

APPELLANT'S STATEMENT OF CASE

PREPARED ON BEHALF OF HIGH SPEED TWO (HS2) LIMITED

**APPEAL AGAINST PART REFUSAL AND PART APPROVAL ON CONDITIONS BY
BUCKINGHAMSHIRE COUNCIL OF SCHEDULE 17 SUBMISSION FOR APPROVAL OF
PLANS AND SPECIFICATIONS FOR BUILDINGS WORKS, EARTHWORKS AND
WALLS/FENCING**

**LAND TO THE EAST OF A413 LONDON ROAD, WENDOVER DEAN BETWEEN THE
SETTLEMENTS OF SOUTH HEATH AND WENDOVER DEAN, BUCKINGHAMSHIRE**

LPA reference: 22/01330/HS2

DLA Piper reference: 380900/390

PINS reference: TBC

1. INTRODUCTION

- 1.1 This Statement of Case has been prepared by DLA Piper UK LLP on behalf of High Speed Two (HS2) Limited ("**Appellant**").
- 1.2 This appeal is made under paragraph 22 of Schedule 17 to the High Speed Rail (London - West Midlands) Act 2017 ("**Act**") against the decision of the Buckinghamshire Council ("**Council**") of a submission ("**Submission**") made by the Appellant under paragraphs 2 and 3 of Schedule 17 of the Act for the approval of plans and specifications for building works, earthworks and fences and walls ("**Works**").
- 1.3 The Works will be constructed on land extending from Leather Lane in the south west to the west of Jones' Hill Wood in the north and is located to the east of the A413 London Road, Wendover Dean, approximately 4km to the south of Wendover and 1.9km to the north of Great Missenden ("**Site**").¹
- 1.4 The Submission was made to the Council on 8th April 2022. The Council issued its decision notice on 22 July 2022. This was a split decision whereby part of the Submission was refused and part was approved subject to seven conditions.
- 1.5 The refusal element of the decision relates to part of the Works relating to Work No. 2/23 in Schedule 1 of the Act,² including the new Bowood Lane overbridge with associated earthworks, vehicle restraint barriers and fencing. There are two reasons for refusal which relate to:
 - 1.5.1 the potential impact on the local environment and a site of historic interest; and
 - 1.5.2 highway safety.
- 1.6 The Appellant's Statement of Case is structured as follows:
 - 1.6.1 section 2 explains the proposed works and describes the Site by reference to the relevant documents comprised within the Submission;
 - 1.6.2 section 3 sets out the statutory framework in the Act, clarifying that the process under the Act is distinguished from that under the Town and Country Planning Act 1990 ("**1990 Act**"), and highlights relevant parts of the associated statutory guidance;
 - 1.6.3 section 4 sets out the relevant caselaw and previous appeal decisions issued under Schedule 17 of the Act;

¹ A copy of the Site location plan is located at Appendix D2.

² Defined as: "A realignment of Bowood Lane commencing on that road at a point 487 metres west of its junction with King's Lane and terminating on that road at a point 201 metres west of that junction. Work No. 2/23 includes a bridge over Work No. 2/14." Work No. 2/14 is, in effect, the section of the new high speed railway being constructed within the Site.

- 1.6.4 section 5 summarises the relevant principles arising from the statutory framework, the caselaw and the previous appeals and sets out how they should be applied in this appeal;
- 1.6.5 section 6 sets out the Appellant's case in response to the Council's reasons for refusal of part of the Submission (analysed within the appropriate statutory context and framework);
- 1.6.6 section 7 sets out the Appellant's case in respect of the conditions which the Council seeks to impose on the approved part of the Submission (again, analysed within the appropriate statutory context and framework); and
- 1.6.7 section 8 summarises the Appellant's overall conclusions as to the proper determination of the appeal.

2. PROPOSAL

- 2.1 The Works for which the Submission sought approval comprise the construction of:
- 2.1.1 a road overbridge on Bowood Lane;
 - 2.1.2 earthworks associated with the re-alignment of Bowood Lane (WEN/37/1) and a maintenance access track;
 - 2.1.3 an accommodation overbridge on footpath TLE/2;
 - 2.1.4 earthworks associated with the realignment of footpath TLE/2;
 - 2.1.5 an accommodation overbridge to serve Cottage Farm;
 - 2.1.6 earthworks associated with the realignment of the Cottage Farm access track;
 - 2.1.7 part of the South Heath Cutting;
 - 2.1.8 a drop inlet culvert on Bowood Lane;
 - 2.1.9 1 no. drainage pond;
 - 2.1.10 drainage ditches;
 - 2.1.11 vehicle restraint barriers; and
 - 2.1.12 permanent security fencing.
- 2.2 The Site is rural in character and mainly comprises of medium sized arable fields interspersed with areas of woodland. The arable fields are well-defined by mature hedgerows that connect with occasional isolated tree clumps. The area outside of the site is similarly characterised as arable agricultural land with some pasture and large areas of woodland. The field pattern is generally well defined by mature hedgerows.
- 2.3 The Site falls outwith a defined settlement boundary and is located within the open countryside. It is also located within the Chilterns Area of Outstanding Natural Beauty ("**AONB**") and designated Green Belt land.
- 2.4 The nearest properties are Strawberryhill Farm and Hunt's Green Farm to the north of the HS2 line and Cottage Farm and Wendover Dean Farm to the south of the HS2 line. There are further scattered farmsteads and individual residential properties located along the A413, Bowood Lane, Leather Lane and King's Lane and the adjacent local tracks off them.
- 2.5 Further details on the Works and the Site can be found in the written statement accompanying the Submission ("**Written Statement**").³

Contents of the Submission

- 2.6 The Appellant's Submission was accompanied by a set of plans and specifications for approval.

³ See generally Appendix D34.

- 2.7 Copies of these documents are provided at Appendices A1 to A20.
- 2.8 Additional documents were also submitted for information. Copies of these documents are provided at Appendices D1 to D37.
- 2.9 Copies of relevant pre-appeal correspondence between the Appellant and the Council are also reproduced at Appendices E1 to E22.

3. THE ACT AND STATUTORY GUIDANCE

- 3.1 For the purposes of this Statement of Case, unless otherwise indicated, all references to statutory provisions are references to the Act and references to paragraphs are to paragraphs in Schedule 17 to the same.

The deemed planning permission

- 3.2 Planning permission for the carrying out of the development authorised by the Act ("**Phase One**") is deemed to have been granted for the purposes of Part 3 of the 1990 Act by virtue of section 20(1) of the Act.
- 3.3 Pursuant to section 20(3) of the Act, such deemed permission is subject to the conditions contained in Schedule 17. This means that the principle of development has already been accepted, but certain details are subject to further approval in a manner analogous to the discharge of conditions attached to planning permission granted under the 1990 Act.
- 3.4 However, the grounds on which a local planning authority can refuse a submission under Schedule 17 are limited to those set out within the relevant paragraph of Schedule 17 to the Act. This is a key distinction between the Schedule 17 process and decision-making under the 1990 Act and reflects the fact that the Act has already settled the principle of development and authorised the construction of Phase One.
- 3.5 The deemed planning permission has been granted on the basis of the impacts which were assessed and reported as part of the High Speed Two (HS2) Phase One Environmental Statement ("**Environmental Statement**").⁴ Parliament has judged such impacts as being acceptable in the context of Phase One.

The relevant Schedule 17 conditions

- 3.6 The Submission relates to Works within the scope of paragraphs 2 and 3 of Schedule 17 which set out the relevant conditions. It should be noted that paragraph 3 only applies if the relevant planning authority is a qualifying authority for the purposes of the Act (paragraph 3(1)). The grounds upon which approval of the plans and specifications for the paragraph 2 Works may be refused (or conditions imposed) also depend upon whether the relevant planning authority is a qualifying authority (paragraph 2(5) and (6)).
- 3.7 By paragraph 13, a qualifying authority is a planning authority so specified by an order of the Secretary of State. The Council is designated as a qualifying authority in the High Speed Rail (London – West Midlands) (Qualifying Authorities) Order 2017.⁵ It is accorded this special

⁴ Published 25 November 2013. Due to its size, a copy of the Environmental Statement is not provided with this Appeal, but it can be accessed via: <https://www.gov.uk/government/collections/hs2-phase-one-environmental-statement-documents#guide-to-the-environmental-statement>.

