was the respondent's case that what he was proposing to do did not require planning permission, the court could not avoid reaching its own view about that (if it were otherwise disposed to grant an injunction). *Ipswich Borough Council v Fairview Hotels (Ipswich Ltd)* [2022] EWHC 2868 (KB), [2023] JPL 630 illustrates this point well. In that case, a local planning authority sought an injunction under s. 187B of the TCPA 1990 to restrain the use of a hotel to house asylum seekers. There was a dispute about whether this involved a material change of use and so required planning permission. Holgate J considered the arguments for and against in some detail and decided that the issue was "triable": see at [103]. He went on to conclude that the balance of convenience was against the grant of relief until trial. The conclusion that the threshold issue was "triable" presupposes that that issue was, on the facts of the case, suitable for resolution by the court.

35 The same reasoning applies, *mutatis mutandis*, to s. 171 of the PA 2008. The existence of that provision shows that Parliament envisaged that the threshold question whether development consent is required might, in some circumstances, have to be determined by this court (or a county court). The present proceedings are not, of course, proceedings for an injunction under s. 171, but I do not think that matters. They are proceedings brought by parties which could have sought relief under s. 171 in this court. Their purpose is to resolve an issue which both the claimants and Lightsource consider ought to be resolved. If, as I have concluded, that issue can in principle be determined by the court, there are powerful reasons why it should be.

36 The alternatives are, in my view, unpalatable. Mr Kohli's suggestion that Lightsource could make an application to the Secretary of State for development consent is impractical and would not achieve the certainty required. It is impractical because applications for development consent are "front loaded" in the sense that they involve a very large amount of preparatory work, including consulting affected parties (see ss. 41-48). Why would Parliament have intended that a developer should be required to consult in relation to an application which, in its view, does not require development consent at all? How could such a consultation be carried out in circumstances where the developer considers that the project is not an NSIP without confusing or misleading those being consulted? In any event, even if a developer undertook all the necessary

preparatory work, and submitted an application for development consent, and the Secretary of State rejected the application on the ground that development consent was not required, nothing in the PA 2008 suggests that the Secretary of State's view would bind the court if the local planning authority took a different view and decided to prosecute (though it might in practice be persuasive).

37 If the developer chose not to apply for development consent, it would be open to the local planning authority to prosecute under s. 160 once the development had started. Then, as Mr Kohli accepts, the criminal court would have to determine the issue. But why should a developer have to incur the expense of beginning the development when it is clear that there is a dispute between it and the local planning authority about whether development consent is required? And why should a developer have to run the risk of a criminal conviction in order to obtain certainty on a point which both it and the local planning authority wish to have resolved?

38 Finally, even if there are cases where the question whether development consent is required turns on disputed issues of fact, that is not the position here. Even Mr Kohli did not submit that there were any material disputes of fact. He was right to submit that the question whether development consent is required involves a judgment (or, as it is sometimes put, a question of mixed fact and law). But it is not the kind of judgment which requires the court to weigh the "planning merits" (i.e. the advantages and disadvantages in planning terms of a proposed development). The judgment no doubt involves considering more than one factor, but it is the kind of judgment a court has to make whenever it asks whether a given set of facts falls within a statutory concept. I can see no constitutional or institutional reason why it would be wrong for that judgment to be made by me in circumstances where both the local planning authority and the developer invite me to resolve the issue.

Issue (b): Is development consent required?

39 Messrs Barrett and Hunter submit that Hulam and Sheraton are physically connected by a piece of "critical infrastructure". They note that – in the one situation in which "generating station" is defined, where electricity is generated from water – it includes structures and works for holding water: see s. 64(1) of the EA 1989. By analogy, the substation and cables are part of the generating station. Sheraton and Hulam are to perform as one solar farm, sharing the commercial advantages of common infrastructure. If the individual fields at Sheraton are parts of the same solar farm despite being non-contiguous (as Lightsource accepts), it is not obvious why the addition of those fields to the already permitted solar farm at Hulam is not an extension of the latter.

