Neutral Citation Number: [2024] EWHC 2216 (Admin)

Case No: AC-2023-BHM-000189

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
ADMINISTRATIVE COURT
BIRMINGHAM DISTRICT REGISTRY

Birmingham Civil Justice Centre
Priory Courts, 33 Bull Street, Birmingham, B4 6DS

Date: 27/08/2024

Before :

THE HONOURABLE MR JUSTICE MOULD

- -

Between :

MAIR BAIN	**Claimant**
- and -	
SECRETARY OF STATE FOR TRANSPORT	**Defendant**
- and-	
NATIONAL HIGHWAYS LIMITED	**Interested Party**

- -
- -

MR DAVID WOLFE KC and MR ALEX SHATTOCK (instructed by **Richard Buxton Solicitors**) for the **Claimant**
MR JAMES STRACHAN KC and MS ROSE GROGAN (instructed by **Government Legal Department**) for the **Defendant**
MR REUBEN TAYLOR KC (instructed by National Highways Ltd) for the **Interested Party**

Hearing date: 14 May 2024

- -

Approved Judgment

This judgment was handed down remotely at 11am on Tuesday 27th August 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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MR JUSTICE MOULD

MR JUSTICE MOULD :

Introduction

1. The Claimant brings this claim under section 118(1) of the Planning Act 2008 **['the 2008 Act']** for judicial review of the A38 Derby Junctions Development Consent Order 2023 **['the Order']**. The Defendant made the Order on 17 August 2023.

2. The Claimant advanced three grounds of challenge to the Order. Permission to bring the claim was initially refused on the papers. Following the oral renewal of the application for permission, on 20 December 2023 Jefford J granted the Claimant permission to proceed on ground 1 only. Permission was again refused on ground 2 and ground 3(a).

3. Ground 3(b) sought to raise an issue similar to that considered by this court in *Boswell v Secretary of State for Transport* [2023] EWHC 1710 (Admin). The renewed application for permission on that ground was stayed until after the handing down of the Court of Appeal's judgment in an appeal against that decision. On 22 February 2024, the Court of Appeal handed down judgment in *Boswell v Secretary of State for Transport* [2024] EWCA Civ 145 dismissing the appeal. After the hearing of this claim, on 29 May 2024 the Supreme Court refused permission to appeal – *R (Boswell) v Secretary of State for Transport (UKSC 2024/0046)*. On 31 May 2024 the court received an email from counsel informing me that it was now common ground between the parties that in the light of the Court of Appeal's judgment in *Boswell*, ground 3(b) was unarguable. I shall lift the stay granted by Jefford J and dismiss the renewed application for permission on that ground.

4. The Order grants development consent for the construction, operation and maintenance of three replacement roundabouts on the A38 Trunk Road in Derby, known as the Kingsway, Markeaton and Little Eaton junctions **['the Proposed Development']**.

5. The Interested Party's application for a development consent order authorising the Proposed Development was accepted for examination under Part 6 of the 2008 Act on 21 May 2019. On 8 October 2020 the Examining Authority **['the ExA']** submitted its report on the Proposed Development to the Defendant. The ExA concluded that the Proposed Development met the tests in section 104 of the 2008 Act and recommended that the Defendant should make a development consent order on the Interested Party's application.

6. On 8 January 2021 the Defendant decided to make an order granting development consent for the Proposed Development. The Claimant brought a claim for judicial review of that decision. On 8 July 2021, Lavender J made an order with the consent of the parties quashing the Defendant's decision.

7. On 2 August 2021, in accordance with the procedure laid down in rule 20 of the Infrastructure Planning (Examination Procedure) Rules 2010, the Defendant issued a statement of the matters **['the statement of matters']** with respect to which he invited representations for the purposes of his further consideration of the application for development consent for the Proposed Development. Representations were submitted by both the Claimant and the Interested Party. There followed further rounds of

consultation in January and February 2022. Again, the Claimant responded with her representations.

8. On 17 August 2023 the Defendant issued a letter announcing his decision to make the Order granting development consent for the Proposed Development and stating his reasons for that decision. Paragraph 7 of the decision letter **['DL7']** recorded that the decision had been delegated to the Minister of State for Transport, albeit issued in the name of the Defendant.

9. Under ground 1, the Claimant contends that in deciding to make the Order granting development consent for the Proposed Development, the Defendant acted unlawfully in relying on an economic assessment of the Proposed Development carried out by the Interested Party in early 2019 which had become out of date by the time of the Defendant's decision on 17 August 2023. The Claimant argues that the Defendant ought to have required the provision of an up to date economic assessment. In failing to do so, the Defendant has –

    (a) misinterpreted paragraph 4.5 of the National Policy Statement for National Networks (December 2014) **['the NPSNN']**.

    (b) failed to reach a reasoned conclusion on the significant effects of the Proposed Development on the environment, contrary to regulation 21(1)(b) and (2) of the Infrastructure Planning (Environmental Impact Assessment) Regulations 2017 **['the 2017 Regulations']**.

    (c) failed to discharge his *Tameside* duty of reasonable enquiry (*Secretary of State for Education and Science v Tameside MBC* [1977] AC 1014, 1065).

10. In detailed grounds of resistance filed on 26 January 2024 and 25 January 2024 respectively, both the Defendant and the Interested Party defended the claim on the basis that the Claimant's contentions under ground 1 are unfounded. Both Defendant and the Interested Party also relied upon section 31(2A) of the Senior Courts Act 1981 **['the 1981 Act']** to argue that even if the Claimant has identified an error in the decision to make the Order, it is highly likely that in the absence of that error the outcome would not have been substantially different and the Order would still have been made.

11. In part, the Defendant and the Interested Party advanced their argument in reliance on section 31(2A) of the 1981 Act on the basis of a witness statement of David Lane filed on behalf of the Interested Party. By that evidence they sought to show that, on an up to date economic assessment, the Proposed Development remained a high value scheme. In response to that contention and that evidence, on 5 April 2024 the Claimant applied for permission to admit and rely upon an expert report produced by Professor Phil Goodwin, Emeritus Professor of Transport Policy at University College London and at the University of the West of England.