⁵ Due to local government re-organisation, the predecessor authorities which the Council replaced are listed in the Order. The Council has succeeded to the relevant functions as a qualifying authority.

status under paragraph 13. To so qualify, the Council⁶ (as for all other qualifying authorities) had to provide an "undertaking" to the Secretary of State. The terms of the undertaking are set out in the "*Environmental Minimum Requirements General Principles Annex 2: Planning Memorandum*".⁷ This undertaking binds the Council and shall be "taken into account" in the determination of matters submitted by the Appellant for approval under Schedule 17.⁸

3.8 Amongst other things this undertaking requires that, when considering applications for approval, the Council:

3.8.1 shall have regard to construction, cost and programme implications, and shall not seek to impose any unreasonably stringent requirements on the request for approval which might frustrate or delay the project (paragraph 7.2.1);

3.8.2 shall state clearly and precisely the full reasons for the refusal of an application made to it (paragraph 7.7.1);

3.8.3 if its decision has been reached on the grounds that the Submission ought to and could reasonably be modified it should include an explanation of why and how it considers that the modifications should be made (paragraph 7.7.2);

3.8.4 shall also take into account the assessment and findings set out in the HS2 Environmental Statement, the approved HS2 Code of Construction Practice ("**CoCP**") and any Undertakings and Assurances given by the Appellant in relation to the construction of the project (paragraph 9.1.1); and

3.8.5 shall have regard to the relevant statutory guidance⁹ (paragraph 9.3.1).

3.9 As to the building works, paragraph 2 provides:

"(5) *If the relevant planning authority is a qualifying authority, it may only refuse to approve plans or specifications for the purposes of this paragraph on the ground that—*

(a) *the design or external appearance of the building works ought to be modified—*

(i) *to preserve the local environment or local amenity,*

(ii) *to prevent or reduce prejudicial effects on road safety or on the free flow of traffic in the local area, or*

(iii) *to preserve a site of archaeological or historic interest or nature conservation value,*

⁶ In this case, the predecessor local authorities gave the undertaking. The Council's status as a qualifying authority flows from this.

⁷ A copy is provided at Appendix B1.

⁸ cf. Appendix B1, para. 2.1.2

⁹ See below

and is reasonably capable of being so modified, or

(b) *the development ought to, and could reasonably, be carried out elsewhere within the development's permitted limits.*

...

(7) *The relevant planning authority may only impose conditions on approval for the purposes of this paragraph on a ground referred to in sub-paragraph (5) or (6) (as the case may be)."*

3.10 As to the other construction works (earthworks, fences and walls), paragraph 3 provides:

"(6) *The relevant planning authority may only refuse to approve plans or specifications for the purposes of this paragraph on a ground specified in relation to the work in question in the following table.*

| <i>Development</i> | <i>Possible grounds for refusal of approval</i> |
|--|--|
| ... | |
| 2. <i>Earthworks</i> ¹⁰ | <i>That the design or external appearance of the works ought to, and could reasonably, be modified—</i> <i>(a) to preserve the local environment or local amenity,</i> <i>(b) to prevent or reduce prejudicial effects on road safety or on the free flow of traffic in the local area, or</i> <i>(c) to preserve a site of archaeological or historic interest or nature conservation value.</i> <i>If the development does not form part of a scheduled work, that the development ought to, and could reasonably, be carried out elsewhere within the development's permitted limits.</i> |
| ... | |
| 5. <i>Fences and walls</i> ¹¹ | <i>That the development ought to, and could reasonably, be carried out elsewhere within the development's permitted limits.</i> |

¹⁰ This means terracing, cuttings, embankments or other earth works, per paragraph 3(9)

¹¹ Except for sight, noise and dust screens which are defined as "any fences, walls or other barriers (including bunds) for visual or noise screening or dust suppression", but this does not apply in the present appeal.

- ...
-
- (7) *The relevant planning authority may only impose conditions on approval for the purposes of this paragraph on a ground specified in the table in sub-paragraph (6) in relation to the work in question."*

The appeal process

- 3.11 As set out in paragraph 1.2 above, this appeal is made under paragraph 22 against the Council's decision to refuse part of the Submission and against the imposition of conditions on those parts of the Submission which the Council has approved. Paragraph 22 provides:

"Where the nominated undertaker is aggrieved by a decision of a planning authority on a request for approval under Part 1 (including a decision to require additional details), it may appeal to the appropriate Ministers by giving notice of the appeal in the prescribed form to them and to the authority whose decision is appealed against within 42 days of notification of the decision."

- 3.12 The "*appropriate ministers*" for the purposes of paragraph 22 are the Secretary of State for Transport and the Secretary of State for Levelling Up, Housing and Communities (the "**Appropriate Ministers**"). Paragraph 23 provides that appeals under Schedule 17 are to be determined by the Appropriate Ministers, unless the Appropriate Ministers direct otherwise. The Appropriate Ministers have delegated this function to the Planning Inspectorate, whilst retaining the ability to "recover" the appeal, should they deem it necessary.¹²
- 3.13 It should be noted that the appeal mechanism under the Act is different from that under section 78 of the 1990 Act and paragraph 22(10) prevents an appeal under section 78 of the 1990 Act if a right of appeal is available under Schedule 17.
- 3.14 Paragraph 25(1) provides that appeals shall be determined by way of written representations unless the person deciding the appeal directs otherwise. Paragraphs 25(2) and (3) permit the Appropriate Ministers to make regulations in relation to appeals under paragraph 22, which they have done in the form of the High Speed Rail (London - West Midlands) (Planning Appeals) (Written Representations Procedure) (England) Regulations 2017.
- 3.15 In addition, the Department for Transport has issued guidance on how the appeal process should work in practice ("**Appeals Guidance**").¹³

The appeal decision

- 3.16 Unlike an appeal under section 78 of the 1990 Act, the Planning Inspectorate is not being asked to consider the appropriateness of the development of HS2 as a whole as part of this process. Rather, paragraph 22(2) sets out the question before the Appropriate Ministers:

"on an appeal under this paragraph, the appropriate ministers may allow or dismiss the appeal or vary the decision of the authority whose decision is appealed against, but may only make a determination involving -

¹² Paragraph 23(2)

¹³ A copy is provided at Appendix B2.

- (a) *the refusal of approval, or*
- (b) *the imposition of conditions on approval,*

on a ground open to that authority."

- 3.17 Therefore, any decision by the Inspector to refuse the Appeal or to impose conditions must be confined to the grounds in paragraphs 2 and 3 which have been comprehensively set out above.
- 3.18 If the Inspector is minded to seek to impose any conditions, the Appellant would welcome discussions with the Inspector as to the appropriateness of and potential wording for such proposed condition(s), such as through a brief issue specific hearing – this was the approach adopted by the Inspector in appeal reference APP/HS2/4.

The Statutory Guidance

- 3.19 Paragraph 26(1) allows the Secretary of State to issue statutory guidance and planning authorities are required by paragraph 26(2) to have regard to such guidance in the exercise of their functions under Schedule 17. In exercise of this power, the Secretary of State published updated guidance on 5 May 2021 ("**Guidance**")¹⁴.
- 3.20 Paragraphs 19 and 20 of the Guidance state that the approvals under Schedule 17 have been:

"carefully defined to provide an appropriate level of local planning control over the works while not unduly delaying or adding cost to the project.

Planning authorities should not through the exercise of the Schedule seek to:

- *revisit matters settled through the parliamentary process*
 - *seek to extend or alter the scope of the project*
- or*
- *modify controls already in place, either specific to HS2 Phase One such as the Environmental Minimum Requirements (EMRs), other controls in the Act such as those under Schedule 4 or 33, or existing legislation such as the Control of Pollution Act or the regulatory requirements that apply to railways."*

- 3.21 Pursuant to a Development Agreement which governs the relationship between the Secretary of State for Transport and the Appellant for the delivery of the entire HS2 project,¹⁵ the Appellant is contractually obliged, *"to comply with and discharge the Undertakings, Assurances and Requirements."*¹⁶ Clause 1 of the Development Agreement contains definitions and interpretations for the agreement and provides that the Environmental Minimum

¹⁴ A copy of the Guidance is located at Appendix B3

¹⁵ Relevant extracts from the most recent version of the Development Agreement are located at Appendix B4 of this Statement of Case.