40 In my judgment, Messrs Humphries and Kohli are correct that the reference to s. 64(1) of the EA 1989 does not assist the claimants. In the first place, the fact that a special definition was employed for a generating station involving water suggests that, without that definition, the structure and works for holding or channelling the water would not fall within the ordinary meaning of "generating station". In any event, even if it were appropriate to draw an analogy from a generating station using water to one using solar power, the definition suggests inclusion of structures and works for containing and channelling the raw material from which the power is generated. In the case of solar, that source is sunlight. The structure and works whose function is to collect and channel the sunlight are the photovoltaic panels. There is nothing in the definition in s. 64(1) to

suggest that the apparatus needed to transmit and distribute the electricity is itself part of the "generating station".

41 On this point, the decision in *R (Redcar and Cleveland Borough Council) v Secretary of State for Business, Enterprise and Regulatory Reform* [2008] EWHC 1847 is directly relevant. There, the Secretary of State had given consent under s. 36 of the EA 1989 for the construction and operation of an offshore wind farm. The developer had applied separately under the TCPA 1990 for planning permission for an on-shore substation and underground cabling connecting the wind farm to the substation. The local planning authority's argument was that the consent for the offshore wind farm was invalid because the cables and substation were part of the "generating station" and a consent under s. 36 of the EA 1989 could only be granted for the whole of the generating station.

42 At [18], Sullivan J said this:

> "It is true that the 'whole scheme' proposed by the interested party includes both the wind farm offshore and the elements comprised in the onshore application: the cabling and the onshore substation. However, it does not follow that the wind farm comprised in the s 36 application could not properly be described as a 'generating station' for the purposes of that section. In ordinary language a 'station' is simply a place, building or structure where a particular activity occurs. Thus, we speak of police stations, polling stations, railway stations, et cetera. A non-technical description of a 'generating station' would simply be a building or structure where electricity is generated. The nature of the building or structure will depend on the means of generation: wind, water, coal, nuclear power, et cetera. An application for consent under s. 36 may include ancillary facilities, such as transformers, substations and associated cabling, and, for example, coal stockpiles and handling equipment if the generating station is coal-fired, et cetera. Whether or not such ancillary facilities are included in any s. 36 application will depend upon the facts of the individual case, including, in particular, the physical proximity of the ancillary facilities to the turbines themselves. In the case of an oil or coal-fired generating station the turbines and some or all of the ancillary facilities may well be housed in one building or structure or complex of buildings or structures. In the case of an offshore wind farm the turbines may well be separated by many kilometres of territorial waters from the ancillary facilities onshore. In the former case it will be sensible to include all of the elements of the scheme, including any ancillary facilities, in one application under s. 36. In the latter case it will not, not least since the environmental implications of the offshore turbines may well be entirely divorced from the environmental impact of the onshore facilities many kilometres distant."

43 At [27], he continued:

> "Both as a matter of ordinary language, and on any reasonable interpretation of the provisions of the 1989 Act as amended by the 2004 Act, the 'generating station' is the place, in the present case the wind

> farm offshore, where the electricity is generated. Once it has been generated there, at a 'generating station', it is transmitted ashore."

44 These passages demonstrate that the cables and substation the subject of the present applications are not part of a "generating station". They are the means by which the electricity is transmitted and distributed, not generated. It is true that the PA 2008 does not incorporate all the provisions of the EA 1989 upon which Sullivan J placed reliance. But, by s. 235(1) of the PA 2008, Parliament made a deliberate decision that "generating station" should bear the same meaning as in Part 1 of the EA 1989. This would be a bizarre drafting technique if the intention had been to give the term "generating station" a different meaning. The *Redcar* case is therefore, on the face of it, fatal to the claimants' argument that the cables and substation are part of the generating station. As the decision of a judge of co-ordinate jurisdiction, I am obliged to follow it unless convinced it was wrongly decided. I am not convinced that it was wrongly decided. On the contrary, I find the analysis of Sullivan J compelling as a matter of ordinary language.

45 This is consistent with the scheme of the PA 2008, which permits an application for development consent to include both "development for which development consent is required" and also "associated development": see s. 115(1)(a) and (b). Annex B of the Department for Communities and Local Government's *Guidance on associated development applications for major infrastructure projects* (April 2013) lists both overhead and underground cables and substations as examples of associated development related to onshore generating stations. Although not determinative as to the proper interpretation of the PA 2008, this is consistent with the analysis in the *Redcar* case.