12. On 23 April 2024, the Interested Party informed the Claimant's solicitors by email that the Interested Party no longer sought to rely on David Lane's witness statement. Nevertheless, in her skeleton argument and in a separate written submission in response to certain questions which I raised prior to the hearing of this claim, the Claimant maintained her application to admit Professor Goodwin's expert report. In their skeleton arguments in response, both the Defendant and the Interested Party stated that

they no longer pursued their defence founded on section 31(2A) of the 1981 Act. Nor did they seek to rely on the economic assessment produced in the witness statement of David Lane. They resisted the Claimant's application, arguing that as their defence founded on section 31(2A) of the 1981 Act was no longer maintained, there was no justification for the admission of Professor Goodwin's expert report.

13. For the reasons I give later in this judgment, I refuse the Claimant's application to admit and to rely upon the expert report of Professor Goodwin.

Statutory background

14. The function of deciding an application for an order granting development consent made under Part 6 of the 2008 Act lies with the Defendant: section 103(1) of the 2008 Act.

15. The Proposed Development was a description of development in relation to which the NPSNN had effect at the date of the Defendant's decision to make the Order. The introductory paragraph of the NPSNN stated that it set out the need for, and Government's policies to deliver, development of nationally significant infrastructure projects (NSIPs) on the national road and rail networks in England.

16. In deciding an application for an order granting development consent for a description of development in relation to which a national policy statement is in effect, the Defendant must make his decision in accordance with section 104 of the 2008 Act. Of particular relevance to the issues arising in this claim are the following provisions of section 104 of the 2008 Act –

> *"…*
>
> *(2) In deciding the application the Secretary of State must have regard to –*
>
> *(a) any national policy statement which has effect in relation to development of the description to which the application relates (a "relevant national policy statement"),*
>
> *…*
>
> *(3) The Secretary of State must decide the application in accordance with any relevant national policy statement, except to the extent that one or more of subsections (4) to (8) applies.*
>
> *…*
>
> *(7) This subsection applies if the Secretary of State is satisfied that the adverse impact of the proposed development would outweigh its benefits.*
>
> *…".*

17. The Proposed Development is EIA development for the purposes of the 2017 Regulations. Regulation 21(1) and (2) of the 2017 Regulations states –

"(1) When deciding whether to make an order granting development consent for EIA development the Secretary of State must –

(a) examine the environmental information;

(b) reach a reasoned conclusion on the significant effects of the proposed development on the environment, taking into account the examination referred to in sub-paragraph (a) and, where appropriate, any supplementary examination considered necessary;

(c) integrate that conclusion into the decision as to whether an order is to be granted; and

(d) if an order is to be made, consider whether it is appropriate to impose monitoring measures.

(2) The reasoned conclusion referred to in paragraph (1)(b) must be up to date at the time that the decision as to whether the order is to be granted is taken, and that conclusion shall be taken to be up to date if in the opinion of the Secretary of State it addresses the significant effects of the proposed development on the environment that are likely to arise as a result of the development described in the application".

18. Regulation 3(1) of the 2017 Regulations contains the following definitions –

"environmental information" means the environmental statement (or in the case of a subsequent application, the updated environmental statement), including any further information and any other information, any representations made by any body required by these Regulations to be invited to make representations and any representations duly made by any other person about the environmental effects of the development and of any associated development.

…

"further information" means additional information which, in the view of the Examining authority, the Secretary of State or the relevant authority, is directly relevant to reaching a reasoned conclusion on the significant effects of the development on the environment and which it is necessary to include in an environmental statement or updated environmental statement in order for it to satisfy the requirements of regulation 14(2).

…

"any other information" means any other substantive information provided by the applicant in relation to the environmental statement or updated environmental statement.

…

"updated environmental statement" means the environmental statement submitted as part of an application for an order granting development consent, updated to include any further information.

Factual background

The NPSNN

19. Chapter 4 of the NPSNN headed *"Assessment principles"* set out general policies in accordance with which applications for development consent relating to national networks infrastructure were to be decided.

20. Paragraphs 4.2 and 4.3 stated –

> *"4.2 Subject to the detailed policies and protections in this NPS, and the legal constraints set out in the Planning Act, there is a presumption in favour of granting development consent for national networks NSIPs that fall within the need for infrastructure established in this NPS. The statutory framework for deciding NSIP applications where there is a relevant designated NPS is set out in Section 104 of the Planning Act.*
>
> *4.3 In considering any proposed development, and in particular, when weighing its adverse impacts against its benefits, the Examining Authority and the Secretary of State should take into account:*
>
> - *its potential benefits, including the facilitation of economic development, including job creation, housing and environmental improvement, and any long-term or wider benefits;*
>
> - *its potential adverse impacts, including any longer-term and cumulative adverse impacts, as well as any measures to avoid, reduce or compensate for any adverse impacts".*

21. Paragraph 4.5 of the NPSNN is central to the issues arising under ground 1 of this claim –

> *"4.5 Applications for road and rail projects … will normally be supported by a business case prepared in accordance with Treasury Green Book principles. This business case provides the basis for investment decisions on road and rail projects. The business case will normally be developed based on the Department's Transport Business Case guidance and WebTAG guidance. The economic case prepared for a transport business case will assess the economic, environmental and social impacts of a development. The information provided will be proportionate to the development. This information will be important for the Examining Authority and the Secretary of State's consideration of the adverse impacts and benefits of a proposed development. It is expected that NSIP schemes brought forward through the development consent order process by virtue of Section 35 of the Planning Act 2008, should also meet this requirement".*

22. Paragraph 4.7 addresses the updating of WebTAG guidance –

> *"4.7 The Department's WebTAG guidance is updated regularly. This is to allow the evidence used to inform decision-making to be up to date. Where updates are made during the course of preparing analytical work, the updated guidance is only*

expected to be used where it would be material to the investment decision and in proportion to the scale of the investment and its impacts".