¹⁶ Please see clause 8.1(N) of the Development Agreement

Requirements ("**EMRs**") form part of the Undertakings, Assurances and Requirements with which the Appellant is contractually obliged to adhere.

- 3.22 As such, Schedule 17, the Guidance and the EMRs are intrinsically linked and form an overarching framework that the Appellant must adhere to and which a decision-maker should take into account when determining a specific Submission. This is also made clear by the undertakings given by the Council (and binding on it) in order for it to attain the status of a qualifying authority.¹⁷
- 3.23 Paragraphs 47 to 49 of the Guidance also make clear that where a planning authority considers that the Submission ought to, and could reasonably, be modified then it is for the planning authority to justify the proposed modification by reference to the grounds for refusal set out in the relevant conditions of Schedule 17. Similarly, where the planning authority seeks to secure a modification by imposing a condition then "*the onus is on it to demonstrate that the condition is justified and relevant to the grounds*" (paragraph 55 of the Guidance).
- 3.24 Paragraph 52 of the Guidance further emphasises that conditions should not be imposed which conflict with controls or commitments contained in the EMRs. It is not the purpose of the Schedule 17 procedure to replicate or police the EMRs, but rather to complement them.
- 3.25 Paragraph 54 of the Guidance also provides that the requirements of paragraph 55 of the National Planning Policy Framework (2019) apply to the imposition of conditions under Schedule 17. This has now been replaced by paragraph 56 of the National Planning Policy Framework (2021) which provides inter alia that:
- "Planning conditions should be kept to a minimum and only imposed where they are necessary, relevant to planning and to the development to be permitted, enforceable, precise and reasonable in all other respects."*
- 3.26 To assist with the interpretation of the NPPF, the Government has published National Planning Practice Guidance ("**NPPG**"). The NPPG provides guidance on the use of planning conditions and is therefore relevant to the interpretation and application of this part of the NPPF.
- 3.27 It is notable that the NPPG advises that conditions requiring compliance with other regulatory regimes will not meet the test of necessity. Similarly, conditions which place unjustifiable and disproportionate financial burdens on an applicant will fail the test of reasonableness.¹⁸ This could include where delay to the project programme results in increased costs for the Appellant. Therefore, any condition that conflicts with the paragraphs of the Guidance summarised above will fail to comply with the six tests in the NPPF and so will also be in conflict with the Guidance.

¹⁷ See above at paras. 3.7 and 3.8 for further details on the undertakings.

¹⁸ see NPPG paragraph 21a-005-20140306.

4. PREVIOUS RELEVANT CASELAW AND APPEAL DECISIONS

Relevant caselaw

- 4.1 Schedule 17 has been considered by the Court of Appeal in a case which concerned a submission for approval of an earthwork pursuant to paragraph 3,¹⁹ although the case contains a number of principles of general applicability as to the operation of Schedule 17. These principles may be summarised as follows:
- 4.1.1 A decision-maker is under a duty to evaluate the impact of the Appellant's proposal on the identified planning interests, and this duty cannot be delegated or sub-contracted to any third party.²⁰
 - 4.1.2 The grounds (i.e. the relevant planning interests) on which an application can be refused, or on which conditions can be imposed on an approval, are limited to those set out in the relevant paragraph of Schedule 17. In this respect, the decision-maker's function is significantly constrained compared to the 1990 Act.²¹
 - 4.1.3 If a decision-maker considers that it has insufficient information to consider the relevant grounds it can refuse to consider a submission, but it cannot refuse a submission other than on the limited grounds set out in the relevant paragraph of Schedule 17. Insufficiency of information is not a ground for refusal or the imposition of conditions.²²
 - 4.1.4 The Appellant is under a duty to provide adequate information on its proposal to enable the decision-maker to consult and undertake its assessment. It is for the decision-maker, acting within the relevant margin of discretion, to determine what information it requires to be able to determine a submission.²³
 - 4.1.5 The EMRs do not supplant the statutory regime of planning enforcement but are matters for authorities to take into account. The degree of weight to be given to them is a question of discretion for the decision-maker. It is not the role of the local

¹⁹ A copy of the Court of Appeal judgment is provided at Appendix C1.

²⁰ Appendix C1, para. 68

²¹ Appendix C1, paras. 72 to 73

²² Appendix C1, para. 74

²³ Appendix C1, paras. 76 to 77. This matter was also subject to more recent consideration by the High Court which confirmed that if there is a difference of opinion between the Appellant and the relevant planning authority as to whether sufficient information (in legal terms) has been supplied then this is properly dealt with as a preliminary issue in any ensuing appeal; see in particular Appendix C11, paras. 110 to 124

planning authority to police the operation of the EMRs and it should be assumed that the Appellant will comply with them.²⁴

- 4.2 In addition, a *Grampian* condition requiring that necessary investigations are undertaken after the approval of the Submission would not generally meet the tests for the imposition of conditions or be appropriate.²⁵

Relevant appeal decisions

- 4.3 The following previous appeal decisions provide useful guidance as to the way in which the Appellant's proposals should be evaluated and appeals determined:

4.3.1 **APP/HS2/2:** the Appropriate Ministers agreed with the inspector's recommendation to approve lorry routes to two worksites in Hillingdon subject to the imposition of one condition, agreed by the Appellant. Two other conditions proposed by the Council were not imposed.

4.3.2 **APP/HS2/3:** this related to the approval of various works under paragraphs 2 and 3 of Schedule 17 and confirms that conditions may only be imposed if they effect a substantive modification to the Appellant's proposals. If no substantive modification is put forward then this would not fall within the scope of the Schedule 17 powers and the imposition of the condition will be ultra vires.²⁶

4.3.3 **APP/HS2/4:** an inspector approved lorry routes to various worksites in Camden. The planning authority had proposed 16 conditions, but the final approval contained only three which were agreed with the Appellant following an issue specific hearing.

4.3.4 **APP/HS2/5:** an appointed inspector approved lorry routes on appeal without conditions notwithstanding the fact that the planning authority contended that the underlying submission was legally invalid. The Inspector's decision was upheld following a subsequent legal challenge by both the High Court²⁷ and the Court of Appeal²⁸, applying the earlier Court of Appeal decision (see above at paragraph 4.1).

4.3.5 **APP/HS2/7:** an inspector approved plans and specifications for the part of the Colne Valley Viaduct ("CVV") falling within the relevant planning authority's

²⁴ Appendix C1, paras. 76 and 84

²⁵ Appendix C1, para. 89; see also paragraph 56 of the Guidance.

²⁶ Appendix C6, para. 13

²⁷ A copy of the High Court judgment is provided at Appendix C2.

²⁸ A copy of the Court of Appeal judgment is provided at Appendix C3.

administrative area²⁹ together with sundry associated earthworks and fencing, including vehicle restraint barriers. The Inspector rejected the planning authority's contention that insufficient information had been provided by the Appellant and concluded that there was no reason why the design for the CVV ought to be modified. Sundry conditions (proposed by the planning authority and third parties) were also rejected by the Inspector on the basis that they were not within the scope of paragraphs 2 and 3 or did not propose any substantive modification to the Appellant's proposals or duplicated other controls (and were accordingly unnecessary) or were otherwise contrary to the Guidance.

4.3.6 **APP/HS2/8:** the Inspector overturned two conditions imposed by the relevant planning authority on the basis that it had not provided evidence to demonstrate that there would be any improvement compared to the Appellant's proposals such that the conditions were unnecessary, they did not specify how the design should be modified and, accordingly, were insufficiently clear and precise or were otherwise outwith the scope of paragraphs 2 and 3 because they related to future monitoring arrangements and not to the design, external appearance or location of the works in question.