46 That leaves the argument, upon which Messrs Barrett and Hunter placed emphasis at the hearing, that even if the cables and substation are not part of the generating station, the addition of further generating capacity at Sheraton, functionally linked to that at Hulam, counts as an extension of the latter. As to this, I accept that the addition of generating capacity, even at a site which is non-contiguous with the site of the existing generating capacity, could fall within the definition of an "extension" in s. 36(9) of the EA, if – on the facts – the two sites could properly be regarded as part of the same generating station. In this case, however, there are a number of features which point strongly against that conclusion.

47 First, the projects at Hulam and Sheraton were developed separately at different times. This would not be determinative on its own, but it points in the direction of separate stations, other things being equal. Second, they have separate distribution and connection agreements and are separately metered. A third, related point is that Sheraton and Hulam could operate independently of each other – both in contractual terms and in terms of physical infrastructure. Fourth, the common substation at Hart Moor in reality consists of two substations, one for Sheraton and one for Hulam. Fifth, in any event, this substation is part of the apparatus for transmitting and distributing electricity, not generating it – as reflected in the proposal that it will in due course be adopted by NPg. Sixth, as the Technical Note shows, the reason for the proposed common 66kV cable transmitting electricity from the common substation to the grid is that this arrangement is more efficient, not that the generating capacity of the two solar farms is interconnected.

48 These factors, taken together, make it clear that the proposed generating capacity at Sheraton is, in terms of the PA 2008, a new generating station and not an extension of the permitted solar farm at Hulam. I would therefore refuse to grant Declarations One and Two, not because the grant of declarations would be in principle inappropriate, but because the substance of the declarations is wrong in law. Mr Humphries did not ask me to grant any other declaration and I do not do so.

Issue (c): If the projects are an NSIP, does the Inspector have jurisdiction to consider the appeals?

49 Given my conclusions on issues (a) and (b), this issue does not strictly arise. However, given that I have heard argument, I will briefly express my view on it.

50 The claimants' case is that the regimes under the TCPA 1990 and the PA 2008 are mutually exclusive. They say that the position is as set out in the Planning Encyclopaedia: "where development consent is required under the Act, planning permission under the Town and Country Planning Act 1990 is neither required nor capable of being granted" (emphasis added). In my view, this is wrong, for four reasons.

51 First, it is clear that Parliament intended that development consent under the PA 2008 should not be granted unless it was required: s. 55(3)(c). There is nothing equivalent in the TCPA 1990. Section 336(1) provides that "planning permission" means "permission under Part III or section 293A but does not include permission in principle". Parliament could have provided that planning permission can only be granted for projects for which it is required in accordance with s. 57, but it did not do so.

52 Second, s. 33 of the PA 2008 does two separate things. Section 33(1) provides that, where development consent is required in relation to development, various other permissions, consents, notices and authorisations are "not required to be obtained or given" (emphasis added). These latter words reflect the fact that some of the things that are not required – e.g. planning permission granted under the General Permitted Development Order or notice under s. 35 of the Ancient Monuments and Archaeological Areas Act 1979 – are "given" rather than "obtained". Sections 33(2) and (4) provide that, to the extent that development consent is required for development, it cannot be authorised pursuant to certain specified statutory procedures. There is no prohibition on the grant of planning permission.

53 Third, it is true that, in general, Parliament is unlikely to empower a public authority to undertake a resource intensive function, such as deciding whether to grant planning permission, if the permission will have no effect. By the same token, however, it is unlikely that parties would commit the time and expense involved in making a planning application in cases where it is clear that implementing it would be unlawful under s. 160 of the PA 2008.

54 Fourth, the facts of the present case are a good example of a situation in which the planning permissions sought would be far from useless even if – contrary to my conclusion – the two solar farms, taken together, were an NSIP. In that case, parts of the permissions could be lawfully implemented, provided that the generating capacity of the whole did not exceed 50 MW.

55 I would therefore hold that the local planning authority's power to grant planning permission, and the inspector's jurisdiction to entertain the appeals, are not dependent on the projects not being an NSIP.

Conclusion

56 For these reasons I conclude as follows:

a) There is no reason why I should not determine whether the project to which these appeals relate requires development consent and good reason why I should.

b) The project does not require development consent.

c) Even if it did, that would not deprive the local planning authority of jurisdiction to grant planning permission, nor deprive the Secretary of State of jurisdiction to entertain the appeals.

57 The claim for judicial review is therefore dismissed.