23. A footnote to paragraph 4.7 refers to WebTAG guidance published by the Department for Transport and entitled *"The Proportionate Update Process"* (January 2014). Section 1.3 of that document is headed *"The principles of proportionate updating"* and states –

> *"1.3.1 While sound planning of business case development, assisted by the Orderly Release Process, can minimise the cost, resource, and time needed to ensure a business case remains in step with latest evidence, it is nonetheless reasonable for project sponsors to decide what updates to business cases it is proportionate to make when TAG, or other guidance/evidence changes.*
>
> *1.3.2 The Department expects that such decisions should be made on a scheme by scheme basis and be based on balancing the need to ensure decisions are based on up-to-date evidence with the need to support decision makers in delivering their programme. This should involve reasonably balancing (a) the greater time, cost, and/or resource needed to deliver programmes, with (b) the quality of the analysis submitted to assist the decision required, including its robustness against potential challenge from all sources".*

Under the heading *"When to update"*, paragraph 1.3.7 advises –

> *"1.3.7 Updates to analytical models and appraisals, where they are deemed to be material, should be programmed to coincide with forthcoming decision-points within a project. The Department would not expect work to be undertaken to update analysis as a general necessity where it will not be used. Promoters should therefore plan when changes should be implemented for their work programme, considering the balance of factors described above".*

The Interested Party's planning statement

24. The Interested Party's application for development consent was supported by a planning statement. Chapter 4 of that document, headed *"Economic case overview"*, presented a summary of the methodology and findings of an economic assessment of the Proposed Development. The economic assessment was not itself provided as a supporting document. Paragraph 4.1.3 said that the economic assessment took account of and sought to ascribe monetary values to the economic, environmental and social benefits of the Proposed Development. Paragraph 4.1.4 stated –

> *"4.1.4 The total value of the economic, environmental and social monetised benefits and disbenefits are calculated to obtain a ratio. This ratio is referred to as the benefit cost ratio (BCR) and provides an indication of whether the Scheme presents a sufficient level of benefits to be considered as good value for money".*

25. The results of that analysis were summarised in paragraphs 4.2.1 to 4.2.3 of the planning statement –

> *"4.2.1 Various impacts emanating from the Scheme have been monetised in order to calculate a BCR, which indicates whether the Scheme would provide overall*

value for money. As the Scheme would be operational for several decades, the economic assessment for the Scheme is based over a 60-year period. As a result, monetised benefits and disbenefits are attached to a set year. In this case, the costs are based on 2010 market prices discounted to a 2010 present value year.

4.2.2 Overall, the Net Present Value of Benefits (PVB) i.e. the total value of Benefits for the Scheme is £419 million, while the Net Present Value of Costs (PVC) is a £163.1 million deficit. The BCR is calculated as the ratio of costs (PVC) compared to the benefits of the Scheme (NPV), which derives a BCR of 2.6.

4.2.3 The DfT BCR benchmark is a ratio of 2, which is considered high value for money. The BCR for this Scheme is 2.6 and can therefore be considered to constitute a high value for money scheme".

The Examining Authority's Report

26. In section 4.5 of their report, headed *"Policy conformity"*, the ExA considered whether the Proposed Development complied in principle with the requirements of the NPSNN, with development plans and with other relevant policies. In so doing, the ExA considered whether the need for the Proposed Development had been established through the NPSNN and whether alternatives to the Proposed Development had been properly considered.

27. In paragraphs 4.5.2 and 4.5.3 of their report, the ExA referred to the policy presumption stated in paragraph 4.2 of the NPSNN and to the Interested Party's evaluation of the Proposed Development against relevant NPSNN polices in the supporting planning statement. In paragraph 4.5.6, the ExA reported the Interested Party's view that the Proposed Development would improve traffic flow and reduce congestion at the three A38 junctions, thereby offering journey time benefits. The proposals offered the potential to improve segregation between pedestrians, cyclists and vehicles using the A38. There would be highway safety improvements over the operational lifetime of the Proposed Development. In paragraph 4.5.7 the ExA reported that the need to address existing problems at the three junctions was not in dispute.

28. In paragraphs 4.5.8 to 4.5.10 the ExA reported the Interested Party's view that the Proposed Development would provide additional capacity along the A38. This would assist in facilitating regeneration, development and economic growth on the west side of Derby. The A38 was considered to be an important regional route. Local development and transport plans recognised that failure to deliver the Proposed Development would be likely to restrict development to the west of the city. Local development plans had made provision for a minimum of 11,000 new homes and a substantial supply of new employment land. The Proposed Development was expected to provide additional highway capacity to facilitate these growth proposals. There was substantive evidence that the constrained capacity of the existing junctions was holding back development which would otherwise come forward. Delivery of the Proposed Development was likely to have a direct impact in facilitating planned housing and economic growth.

29. In paragraph 4.5.11 of their report, the ExA reported the economic assessment of the Proposed Development –

> *"4.5.11 The Proposed Development has been the subject of an economic assessment which considered its economic, environmental and social benefits and disbenefits. The Applicant advised that the assessment followed the DfT's WebTAG guidance and HM Treasury's Green Book. It was based on the assignment of a forecast core growth scenario, with sensitivity tests using low growth and high growth assumptions for the volume of traffic using the Proposed Development. Benefits and disbenefits were monetized to provide a benefit cost ratio (BCR). The DfT benchmarks a BCR of 2 as high value for money. In comparison, the BCR for the Proposed Development was calculated to be 2.6 [REP1-005 REP7-007 REP10-009]. We are satisfied that the approach taken to the economic assessment is consistent with the advice at paragraph 4.5 of the NPSNN".*

30. In paragraph 4.5.13 of their report, the ExA stated their conclusions on the question whether a need for the Proposed Development had been established –

> *"We are, therefore, satisfied that the Proposed Development would be likely to result in significant reductions to delays and congestion at the three junctions and would improve highway safety. As such it would also help to release constraints on housing and economic development to the west of Derby. We are also content that the costs and benefits of the proposal have been assessed appropriately. Overall, therefore, we conclude that the need for the Proposed Development has been established in accordance with the requirements of the NPSNN and that the presumption in favour of development is engaged".*

31. Following the quashing of the Defendant's first decision, on 26 October 2021 the Claimant's solicitors wrote to the Defendant in response to his invitation to make representations on the matters raised in the statement of matters. Paragraphs 125 to 128 of the Claimant's representations addressed the issue of changes to relevant policy since the ExA's examination closed on 8 July 2020. The Claimant referred to new and updated guidance on the quantification and valuation of carbon emissions in economic assessments. These included HM Treasury's Green Book publication *"Valuation of energy use and greenhouse gas: Supplementary guidance to the HM Treasury Green Book on Appraisal and Evaluation in Central Government* (October 2021), a Government policy paper *"Valuation of greenhouse gas emissions: for policy appraisal and evaluation"* (September 2021), a notification published by the Department for Transport on 13 October 2021 of a forthcoming change to WebTAG which would include changes to emissions factors and an updated version of the Interested Party's Carbon Reporting Tool from that used to assess greenhouse gas emissions in the environmental statement for the Proposed Development.