4.4 Copies of the relevant decision letters (and associated inspectors' reports where relevant) are provided at Appendices C4 to C10 and relevant passages are identified in section 5 below.

²⁹ The other part of the CVV had already been approved by the neighbouring planning authority subject to conditions to which the Appellant objected. The conditions were all removed on appeal under reference APP/HS2/3 (Appendix C6).

5. RELEVANT PRINCIPLES FOR DETERMINING THE APPEAL

- 5.1 Based on the statutory framework, the caselaw and the previous appeal decisions, it is possible to distil the following systematic framework in which a decision-maker should approach a decision under paragraphs 2 and 3 of Schedule 17:
- 5.1.1 The decision-maker must evaluate whether the design or external appearance of the Works (as applied for and set out by the Appellant in the Submission) ought to and could reasonably be modified.³⁰ The justification for any proposed modification must be based on an adverse impact on one or more of the factors identified. The requirement for the identified impact to be adverse flows from the statutory language which refers to the 'preservation' of the identified features³¹ or the 'prevention' and 'reduction' of 'prejudicial' effects.³² It follows that if the Inspector concludes that the Submission would not lead to an adverse impact – such that the relevant interests are preserved and there is no harm to prevent or reduce – then an essential pre-requisite for a modification is not made out.
- 5.1.2 If the decision-maker concludes that there would not be an adverse impact, the Submission must be approved without modification as it would not be possible to satisfy the statutory requirements for refusal or the imposition of conditions. To put the matter another way: if there is no adverse impact arising from the Appellant's proposal then there will be no underlying reason why the Submission "ought" to be modified.³³
- 5.1.3 If the evaluation of the Appellant's proposals concludes that there would be an adverse impact on one or more of the statutory factors, this impact must be "*materially adverse*"³⁴ and not de minimis. This is because minor impacts will not satisfy the statutory requirement that the Submission "ought" to be modified.
- 5.1.4 If there would be a materially adverse impact, it is then necessary for the decision-maker to decide whether that impact can be avoided, wholly or in part, by a modification to the Submission. It is necessary for such proposed modification to alter the substance of the Submission³⁵ – if it does not, it will not fall within the limited scope of Schedule 17 even if the proposed modification would not be seen

³⁰ Or carried out elsewhere, as the case may be. For brevity, the following paragraphs of this Statement of Case refer to both as 'modifications'.

³¹ Paragraph 2(5)(a)(i) and (iii); paragraph 3(6)(2.)(a) and (c)

³² Paragraph 2(5)(a)(ii) and paragraph 3(6)(2.)(b)

³³ Paragraphs 2(5)(a) and 3(6)(2.)

³⁴ Appendix C7, paras. 19 and 43

³⁵ Appendix C6, para. 13

as unusual or excessive in terms of an appeal under the 1990 Act.³⁶ It also follows that if it is not possible to specify a substantive modification that would have a beneficial effect on the identified adverse impact then the statutory grounds will not be satisfied because there is no modification that is actually capable of being made – reasonable or otherwise.

5.1.5 If a substantive modification that would have a beneficial effect on the identified adverse impact arising from the Submission can be specified, the decision-maker must then consider whether such modification ought to and can reasonably be made. There must be sufficient benefit from the modification in terms of avoiding the identified adverse impact to outweigh any disbenefit to the Appellant or more generally, such as by way of increased costs, delays to the programme or pollution.³⁷ This is because the grounds in paragraphs 2(5) and 3(6) require it to be demonstrated that a modification ought to be made – it is not enough for that modification to be merely desirable or sensible.³⁸ Similarly, if the disbenefits would impose an unreasonable burden on the Appellant such that the Submission could not "*reasonably be modified*" then the modification cannot be imposed as this would fall outwith the statutory requirements. In such circumstances, the Submission should be approved without conditions.

5.1.6 If a substantive modification has been identified which ought to be and is reasonably capable of being made, the decision-maker must then consider whether it is appropriate to impose a condition. In this regard, a condition is the means by which a modification is effected. As set out above, paragraph 54 of the Guidance provides that the 'six tests' in the NPPF should be used. For example, if the proposed condition would not be necessary or reasonable then it should not be imposed and the Submission should instead be approved without imposing that condition. This is the consistent approach taken in each of the earlier appeal decisions where conditions were in issue.³⁹

5.1.7 In particular, whilst the EMRs do not oust the decision-maker's discretion under Schedule 17 and the degree of weight to be given to them is a question of planning judgment for the decision-maker, where a proposed condition duplicates or conflicts with an existing EMR control then it will not be necessary to impose the condition and the Submission should be approved without it.⁴⁰

³⁶ Appendix C5, para. 60

³⁷ Appendix C7, paras. 29 and 36

³⁸ Appendix C5, para. 60

³⁹ For example: Appendix C5, para. 51; Appendix C6, paras. 16 and 18; Appendix C7, paras. 15, 24, 26, 27 and 29

⁴⁰ For example: Appendix C5, paras. 52, 61 and 66; Appendix C6, paras. 14 and 17; Appendix C7, paras. 20, 23 and 24

5.1.8 Accordingly, it is only if all of the foregoing steps are satisfied, such that it is necessary and reasonable to effect a modification but a condition cannot be imposed⁴¹, that the Submission may be refused. In that sense, refusal of the Submission is very much a last resort under the statutory scheme of Schedule 17.

⁴¹ Due to non-compliance with the 'six tests' or is legally invalid under the Schedule 17 regime.

6. THE APPELLANT'S RESPONSE TO THE REASONS FOR REFUSAL

Summary of Reasons for Refusal

- 6.1 From the outset, it is noted that both of the reasons for refusal are confused in that it is not clear whether the Council is simply proposing a reduction in the carriageway width, or a reduction to the width of the bridge more generally. Whilst the majority of the Decision Notice refers to carriageway width, there are matters contained within the reasons for refusal which could not be changed without a design change to the Bowood Lane overbridge itself.
- 6.2 It is clear from the case officer's report for the Submission ("**Officer's Report**")⁴², however, that the Council's only concern regarding the bridge relates to the width of the carriageway and not the design of the bridge itself. Indeed, following the issue of the Decision Notice, the Appellant and the Council have been working collaboratively in order to progress the issues between them. During a meeting on 15 August between the Appellant, its agents and the Council, it became clear that the Council's concern is not with the Bowood Lane overbridge itself, but with the width of the carriageway on the bridge - the Council preferring a 3.5m wide carriageway to the proposed 5.5m wide carriageway with road markings.⁴³
- 6.3 Accordingly, the difference between the parties is extremely narrow and essentially comes down to whether the bridge includes a wider carriageway with white lines; or whether it includes a narrower carriageway with wider verges.
- 6.4 The Council has, therefore, refused the submission on the basis that a wider carriageway will have a harmful impact on the character and local interest of the area, as well as having a prejudicial effect on road safety and has proposed that a narrower, 3.5m wide carriageway should be preferred.

PART 1: Railway Safety

- 6.5 Before turning to the detail of the Council's reasons for refusal, it is important to understand the context in which to any overbridge over a high-speed railway is designed.

Design Standards

- 6.6 There are no national design standards for single-track roads. In the absence of any standards, a highway design focus group comprising subject matter experts (both within the Appellant's organisation and various consultants developing the parliamentary design for Phase One)

⁴² Appendix A22.

⁴³ It should be noted that the Appellant wrote to the Council on 16 August 2022 confirming the minutes of that meeting. On 17 August 2022, the Council replied stating that it could not agree to the minutes. However, given the position taken in the Officer's Report, it is clear that the Council's concerns relate to the width of the carriageway and not to the design of the bridge itself and so in the absence of the Council specifically stating that its concerns with the Submission are not limited to the width of the carriageway, the Appellant must proceed on the basis that the Council's concerns are as set out in this paragraph 6.2.

developed the “HS2 rural road design criteria”.⁴⁴ The HS2 Rural Design Criteria (“**Design Criteria**”) is contained in Appendix C to the “Technical Standards – Roads” (“**Technical Standard**”), which is itself the standard providing “*the technical requirements and associated guidance for the design of any works to roads potentially affected by the HS2 project.*”⁴⁵

- 6.7 Paragraph 6.5 of the Technical Standard describes the Design Criteria, noting the absence of any relevant design standard, and paragraph 6.5.6 imposes a requirement that:

“Unless otherwise specified in Appendix A, roads designed to the design basis ‘HS2 rural road design criteria’ shall be in accordance with Appendix C.”