32. Paragraphs 126 to 128 of the Claimant's representations stated –

> *"126. The ExA noted that the Applicant advised the scheme had been subject to economic assessment which followed the DfT's WebTAG guidance and HM Treasury's Green Book and the benefits and disbenefits monetised to provide a benefit to cost ratio (BCR). It was necessary for the ExA (and SoS) to satisfy themselves that the approach taken to the economic assessment was consistent with the advice at paragraph 4.5 of the NPSNN [ExA Report, 4.5.11] which provides that this information is important for the Examining Authority and the Secretary of State's consideration of the adverse impacts and benefits of the proposed development.*

127. In order therefore to satisfy the requirement of NPSNN paragraph 4.5 and in order that the SoS can provide an up to date reasoned conclusion on the benefits of the Scheme, the Applicant must undertake an assessment of the Scheme against the most recent Government policy and guidance and recalculate the BCR which, in light of the above, is likely to have changed.

128. The recalculation of the BCR will also be relevant to the SoS' assessment of the "straightforward" balancing exercise required under section 104(7) of the Planning Act between the Scheme's "adverse impact" and "benefits"."

33. Paragraph 129 of the Claimant's representations concerned the adequacy of the environmental information before the Defendant –

"129. Overall the adequacy of the environmental information produced in support of the application for Development is, in light of the length of time since the examination closed, inadequate and, as per the paragraphs above, further information is now required to provide the SoS with an up to date picture".

34. On 2 February 2022 the Interested Party submitted the following response to paragraphs 125 to 128 of the Claimant's representations –

"Before main construction work can commence the project will need to have a full business case in place and gain approval from National Highways' Investment Committee, with this incorporating an assessment of Economic Value for Money for the scheme.

The BCR is re-calculated at each key stage (end of preliminary design ahead of the DCO application and at the end of detailed design ahead of construction starting). The BCR (and Value for Money) will be re-estimated before a final decision is made to commit construction funds".

35. On 23 March 2022 the Claimant's solicitors submitted further representations on her behalf, which included the following response to the Interested Party –

"26. The Statement of Matters asked for further representations on any change in whether the Development would be consistent with the requirements and provisions of relevant local or national policies, given the length of time since the examination closed. Our client highlighted several guidance documents and policies that had been updated since the end of the examination, including:

(i) HM Treasury Green Book

(ii) Valuation of greenhouse gas emissions

(iii) DfT's WebTAG guidance

(iv) DMRB Volume 11, Section 3, Part 1, HA 207/07 – This was withdrawn in November 2019

(v) Highways England Carbon Reporting Tool.

> *27. The Applicant's response here focusses on the impact that these documents have on BCR and value for money of the scheme and says that those will be recalculated later, but does not address whether, and the extent to which, the scheme is consistent with the requirements and provisions of those guidance and policy documents. The SoS will need to consider the extent to which the Development would be consistent with policy and so the Applicant should assist by providing further detail regarding the scheme's compliance with these documents".*

36. The Claimant also relied upon an expert report produced by Dr Andrew Boswell dated 23 March 2022. In paragraphs 17 and 18 of his report, Dr Boswell said that the changes in policy and guidance on economic appraisal of carbon emissions in relation to transport schemes, to which the Appellant had referred in her representations of 26 October 2021 *"should have prompted the applicant to revise the calculation of the BCR and the economic case for the scheme"*. He continued –

> *"17. … The case made for the scheme in the DCO application is affected by changes to the BCR and economic case for the scheme. The applicant appears to have ignored this new policy guidance from the Government.*
>
> *18. …ES chapter 2 "The Scheme" states at 2.2.2 that a Scheme-specific objective for the A38 Derby scheme is:*
>
> > *"To be affordable and represent High Value for Money according to Department for Transport (DfT) appraisal criteria."*
>
> *The new carbon price data has changed the application of the DfT's WebTAG guidance and required a re-issuing of TAG Data Book now at v1.17 released in November 2021 with the new carbon price data. In order to demonstrate value for money, and to meet the scheme objective in the ES, the revised DfT criteria should be tested with new calculations of the BCR as described in a later section. The SoS cannot consider the case for the scheme to be legitimate for determining the DCO, or consistent with its own objectives, until this has been done".*

37. Having briefly explained the changes in methodology, at paragraph 23 Dr Boswell said –

> *"It can be seen that the new carbon prices are significantly greater than the previous ones. For example, for the predominant non-traded sector, the 2020 carbon price in the new policy data is c.£240/tCO2e compared to of c.£60/tCO2e on the previous data (i.e. 4 times greater)".*

Dr Boswell produced a policy paper published by the Department for Business, Energy and Industrial Strategy in September 2021, which showed that these changes had been made in the light of changes in international and national climate change targets, including the UK 2050 net zero target. Dr Boswell also argued for a re-assessment of the BCR for the Proposed Development to take account of updates to the traffic model including a new version of the Emissions Factor Toolkit.

The decision

38. In DL1, the Defendant said that in reaching his decision to grant development consent for the Proposed Development, he had taken into consideration a number of matters, including the ExA's report and the representations received in response to the statement of matters issued on 2 August 2021. DL12 said that unless otherwise stated the Defendant was to be taken to agree with the ExA's findings, conclusions and recommendations as set out in their report. DL13 noted the Defendant's statutory duties in determining the application for development consent as enacted by section 104 of the 2008 Act. DL14 confirmed that, notwithstanding the publication in March 2023 of a draft review of national policy for national networks, the NPSNN remained government policy and continued to provide a proper basis for determining applications for development consent. DL15 stated –

> *"The Secretary of State therefore agrees with the ExA that section 104(3) of the PA2008 has effect in this case and that he must decide the application in accordance with the NPSNN designated in December 2014, except to the extent that one or more of section 104(4) to (8) of the PA2008 apply…".*

39. DL18 to DL25 set out the Defendant's reasoning and conclusions on the question of need, which led him to draw the overall conclusion in DL25, that he was satisfied that the Proposed Development would contribute to meeting the need for development of the national road network as established in the NPSNN and that it complied with local and national policies.

40. In DL18, the Defendant noted that the A38 forms part of the strategic road network and provides a connection between Birmingham and the M1 at junction 28, a route for long distance road journeys. The existing operation of the highway network results in delays and congestion at the three roundabout junctions which the Proposed Development seeks to ameliorate. The Defendant found policy support for the Proposed Development in the NPSNN's identification of a compelling need for the development of the national road network to address congestion, provide safe and resilient networks and facilitate economic growth.

41. In DL19 and DL20, the Defendant outlined the benefits of the Proposed Development in essentially similar terms to those reported by the ExA in paragraphs 4.5.2 to 4.5.10 of their report. The Proposed Development would reduce congestion and improve journey times. There would be highway safety benefits for all road users. The Proposed Development would result in increased road capacity which was likely to support the delivery of housing and economic development in accordance with the objectives of local development and transport plans. There was substantive evidence to support the view that the constrained capacity of the existing junctions was holding back development that would otherwise have come forward. Completion of the Proposed Development would therefore have a direct effect by facilitating planned housing and growth. The Interested Party's appraisal of alternatives to a road-based scheme had been sufficient to meet the requirements of the NPSNN.

42. In DL24, the Defendant gave consideration to the impact of the COVID-19 pandemic on the demand for road travel and whether that had weakened the need for the Proposed Development. He found there to be no evidence to show that changes to pre-pandemic traffic levels would be so significant as to negate the need for the Proposed Development.

43. The Defendant addressed the economic assessment of the Proposed Development in DL22 –

> *"The Secretary of State has taken account that the Proposed Development has been the subject of an economic assessment and the ExA considers that the approach taken, which considered its economic, environmental, and social benefits and disbenefits, is consistent with paragraph 4.5 of the NPSNN [ER 4.5.11]. The Secretary of State has noted that Mair Bain, in a response of 26 October 2021 to the statement of matters, said that the Department for Transport's WebTAG guidance and HM Treasury's Green Book have been updated since the assessment and contended that the benefit-cost ratio ("BCR") should be recalculated. The Applicant, in its response of 2 February 2022 to the Secretary of State's consultation of 7 January 2022, stated that the BCR will be re-estimated before a final decision is made to commit construction funds. The Secretary of State, like the ExA, is satisfied that the economic assessment has been undertaken in a way consistent with paragraph 4.5 of the NPSNN. Paragraph 4.5 identifies that the business case provides the basis for investment decisions on road projects and it will normally be based on the Department's Transport Business Case guidance and WebTAG guidance and will assess the economic, environmental and social impacts of a development where the information is proportionate to the development and where such information will be important for the Secretary of State's consideration of the adverse impacts and benefits of a proposed development. Given the economic assessment that has already been undertaken (and its assessment of effects), along with all of the information now available on the economic, environmental and social impacts of the Proposed Development and the way in which the BCR is used to inform investment decisions, the Secretary of State is satisfied that the information already provided is proportionate. Accordingly, the Secretary of State is content that the assessment was appropriately carried out at the time of application and does not consider that it is necessary to recalculate the BCR now in light of the updates that have occurred as the Applicant has confirmed that the BCR will be reassessed before any final decision is made to commit construction funds and that reassessment will take account of those updates. The Secretary of State has taken into account that the ExA is satisfied that the Proposed Development would be likely to result in significant reductions to delays and congestion at the three junctions, improve highway safety and also help to release constraints on housing and economic development to the west of Derby [ER 4.5.13]. The Secretary of State has not been provided with any evidence that persuades him that the economic, environmental and social impacts of the Proposed Development have changed significantly since the examination closed".*

44. In DL23, the Defendant considered the options appraisal work carried out by the Interested Party in bringing forward the application for development consent. He said –

> *"The Secretary of State notes that the options appraisal considered alternative layouts for each of the junctions and assessed them against economic, environmental, social and value for money criteria [ER 4.5.27] and notes the description of options appraisal at ER 2.4. The Secretary of State has further considered that these options were subject to several consultation exercises before*

the preferred route was finalised [ER 4.5.27]. Therefore, the Secretary of State is satisfied that the need for the Proposed Development has been established in accordance with the NPSNN and that the alternatives have been assessed in line with paragraphs 4.26 and 4.27 of the NPSNN. Moreover, the Secretary of State agrees with the ExA that the options appraisal for the Proposed Development was properly undertaken and that due consideration has been given to the alternatives to the Proposed Development [ER 4.5.28] and that the proposals meet the requirements for good design and development [ER 4.5.39]".

45. The Defendant addressed the issue of climate change in considerable detail in DL97 to DL148. DL112 summarises the Interested Party's approach to assessment in its written representations of 2 February 2022. The Interested Party had sought to compare the predicted carbon emissions from the Proposed Development with the national carbon budgets for each period. In DL118, the Defendant referred to guidance given by the Institute of Environmental Management and Assessment (IEMA) including that the crux of significance is not whether a project emits greenhouse gas emissions, nor the magnitude of such emissions alone, but whether the project contributes to reducing such emissions relative to a comparable baseline consistent with a trajectory towards net zero by 2050.