- 6.8 Appendix A relates to common design standards and is not relevant to the issues in dispute at this Appeal.

- 6.9 Paragraphs C.6.6 to C.6.9 of the Design Criteria deal with appropriate carriageway widths for rural roads, with paragraph C.6.9 providing the following in respect of overbridges:

“The carriageway width across overbridges and through underbridges on single-track roads shall be 5.5 metres, using road markings to give a centred 3.5 metre running lane to discourage a sudden increase in traffic speed or unsafe overtaking manoeuvres. Inter-visible passing places shall be provided at each end of the structure.”

- 6.10 It should be noted that Buckinghamshire County Council (as the Council then was) first had sight of the Design Criteria containing the relevant carriageway width requirements in 2014, in its capacity as a member of the Highways sub-group of the Phase One Planning Forum. No issue was taken regarding carriageway widths on overbridges.

The high-speed railway

- 6.11 It should be noted that HS2 is the first railway of its kind in the United Kingdom – quite simply, there is no comparative railway in terms of speed and frequency of trains.

- 6.12 Once operational, the railway will operate at a line speed of 360 km/h (225 mph), with a train frequency of up to 18 trains per hour in each direction. This means that the trains have a separation (at full operating capacity) of circa 3 minutes.

- 6.13 The trains themselves will carry up to 1100 seated passengers.

- 6.14 A train travelling at 360 km/h takes approximately 5 km to come to a complete stop. Therefore, by the time a train driver sees anything alien on the track, it is too late. The train will inevitably strike the object; if the object is significant (for example, a vehicle) the train will derail; and the result will be catastrophic on a scale which this country has never seen in railway terms, with estimated fatalities of between 100 and 300.

- 6.15 Furthermore, notwithstanding HS2 has various emergency safety measures, it is likely when the railway is operating at full capacity that an oncoming train will be less than 5 km away from

⁴⁴ The Rural Road Design Criteria is contained in Appendix C to the document “Technical Standards – Roads”, a copy of which is located at Appendix B5.

⁴⁵ Appendix B5.

the accident, and thus is likely to be unable to avoid a collision with it. Such an event is likely to have an even greater impact in terms of loss of life than the initial accident.

- 6.16 On a conventional railway there are opportunities to mitigate the risk, for example:
- 6.16.1 the driver may (or is at least significantly more likely to) see the event and be able to stop or significantly slow the train before impact; and
 - 6.16.2 the vehicle (or other alien object) could be detected, with trains stopped on approach by a radio or technical system.

The result is that the striking of any vehicle or other alien object, whilst a highly unfortunate event, would be significantly less likely to involve loss of life (and certainly loss of life on the scale described above) than a high-speed train striking the same vehicle or object.

Interaction between a high-speed railway and bridges

- 6.17 Given the potentially catastrophic consequences of a collision. It is HS2's responsibility to place railway safety at the forefront of everything it does. This is why it has spent over ten years developing the Technical Standard and the Design Criteria. Ultimately, HS2's designs and methodologies are all developed and undertaken to keep the railway clear and to avoid a catastrophic event. In the normal course of events, the railway is kept isolated from external factors in order to minimise the risk of alien items being present on the track.
- 6.18 Bridges are a significant risk in railway safety terms because they bring vehicles (and pedestrians) into close contact with the railway; introducing factors which are outside of HS2's control. As a consequence, the design of bridges is critical in safety terms. Fundamentally, all of HS2's bridges are designed to reduce so far as possible the risk of anything coming into contact with the railway. A collision on a bridge could lead to any number of events such as:
- 6.18.1 two vehicles colliding or swerving away from the carriageway to avoid a collision, with one or both falling on to the railway; or
 - 6.18.2 two vehicles colliding or one vehicle colliding with the bridge, resulting in fallen debris (either from the bridge or the vehicle) on the track;
- 6.19 In addition to such catastrophic events, even a minor collision that did not result in alien items on the track would result in the suspension of the operation of the railway until a structural engineer has been able to confirm the structural integrity of the bridge and safety checks have been carried out on the line below. HS2 estimates that such an event would cost in the region of £500,000 for each hour that the railway remained suspended.
- 6.20 In preparation for this Appeal, the Appellant has produced a briefing note for bridges on single track roads ("**Briefing Note**").⁴⁶ Section 4.2 of the Briefing Note relates specifically to railway safety and explains in further detail the safety considerations in designing a bridge over a high-speed railway.

Rationale for the design of the Bowood Lane overbridge

⁴⁶ Appendix B6.

- 6.21 The reason, therefore, that the Appellant has designed the overbridge in the way that it has is because it presents the option which poses the lowest safety risk to the railway. It allows vehicles to safely pass one another, within the minimum possible risk to the railway or the safety of its passengers below.
- 6.22 The Appellant has considered the Council’s proposal of reducing the width of the carriageway but has discounted it on the basis that it presents a higher risk to the safety of the railway than the Appellant’s proposal and so is not acceptable. Given that the Appellant must do all that it can to reduce the risk to railway safety, it cannot accept a proposal which increases that risk.
- 6.23 Simply put, if the carriageway is narrowed as the Council proposes, there is a higher risk of an incident. If two vehicles do not have sufficient space to pass one another then the likelihood of those two vehicles colliding or swerving into the bridge increases. This presents a greater risk than a solution which allows the same two vehicles to pass one another without needing to leave the carriageway.
- 6.24 The design approach and rationale for the Bowood Lane overbridge (and other bridges included within the submission) is contained in section 4 of the Written Statement⁴⁷ and so is not repeated in any detail in this statement of case.
- 6.25 However, it is evident from section 4 of the Written Statement that the design of the overbridges has been carefully considered and developed in accordance with the Technical Standard and Design Criteria. Indeed, the Appellant has worked collaboratively with the Council to influence the final design of the proposed scheme (paragraph 4.6.3 of the Written Statement). This includes a number of measures, but importantly in the context of the Council’s second reason for refusal:

*The key principle in establishing suitable parameters that strike an optimum balance between safety and landscape considerations is the safety of road and railway users. This translates into providing sufficient width for vehicles and other bridge users to pass safely, and avoiding incursion of debris onto the HS2 line. Consequently, the carriageway width across overbridges on single-track public roads has been set at 5.5 m, the standard minimum for a two-lane road which allows two cars to pass in safety. A 5.5 m carriageway is also just wide enough for two large vehicles to pass each other on an exceptional basis. **To discourage a sudden increase in traffic speed or unsafe overtaking manoeuvres, road markings are specified to give a centred 3.5 m running lane whilst still allowing two vehicles to pass each other during an incident and thus avoid collision or hitting the structure. Inter-visible passing places will also be used at each end of the bridge to further reduce the risk of two vehicles trying to cross at the same time by encouraging disciplined driving habits.***

- 6.26 The highlighted section of the passage expressly addresses the rationale behind the Council’s second reason for refusal.
- 6.27 In addition to what is set out in the Written Statement, the Appellant has undertaken an independent safety review⁴⁸ of the Bowood Lane overbridge (“**Safety Review**”). Annex B to the Safety Review sets out the alternative options which were considered which could have reduced or eliminated risks at Bowood Lane (and similar locations).

⁴⁷ Appendix D34

⁴⁸ Appendix B7.

- 6.28 Indeed, options 2 and 3 of Annex B were considered in great detail with Council officers. However, the Council confirmed in writing on 22 July 2022 that it was not confident as to the likelihood of successfully stopping up Bowood Lane or imposing a traffic regulation order and so rejected these offered modifications.
- 6.29 Accordingly, the Appellant was left with no option but to pursue the current Submission in the context of the Bowood Lane overbridge, which represents the option that poses the lowest risk to the railway.
- 6.30 Before the railway can become operational, HS2's Head of System Safety is required to provide a legal declaration that HS2 has taken all possible steps to ensure that the railway, once operational, will be safe. Any approval of the Council's proposed modification to the works, therefore, has significant consequences as to whether that legal declaration can be given – it cannot be given, for example, where a safer option was available to HS2 but was not taken. In the absence of any evidence whatsoever that the Council's proposal is safer than the Works, therefore, the Appellant could not lawfully bring the railway into operation because it does not consider the Council's proposal to represent a better option in railway safety terms.