46. In DL120 the Defendant found that the Interested Party's approach to assessment aligned with the approach to significance set out in the most recent IEMA guidance. He considered that the Proposed Development's contribution to overall carbon levels was very low and would not have a material impact on the ability of government to meet its legally binding carbon reduction targets, including the Sixth Carbon Budget which had been considered after the examination before the ExA had concluded. DL125 to DL140 provided a detailed cumulative assessment, leading to the Defendant's conclusion in DL 140 that, subject to certain matters addressed in DL141 to DL143, both the Proposed Development's resilience to climate change and the combined impacts from climate change and the Proposed Development on the surrounding environment and receptors had been adequately addressed.

47. The Defendant's conclusions on the issues raised in relation to the Proposed Development and climate change are stated in DL144 to DL148. At DL 146, the Defendant concluded that while the Proposed Development would result in an increase in carbon emissions, its delivery was consistent with existing and emerging policy requirements to achieve the UK's trajectory towards net zero by 2050. He found that the Proposed Development's effect on climate change would be minor adverse and insignificant, an assessment which aligned with IEMA guidance. He was satisfied that the Proposed Development complied with the NPSNN and would not lead to a breach of any international obligations that result from the Paris Agreement or of the government's own policies and legislation relating to net zero. In DL148, he said –

"148. …While as set out above the Secretary of State considers that the Proposed Development will not significantly impact government's ability to meet carbon targets and therefore Net Zero and the Paris Agreement 2015 and that cumulative emissions have been adequately considered, given that the Proposed Development will increase carbon emissions, it is given negative weight in the planning balance. However, due to the likelihood of the Government's legally binding targets decreasing carbon emissions over the lifetime of the Proposed Development, limited weight is attached to this. …".

48. The Defendant's overall conclusions on the application for development consent are given in DL155 and DL 156 –

> *"155. There is strong Government policy support for schemes that seek to deliver a well-functioning SRN. In providing junction improvements and new slip roads to the SRN to address congestion and improve performance, the Secretary of State considers that the Proposed Development would help to deliver this policy in accordance with paragraphs 2.23-2.27 of the NPSNN. The Secretary of State agrees with the matters considered by the ExA to weigh significantly in favour of the Proposed Development [ER 6.5.7]. The Secretary of State agrees with the ExA that the critical need to improve the SRN to deliver a national network that meets the country's long term needs and supports a prosperous and competitive economy (together with the matters set out at ER 6.5.8) weigh very heavily in favour of the DCO being made [ER 6.5.11].*
>
> *156. The Secretary of State agrees with the ExA's conclusion of the matters that weigh significantly against the DCO being made [ER 6.5.9] but as set out above, also gives limited weight to the temporary deterioration in air quality for some receptors during construction and limited weight to the increase in carbon emissions. Overall, the Secretary of State agrees with the ExA that the adverse effects would be relatively limited in magnitude, duration and/or the number of receptors affected [ER 6.5.12] and that the national need for, and considerable public benefits of, the Proposed Development clearly outweigh all of the adverse effects [ER 6.5.15]. The Secretary of State therefore agrees with the ExA that the case for making the DCO for the Proposed Development has been made [ER 6.5.18]".*

Pre-action and other correspondence

49. On 4 September 2023 the Claimant's solicitors wrote a pre-action letter contending that the Defendant's decision to make the Order granting development consent for the Proposed Development was unlawful. Amongst the proposed grounds put forward in that letter were the contentions now advanced under ground 1. In a letter dated 18 September 2023 in response, the Interested Party referred to paragraph 4.5 of the NPSNN and stated –

> *"In determining the application for the DCO there was no duty to have an up-to-date business case. The business case is used as the basis of an investment decision – it is not determinative of an application for a DCO which requires a more holistic approach to the weighing the planning merits for and against a proposed development.*
>
> *It is normal for the Full Business Case (with an up-to-date BCR and Value for Money Statement) to only be available shortly before the construction investment decision which it informs. That investment decision can be several months after any planning decision, and as it represents by far the largest investment decision, it is important that it takes into account the latest cost estimates/quotes, and schedule, before start of works.*
>
> *The Investment Decision is made in accordance with the appropriate governance and assurance framework for the scale of the investment. Whilst there are regular*

updates to the Outline Business Case and BCR/VfM throughout the lifecycle of a scheme up to construction, they don't necessarily align with any planning decision, as the construction investment decision is kept separate".

50. On 12 February 2024, in an email responding to a request made by the Claimant's solicitors for certain information, the Interested Party's solicitor wrote –

> *"The Ground of Claim on which your client has obtained permission is to the effect that the Defendant was under a legal duty to take into account a BCR that reflected the advice set out in HM Treasury Green Book – Valuation of Energy Use and Greenhouse Gas: Supplementary guidance to the HM Treasury Green Book on Appraisal and Evaluation in Central Government which published in October 2021 (with further updates in January and April 2023).*
>
> *It is not part of the Defendant's case nor that of National Highways (NH) that the Defendant had before him a BCR that reflected that update Green Book advice. Both parties accept as a matter of fact that he did not".*

Ground 1

Relevant principles of judicial review

51. The legal principles applicable to a claim for judicial review under section 118 of the 2008 Act are well established. It is unnecessary to rehearse each of those principles in this judgment. They are conveniently stated in paragraphs 1(a)-(f) of Appendix 1 of Holgate J's judgment in *R (Save Stonehenge World Heritage Site Limited) v Secretary of State for Transport* [2021] EWHC 2161 (Admin); [2022] PTSR 74, 140-144.

52. The interpretation of a national policy statement is a matter for the court. Statements of planning policy are to be understood objectively in accordance with the language used, read in its proper context. It is important to distinguish between issues of policy interpretation which are for the court, and issues of planning judgment in the application of policy, which are for the planning decision-maker subject to judicial review on public law grounds: see *R (Substation Action Save East Suffolk Limited) v Energy Secretary* [2024] EWCA Civ 12; [2024] PTSR 561 at [40].

53. In *R (Scarisbrick) v Secretary of State for Communities and Local Government* [2017] EWCA Civ 787 at [19]. Lindblom LJ said –

> *"19. The court's general approach to the interpretation of planning policy is well established and clear (see the decision of the Supreme Court in Tesco Stores Ltd. v Dundee City Council [2012] UKSC 13, in particular the judgment of Lord Reed at paragraphs 17 to 19). The same approach applies both to development plan policy and statements of government policy (see the judgment of Lord Carnwath in Suffolk Coastal District Council v Hopkins Homes Ltd. and Richborough Estates Partnership LLP v Cheshire East Borough Council [2017] UKSC 37, at paragraphs 22 to 26). Statements of policy are to be interpreted objectively in accordance with the language used, read in its proper context (see paragraph 18 of Lord Reed's judgment in Tesco Stores v Dundee City Council). The author of a planning policy is not free to interpret the policy so as to give it whatever meaning he might choose in a particular case. The interpretation of planning policy is, in*

the end, a matter for the court (see paragraph 18 of Lord Reed's judgment in Tesco v Dundee City Council). But the role of the court should not be overstated. Even when dispute arises over the interpretation of policy, it may not be decisive in the outcome of the proceedings. It is always important to distinguish issues of the interpretation of policy, which are appropriate for judicial analysis, from issues of planning judgment in the application of that policy, which are for the decision-maker, whose exercise of planning judgment is subject only to review on public law grounds (see paragraphs 24 to 26 of Lord Carnwath's judgment in Suffolk Coastal District Council). It is not suggested that those basic principles are inapplicable to the NPS – notwithstanding the particular statutory framework within which it was prepared and is to be used in decision-making.

Ground 1(a) – misinterpretation of paragraph 4.5 of the NPSNN

Submissions

54. The central premise of the Claimant's argument is that the policy stated in paragraph 4.5 of the NPSNN requires the decision maker to consider an up-to-date business case or economic assessment of the scheme before him for decision. Unless the business case or economic assessment is up to date, it cannot be accurate. If it is inaccurate, it cannot reasonably be relied upon for the important purpose of informing the decision maker's consideration of the adverse impacts and benefits of the scheme.

55. The Claimant pointed out that in her representations made on 26 October 2021 and on 23 March 2022, she had drawn the Defendant's attention to a number of material changes made to policy and guidance on the methodology for economic assessment since the ExA closed their examination of the Proposed Development on 8 July 2022. In particular, the methodology and approach to appraisal and monetary valuation of carbon emissions had been updated for the purposes of economic assessment of transport projects following WebTAG and HM Treasury's Green Book methodology. Dr Boswell's expert report submitted to the Defendant in March 2021 showed that the likely effect of those changes would be significantly to increase the costs of the Proposed Development.

56. In summary, it was submitted, in order properly to deploy the economic assessment of the Proposed Development as paragraph 4.5 of the NPSNN required him to do, it had been necessary for the Defendant to require the Interested Party to produce a revised economic assessment based on the updated guidance and methodology to which the Claimant and Dr Boswell had drawn attention, and to provide an up to date BCR calculation.

57. The Defendant had not considered it necessary to require the Interested Party to recalculate the BCR for the purposes of his decision because the Interested Party had confirmed that the BCR would be reassessed by reference to the updated guidance and assessment methodology before a final decision was made to commit construction funds. It was submitted that reasoning disclosed a clear misunderstanding of paragraph 4.5 of NPSNN, which required that the decision whether to grant development consent for the Proposed Development be taken on the basis of an up to date economic assessment and BCR calculation.

Discussion

58. In order to address the Claimant's argument, the starting point is the language of paragraph 4.5 of the NPSNN, read in the context of a chapter of a national policy statement whose stated purpose is to set out general policies for the assessment and determination of applications for development consent for national networks infrastructure projects.

59. Paragraph 4.5 of the NPSNN seems to me essentially to break down into two parts. The first part of the paragraph identifies a particular source of information which should ordinarily be provided to the Defendant in support of an application for development consent for a road or rail project. The second part of the paragraph explains why information from that source is important for the purpose of the examining authority's report and the Defendant's decision on such an application.

60. As regards the first matter, paragraph 4.5 of the NPSNN informs the reader that applications for road and rail projects (with the exception of strategic rail freight interchanges) will normally be supported by a business case prepared in accordance with Treasury Green Book principles. The reader is told how such a business case is prepared: normally, it is developed based on the Department for Transport's Business Case guidance and WebTAG guidance. The reader is also told that the purpose of such a business case is to provide the basis for investment decisions on such projects. The Interested Party's pre-action response of 18 September 2023 provides some further information about the development of such a business case and how it is focused upon supporting the decision whether to invest in a road project.

61. One particular component of such a transport business case is then identified in paragraph 4.5 of the NPSNN, namely the economic case.

62. Having singled out the economic case, the second part of paragraph 4.5 of the NPSNN then explains why that element of a business case is of relevance to the examining authority's and the Defendant's determination of an application for development consent for a road or rail project. It is relevant for that purpose because it will have assessed the economic, environmental and social impacts of the project. That assessment will be important, because it will inform the examining authority's and the Defendant's consideration of the adverse impacts and benefits of the project, which are matters which they must consider for the purposes of determining the application for development consent: see section 104(3) and (7) of the 2008 Act and paragraphs 4.2 and 4.3 of the NPSNN.

63. It is, however, important to note that paragraph 4.5 of the NPSNN does not stipulate any particular level of detail or standard of sufficiency which an applicant must achieve in providing information relating to the economic case. Rather, the policy seeks the provision of information that is *"proportionate"* to the development to which the application relates. In any given case, the question whether the information provided by the applicant from the economic assessment of the project is proportionate to its development will be for the examining authority and, ultimately, for the Defendant as decision maker to judge. There is no indication in the language of paragraph 4.5 that the degree to which the submitted economic assessment or BCR calculation reflects or continues to reflect changing technical guidance on the development of a business case is to be considered differently. The natural inference from the language is that also is a matter for the judgment of the Defendant.

64. I turn from paragraph 4.5 itself to the context in which it is found. Paragraphs 4.2 and 4.3 of the NPSNN indicate why, as a matter of policy, information about the economic case, assessment of the environmental and social impacts of a road and rail project is considered to be important, in the context of setting general assessment principles for deciding whether development consent should be granted. As a matter of general policy, paragraph 4.3 provides that the examining authority and the Defendant will evaluate the adverse impacts of the proposed development against its benefits, an assessment which will consider the potential benefits and potential adverse impacts in the longer term. In the case of road or rail projects, for which such matters will have been assessed as part of the preparation of an economic case in developing the business case for the proposed investment in that project, that assessment is likely to be a relevant source of information for the purposes of the evaluation of benefits and adverse impacts contemplated by paragraph 4.3 of the NPSNN.