Summary

- 6.31 The safety of the railway is paramount in the delivery of Phase One. The Appellant has designed an overbridge which reduces the risk to the railway and consequently reduces the risk of a catastrophic event as far as it possibly can, as well as minimising the risk of disruption to the railway. It would be entirely inappropriate for the Appellant to deliver the Council's proposed modification to the bridge as it represents a greater risk to railway safety for the reasons articulated in this Statement of Case and in the Briefing Note.
- 6.32 It is respectfully submitted that the Inspector must place the greatest weight on the need to minimise risk to the railway in the determination of this appeal. While the Appellant's case is that the Council has not made the case for any modification being considered, the Appellant would in any event say that the consequences of an amendment on railway safety are such as to lead inevitably to the conclusion that the modification that the Council is seeking ought not and cannot reasonably be made so that the statutory test for a modification has not been made out.

PART 2: Reasons for Refusal not relevant to Schedule 17 of the Act

- 6.33 The Council has confirmed its concern is not with the Bowood Lane overbridge itself, but with the width of the carriageway on the bridge. Accordingly, the Council's concerns, and so its Reasons for Refusal, are outwith the scope of Schedule 17.
- 6.34 Paragraph 2 of Schedule 17 to the Act relates to "buildings", which are further defined in paragraph 30 of Schedule 17, as follows:

"building" includes any structure other than—

- (a) anything in the nature of plant or machinery,*
- (b) any gate, fence, wall or other means of enclosure,*
- (c) any tunnel, earthworks (within the meaning of paragraph 3) or railway track bed,*
- (d) any sight, noise or dust screens (within the meaning of paragraph 3),*

- (e) *transformers, telecommunication masts or pedestrian accesses to railway lines,*
 - (f) *lighting equipment, and*
 - (g) *anything underground, except where forming part of a station and intended for use by members of the public without a ticket or other permission to travel*
- 6.35 Whilst it is accepted that the Bowood Lane overbridge is itself a structure, the carriageway upon it is not a structure and is therefore not a matter for approval under a Schedule 17 submission.
- 6.36 Indeed, highways matters are dealt with under Schedule 4 of the Act, Part 3 of which relates to the construction and maintenance highways. Paragraph 11 of Schedule 4 provides:
- (1) *Sub-paragraph (2) applies where under this Act the nominated undertaker—*
 - (a) *constructs a new highway which is constituted by or comprises a carriageway, or*
 - (b) *realigns a highway which is constituted by or comprises a carriageway.*
 - (2) *The construction or realignment must be carried out in accordance with plans, sections and specifications approved by the highway authority at the request of the nominated undertaker; and such approval is not to be unreasonably withheld.*
 - (3) *Any dispute with a highway authority under sub-paragraph (2) must be referred to arbitration if the parties so agree, but must otherwise be determined by the Secretary of State.*
 - (4) *If, on application by the nominated undertaker for the approval of plans, sections or specifications under sub-paragraph (2), the highway authority fails to notify the nominated undertaker of its decision on the application before the end of 28 days beginning with the date on which the application was made, it is to be treated as having approved the plans, sections or specifications as submitted.*
- 6.37 The Council, acting in its capacity as highway authority, has approved the Appellant’s application for the realignment of Bowood Lane pursuant to Schedule 4 of the Act (“**Schedule 4 Application**”). The Schedule 4 Application included details of the width of the carriageway on the Bowood Lane Overbridge and specifically allows for a 5.5m carriageway width. A copy of the approved drawing (pursuant to the Schedule 4 Application) for the Bowood Lane Overbridge is located at Appendix B8.
- 6.38 As noted in paragraph 3.20 above, Paragraphs 19 and 20 of the Guidance state that the approvals under Schedule 17 have been "*carefully defined to provide an appropriate level of local planning control over the works while not unduly delaying or adding cost to the project*" and that "*Planning authorities should not through the exercise of the Schedule seek to ... modify controls already in place, either specific to HS2 Phase One such as the Environmental Minimum Requirements (EMRs), other controls in the Act such as those under Schedule 4 or 33, or existing legislation such as the Control of Pollution Act or the regulatory requirements that apply to railways.*"
- 6.39 Accordingly, it is inappropriate for the Council to seek to address highway matters under Schedule 17 which should be (and have already been) addressed under Schedule 4 of the Act. In so doing, the Council is not only acting contrary to the Guidance, but is considering matters such as carriageway width when Schedule 17 (and in particular, the definition of “building”)

simply does not allow for it and is only concerned with the design and external appearance of structure itself (ie the bridge).

PART 3: Reasons for Refusal

- 6.40 However, even if the Council was able to address the width of carriageway under Schedule 17, the reasons for refusal fail to satisfy the requisite statutory tests under Schedule 17 of the Act for the reasons set out below.

First Reason for Refusal: impact on the local environment and a site of historic interest

- 6.41 In summary, the Council has refused the submission on the basis that the proposed works fail to preserve the distinctive character and historic interest of Bowood Lane. The Council goes on to suggest that the carriageway width ought to be reduced in favour of a wider verge in order to "*continue the Holloway character across the Overbridge deck*".⁴⁹

- 6.42 Given that the Council has informed the Appellant that its reasons for refusal relate solely to the width of the carriageway, and not to the design or appearance of the bridge itself, it follows that paragraphs 3 and 4 of the Council's first reason for refusal fall away in their entirety:

The Bowood Lane Realignment Earthworks should be amended to reduce the size of the bellmouths to a scale more consistent with the character of Bowood Lane. Additionally, further integration details between the earthworks and the overbridge should be provided to ensure the enclosed nature of the Holloway is retained as much as practically possible along Bowood Lane including at either end of Bowood Lane Overbridge.

The locations of vehicle restraint barriers and fencing associated with the Bowood Lane Overbridge and the Bowood Lane Realignment Earthworks should be revised in accordance with any changes to the Bowood Lane Overbridge design and the Bowood Lane Realignment Earthworks.

- 6.43 These modifications are all conditional on an amendment to the design and appearance of the bridge. In the absence of the Council seeking to amend the design or appearance of the bridge, it follows that the features associated with such a bridge must be acceptable.
- 6.44 Should the Council alter its position in its statement of case then the Appellant reserves the right to address such revised position in its response in due course.
- 6.45 It should also be noted that the bellmouths themselves fall within the scope of Schedule 4 of the Act (and indeed have been approved pursuant to the Schedule 4 Application) and are consequently outside the scope of Schedule 17 – it is only the earthworks associated with the bellmouths that are for consideration under this Submission.

Historic Interest

- 6.46 The Council has not identified the historic site with which it is concerned, nor has it articulated the harm that the Council alleges the proposal would cause to the significance of such site.

⁴⁹ Appendix A21.

Moreover, the Council has not explained (with any evidence) why a narrower carriageway on the overbridge would mitigate the alleged harm in heritage terms.

- 6.47 It is noted that the case officer's report for the Submission ("**Officer's Report**")⁵⁰ repeatedly refers to historic holloways at Bowood Lane and goes on to assert that this *ancient sunken lane* helps "to underpin the intrinsic landscape character of the AONB."⁵¹ However, the Council appears to be mistaken as to what amounts to a "site of historic interest" for the purposes of the Act.
- 6.48 There is a clear distinction to be drawn between the historic character of the AONB and heritage significance – simply put, just because something might have a historic character, does not mean that it is a site of historic interest. Every development or landscape has a history, but that does not automatically amount to heritage significance.
- 6.49 Indeed, the Act itself requires that the development ought to, and could reasonably be modified to preserve a site of historic interest. The Council has not articulated the "site" with which it is concerned here and so it has failed to meet the statutory test.
- 6.50 In any event, Council is treating the Submission as though there are no works occurring in the vicinity of the overbridge. This is simply not the case. Regrettably, the sunken nature of Bowood Lane will be lost in this location as a result of Phase One and this is specifically recognised in the Environmental Statement:

6.50.1 *"Construction activities and earthworks along the Proposed Scheme will result in vegetation losses and **severance of historic field patterns**. In particular, the South Heath cutting construction activities will result in the removal of up to 150m of the Grim's Ditch scheduled monument and associated mature vegetation, substantially altering this feature in the landscape. **Furthermore, sunken lanes at Leather Lane and Bowood Lane will be realigned, resulting in the removal of additional historic features from the landscape**"⁵²*

[emphasis added]

6.50.2 *"The key impacts on the landscape of the AONB during construction will include ... **the removal of small areas of historic sunken laneways at Bowood Lane and Leather Lane, and a section of Grim's Ditch scheduled monument.**"⁵³*

[emphasis added]

⁵⁰ Appendix A22.

⁵¹ Page 32 of the Officer's Report.

⁵² Environmental Statement, Volume 3, Route-wide effects, paragraph 2.5.16. Accessed via: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/259488/Volume_3_Route-wide_effects.pdf

⁵³ Ibid. Paragraph 2.5.25.

6.50.3 “By year 15 of operation, the woodland planting mitigation (comprising approximately 50ha) will have begun to mature and will better integrate the Proposed Scheme into the Misbourne Valley in the vicinity of Mantle's Wood (at the site of the Chiltern tunnel north portal and northern approach cutting) and in the vicinity of the South Heath green tunnel and cutting. **Additional areas of woodland and hedgerow mitigation planting, including that at Leather Lane and Bowood Lane, will provide visual screening of the Proposed Scheme from the wider valley landscape. This planting will introduce a new vegetation pattern, which will break up a perceived linearity of the Proposed Scheme and will resemble the character of vegetation patterns in the surrounding landscape.** The extent and location of woodland losses will be less apparent in the Misbourne Valley during year 15 of operation and will not be perceived further afield.”⁵⁴

[emphasis added]

6.50.4 “**During year one of operation, there will be impacts on a number of PRoW and ancient routes. In particular, evidence of the sunken laneway partial realignments associated with the construction phase will be apparent at Bowood Lane and Leather Lane. Visibility of the Proposed Scheme from many of the ancient routes will also occur,** including from notable routes such as the Ridgeway National Trail and the Icknield Way Path south-west of Wendover. **This will affect the recreational value of the AONB landscape in the immediate vicinity of these PRoW.** However, these views will be transient and intermittent in nature and will often be partially screened by intervening vegetation. Visual effects on users of PRoW during operation are described in Volume 2, CFA reports 8, 9 and 10, Section 9. Visual effects from PRoW will not occur beyond the Misbourne Valley. The longest permanent diversion will occur at PRoW Footpath GMI/13 with an approximate additional length of 750m near Great Missenden; however the extent of access by PRoW will be maintained.”⁵⁵

[emphasis added]

6.51 These impacts are not as a result of the width of the carriageway on the overbridge or even of the construction of the overbridge per se; they are the inevitable consequence of the construction of the railway through this landscape, and they will already have occurred before the development that is the subject of this Appeal is constructed. These changes therefore form part of the baseline against which this Submission should be considered. To date the Council has not done this, and instead appears to be judging the Submission against the current character of the area. In reality, once the works that are outwith this Submission and do not need approval have been completed, there simply is no sunken holloway nature.

6.52 Furthermore, an overbridge cannot have the character of a sunken Holloway road. That is inevitable given that it is by definition elevated; regardless of the width of the carriageway across it.

⁵⁴ Ibid. Paragraph 2.6.10.

⁵⁵ Ibid. Paragraph 2.6.10.

- 6.53 In that context, the Council has not identified the impact that a wider carriageway will have on the perceived *site of historic interest*, nor has it shown how a narrower carriageway will mitigate that impact.
- 6.54 Accordingly, the Council has failed to justify its reason for refusal under paragraphs 2(5)(a)(iii) and 3(6)(3)(c) as these grounds only provide the Council with the ability to refuse an application under Schedule 17 to the extent that it can demonstrate the works ought to be modified and are reasonably capable of being so modified in order to preserve a site of historic interest. As the Council has not identified any sites of historic interest, it has fallen at the first hurdle of the statutory test and so it follows that there is no justification for this part of the reason for refusal.
- 6.55 The Appellant's case is that:
- 6.55.1 there is no impact on an historic site and the Council has provided no evidence to displace this;
- 6.55.2 even if there were an historic site its character will have been so changed by the works outwith the scope of the Submission that the works that are the subject of this Submission will not have an impact on such historic site; and
- 6.55.3 in any event a reduction in the width of the carriageway would not mitigate any impact, the impact not being a result of carriageway width.
- 6.56 Finally, the Appellant notes in passing that Historic England raised no objections to the Submission.

Local Environment

- 6.57 Likewise, in terms of preserving the local environment, the Council's only justification is that the holloway character of Bowood Lane should continue across the overbridge.
- 6.58 Again, the Council is failing to recognise both that the character will already have been changed by works outwith this Submission, and that even if that were not the case the Holloway character will inevitably have been lost by the construction of an overbridge regardless of the width of the carriageway.
- 6.59 The Council has also failed to articulate the impacts that it says a wider carriageway would have on the holloway character, nor has it demonstrated why a narrower carriageway would cause less harm to this character. In this context it is worth noting that the difference between the parties is the 2 metres of carriageway (1 metre on either side of the carriageway) that the Council considers should be replaced by a verge. In this respect, the Appellant simply repeats the comments made at paragraphs 6.50 to 6.53 above, albeit in the context of the local environment..
- 6.60 Consequently, the Council has failed to meet the statutory test required by paragraphs 2(5)(a)(i) and 3(6)(3)(a) - it has not demonstrated why the proposal ought to, and could reasonably be modified in order to preserve the local environment.

- 6.61 For the Appellant's part, it is submitted that there are no impacts on the local environment beyond those which were assessed in the Environmental Statement.⁵⁶ As noted in paragraph 3.5 above, Parliament has judged such impacts as being acceptable in the context of Phase One.
- 6.62 Furthermore, significant effort has gone into developing the design of the overbridge and the appearance of its deck and the highway realignment in order to reflect the local context as far as possible – bearing in mind that this is an overbridge spanning a railway. Care has been taken to keep the structure and the realigned road set down into the landscape. This has been achieved by the careful design of the approach landscape earthworks and the recreation of a “holloway bank” along both sides of the carriageway. The Appellant does not consider that a narrower carriageway would further mitigate any impacts, and the Council has not demonstrated that to be the case either.
- 6.63 Over time, the sense of the overbridge being set within the landscape will be strengthened as the proposed landscape mitigation planting establishes.
- 6.64 It is recognised that the highway restraint barriers are incongruous with the character of the holloway but they are fundamental to the safety of the railway below and in any event are positioned at the back of the verge and extend out from the bridge parapet. Over time, these will be further softened by allowing the establishing planting canopy to extend into the barrier (allowing always for sight lines to be maintained and for the barrier to be inspected).
- 6.65 In any event, even if the Council addresses the criticisms of its position set out above, the fact the increased risk of accidents leading to catastrophic loss of life that would result from a narrower carriageway mean that a modification would not satisfy the statutory test on the basis that a modification that reduces safety and increase risk quite simply ought not to be made.

Second Reason for Refusal: highway safety

- 6.66 The Council's second reason for refusal provides that the overbridge fails to prevent or reduce prejudicial impacts on road safety of Bowood Lane. To support its decision, the Council states that:

The Bowood Lane Accommodation Overbridge carriageway width should be reduced so that a similar road user experience to that of the rest of Bowood Lane is retained so as not to confuse road users or provide the perception to road users that speed can be increased across the Bowood Lane Accommodation Overbridge owing to the open nature and wider carriageway.

- 6.67 This reason for refusal is nonsensical. The Council's case can be summarised as purporting that a road user will have a safer experience on an overbridge where there is no ability to pass another vehicle, than it would on a wider carriageway, where two vehicles can safely pass one another.
- 6.68 The Council has provided no evidence to substantiate such a claim and so the Appellant submits that the Council has failed to demonstrate why the proposal ought to be modified in order to prevent or reduce prejudicial effects on road safety. It is not sufficient for the Council to simply allege that a road user may be encouraged to increase its speed without any evidence to justify

⁵⁶ Environmental Statement, CFA 10, Dunsmore, Wendover and Halton. See for example, paragraphs 9.4.61, 9.4.68, 9.5.70 and 9.5.78.

its position or providing any evidence to support its case for a narrower carriageway in highway safety terms.

6.69 In the Officer's Report, it is noted that the Council alleges that the Appellant's proposal of including road markings "would not result in the intended outcome of directing traffic to use a single lane across the bridge and limiting a road user from increasing speed in this location."⁵⁷ Again, however, the Council has provided absolutely no evidence to substantiate this claim.

6.70 Accordingly, the Council has failed to meet the statutory test required to justify a refusal under Schedule 17 and so it is respectfully submitted that in the absence of any evidence, this appeal should be approved without delay.

6.71 Notwithstanding the above, the Appellant submits that the Council's proposed modification actually serves to reduce road safety, rather than enhance it – increasing the likelihood of a collision on the overbridge, rather than allowing sufficient space for two vehicles to safely pass each other.

6.72 As justification for the requirement for a 5.5m carriageway, paragraph 3.3.30 of the written statement ("Written Statement") accompanying the submission provides:

The Overbridge will support a 5.5m wide carriageway with 1.5m wide verges on both sides. A 1.8m high parapet will run over the full length of the Overbridge on both sides. The carriageway will be marked as 3.5m width on the bridge with 1.0m hard strips outside and passing bays at either end to allow oncoming traffic to stop in advance of the bridge and allow safe passage. The additional carriageway width on the bridge in the form of hard strips is provided to allow two vehicles to pass in the case of an emergency without encroaching on the verge and risking damage to the parapets and an increased safety risk to the railway below.

6.73 Paragraph 4.6.3 (bullet 14) of the Written Statement further provides:

The key principle in establishing suitable parameters that strike an optimum balance between safety and landscape considerations is the safety of road and railway users. This translates into providing sufficient width for vehicles and other bridge users to pass safely, and avoiding incursion of debris onto the HS2 line. Consequently, the carriageway width across overbridges on single-track public roads has been set at 5.5 m, the standard minimum for a two-lane road which allows two cars to pass in safety. A 5.5 m carriageway is also just wide enough for two large vehicles to pass each other on an exceptional basis. To discourage a sudden increase in traffic speed or unsafe overtaking manoeuvres, road markings are specified to give a centred 3.5 m running lane whilst still allowing two vehicles to pass each other during an incident and thus avoid collision or hitting the structure. Inter-visible passing places will also be used at each end of the bridge to further reduce the risk of two vehicles trying to cross at the same time by encouraging disciplined driving habits.

6.74 Accordingly, the Council's concerns that a wider carriageway would confuse road users and encourage them to speed along the overbridge, have been expressly addressed in the Written Statement. Essentially, the carriageway will be marked so as to provide a centred 3.5m running lane, with hard strips outside of this area to discourage road users from accessing the second carriageway other than when required for the safe passage of vehicles passing each other. This

⁵⁷ Page 40 of the Officer's Report

has the effect of discouraging road users from increasing their speed when driving over the bridge.

- 6.75 A common-sense approach is that a road user will approach what is a short bridge and will immediately see white road markings indicating where that road user should drive their vehicle. That same road user will, throughout their duration on the bridge, have clear visibility of the other side of the bridge, and in particular, will be able to see that Bowood Lane reverts to its original width on the other side of the bridge. The notion that any road user, in those circumstances, would see this as a place to increase their speed, is nonsensical.
- 6.76 Far from proposing a modification which "prevent[s] or reduce[s] prejudicial effects on road safety", the Council's proposed modification would actually increase the likelihood of a collision on the overbridge.
- 6.77 Accordingly, the Council has failed to demonstrate that the proposal ought to be modified, and so has failed to meet the requirements of the statutory test and so it is submitted that the Council's second reason for refusal fails and that the appeal should be allowed.

7. THE APPELLANT'S CASE ON CONDITIONS

- 7.1 The Council has sought to impose seven conditions on the part of the Submission which it has approved. These are set out in full on the decision notice and may be broadly split into three groups:
- 7.1.1 condition 1 seeks the submission of an archaeological method statement;
 - 7.1.2 conditions 2 to 4 relate to the proposed accommodation overbridge for footpath TLE/2; and
 - 7.1.3 conditions 5 to 7 relate to the proposed accommodation overbridge serving Cottage Farm.
- 7.2 Whilst none of these conditions might be considered unusual or out-of-place in the context of a grant of planning permission under the 1990 Act, it is important to remember that Schedule 17 of the Act is a bespoke, discrete consenting regime. Any decision must fall within the scope of the powers provided for in the Act and the fact that a condition may well be commonplace in a 1990 Act context is in this sense irrelevant.
- 7.3 In any event, it is not necessary to consider the detail of these conditions in this appeal because none of them fall within the scope of the power to impose conditions on an approval under paragraphs 2 and 3 of Schedule 17 and, accordingly, all of them are ultra vires.
- 7.4 As set out above the statutory framework, the caselaw, the previous appeal decisions and the Guidance all make clear that conditions may only be imposed if the Works ought to be modified and are reasonably capable of being so modified. This requires a substantive modification to the Works to be particularised by the Council.
- 7.5 In this regard, the onus is on the Council to provide evidence to demonstrate (clearly and precisely):
- 7.5.1 what the alleged adverse or prejudicial impact of the Appellant's Submission is – by reference to the specific matters expressly and exhaustively identified in paragraphs 2(5) and 3(6);
 - 7.5.2 how it proposes that the substance of the Works be modified compared to the Appellant's proposals;
 - 7.5.3 why that would have a beneficial impact in terms of reducing the alleged adverse impact;
 - 7.5.4 why the modification in question is reasonably capable of being so made; and
 - 7.5.5 that any condition intended to secure that modification complies with the 'six tests' in the NPPF.
- 7.6 However, in this case:
- 7.6.1 the Council's decision notice does not identify any adverse impact on any of the relevant statutory designations in paragraphs 2 and 3 that would occur if the Works (as applied for in the Appellant's Submission) were carried out; and

7.6.2 the conditions propose no modifications to the substantive design of the buildings works, earthworks or fencing at all.

7.7 Since no adverse impact has been identified and no substantive modification to the Works has been proposed in relation to any of these conditions, it follows inexorably that all of them are legally incapable of constituting valid conditions under paragraphs 2 and 3 of Schedule 17 and they are, accordingly, unlawful. This means that – insofar as the Appeal relates to those elements of the Works which were approved by the Council subject to these conditions – approval must be granted with all seven invalid conditions omitted in their entirety.

8. CONCLUSIONS

- 8.1 In conclusion, the Council's proposed modification to the Bowood Lane overbridge presents a greater risk to the safety of the railway than the Appellant's proposal, which allows vehicles to safely pass on the bridge without the risk of a collision and, ultimately, reduces the risk of a vehicle or other debris from the bridge falling onto the railway
- 8.2 In any event, the Council has not substantiated its reasons for refusal and so the Decision Notice fails the legal test placed on the Council by virtue of Schedule 17 to demonstrate that the Works *ought* to be modified and that they *are reasonably capable of being so modified*. The Council has merely made blanket assertions which are not supported by any evidence.
- 8.3 In respect of the conditions attached to the Decision Notice, all of the conditions fall outside the scope of the power to impose conditions on an approval under paragraphs 2 and 3 of Schedule 17 and, accordingly, all of them are legally void.
- 8.4 In these circumstances, the Appellant considers that the statutory requirements for refusal of the Submission or the imposition of conditions have not been made out and respectfully requests that the Appeal be allowed and the whole of the Submission approved without conditions.

DLA Piper UK LLP

1 September 2022