65. In the present case, the Interested Party had undertaken an economic assessment of the Proposed Development. Paragraph 4.1.1 of the planning statement stated that the Interested Party's projects are subject to an economic assessment which takes into account the anticipated benefits and disbenefits of the proposed road scheme, the purpose of that assessment being to determine whether the project provides sufficient value for money. Plainly, the question whether a road project provides sufficient value for money is primarily one which goes to a decision whether to invest in the project. However, paragraph 4.1.2 of the planning statement went on to say that the economic assessment methodology which it follows is one which takes in consideration the economic, social and environmental benefits and disbenefits of a road scheme. It seeks to ascribe monetary values to environmental factors such as air quality, noise and greenhouse gas emissions, and to social factors such as journey time savings and delays and wider economic impacts. The approach to assessment followed by the Interested Party was stated to follow WebTAG guidance and HM Treasury's Green Book principles. Applying that guidance and those principles, a BCR had been calculated in order to give an indication as to whether the Proposed Development presented a sufficient level of benefits to be considered as good value for money.

66. The Interested Party's approach to preparation of the economic case for the Proposed Development in chapter 4 of the planning statement can thus be seen to have followed the process which is contemplated in paragraph 4.5 of the NPSNN. Although the economic assessment was not itself submitted as a supporting document with the application for development consent, the ExA was able to conclude in paragraph 4.5.11 of its report that the approach taken by the Interested Party to the economic assessment of the Proposed Development was consistent with the advice given in paragraph 4.5 of the NPSNN.

67. It is not the Claimant's case that in so concluding, the ExA misinterpreted paragraph 4.5 of the NPSNN. Moreover, in oral submissions Dr David Wolfe KC and Mr Alex Shattock said that it was not the Claimant's case that in the period following the quashing of the initial grant of development consent, there had been material changes in the *"raw data"* which provided the basis for the Interested Party's economic assessment of the Proposed Development.

68. The Claimant's contention was that, since the ExA concluded their examination and their report, there had been a series of updates to the methodology of economic appraisal and assessment, which reflected changes in the assumptions, weighting and

values to be applied to that raw data in order to ascribe appropriate monetary values to the costs and benefits of a transport scheme, so as to calculate a BCR. It was submitted that neither the Defendant nor the Interested Party disputed that the economic assessment of the Proposed Development which was before the Defendant when he concluded as he did in DL22 did not reflect those changes.

69. The issue, therefore, is whether the Defendant misinterpreted paragraph 4.5 of the NPSNN when he concluded in DL22 that he did not need to require the Interested Party to submit an updated economic assessment of the Proposed Development, including a revised BCR calculation, so that he was able to take account of a BCR which reflected the updated guidance drawn to his attention by the Claimant and Dr Boswell.

70. In my judgment, for the following reasons, in so concluding the Defendant did not misinterpret paragraph 4.5 of the NPSNN. Properly understood in its context, paragraph 4.5 did not oblige the Defendant to require the economic assessment and BCR calculation provided by the Interested Party in its planning statement to be revised and recalculated by reference to the updated guidance relied upon by the Claimant and Dr Boswell.

71. As I have already sought to explain, paragraph 4.5 of the NPSNN is principally concerned with an assessment process which will already have been carried out by the time the applicant submits an application for development consent for a road or rail scheme. The clear expectation is that the applicant will by then have prepared the economic case for the project and so be in a position to submit information from that work in support of their application for development consent. That was essentially the factual position in the present case (albeit that the Interested Party chose to summarise the economic assessment in its planning statement rather than submit the detail as part of its application documentation).

72. Moreover, paragraph 4.5 of the NPSNN states a clear expectation that the business case for a road or rail project, including the economic assessment, will have been developed based on the Department for Transport's WebTAG guidance and in accordance with Treasury Green Book principles. That was the Interested Party's approach in the present case, as the ExA confirmed in paragraph 4.5.11 of their report.

73. Paragraph 4.5 of the NPSNN states that the information provided from the economic assessment of a road or rail project should be proportionate to the development. As I have said, whether the information provided in a given case fulfils that requirement is a matter for the examining authority and the Defendant to judge.

74. Paragraph 4.5 does not offer any explicit guidance on the need to review or supplement the information provided from the economic case, in the light of subsequent changes in methodology or updates to WebTAG published during the period between submission of the application for development consent and its determination. However, chapter 4 of the NPSNN is not silent on that particular matter. Policy guidance on how to respond to such changes or updates is instead given in paragraph 4.7 of the NPSNN.

75. Paragraph 4.7 expressly acknowledges that the departmental WebTAG guidance is regularly updated, to allow the evidence used to inform decision-making to be up to date. Paragraph 4.7 then clearly identifies the circumstances in which, as a matter of policy, it is expected that such updated guidance will be used in preparing analytical

work for business case development. The expectation is that updated WebTAG guidance will be so used *"only where it would be material to the investment decision and in proportion to the scale of the investment and its impacts"*.

76. Two relevant points arise from paragraph 4.7 of NPSNN.

77. The first point is that the matters raised by the Claimant and by Dr Boswell in their representations made on 26 October 2021 and on 23 March 2022 clearly fell within the ambit of the guidance given in that paragraph. Those matters concerned changes and updates to WebTAG and related guidance which had come into existence after the Interested Party had provided information about its economic assessment of the Proposed Development in accordance with paragraph 4.5 of the NPSNN. The question whether the information provided from that economic assessment now required revision, including a fresh BCR calculation, to reflect the updated WebTAG guidance was as a matter of policy to be considered and resolved on the approach stated in paragraph 4.7. That was the directly relevant policy guidance.

78. The second point is that the policy of paragraph 4.7 is clear as to what is required. It is a matter for the judgment of the applicant and, ultimately, for the Defendant as decision maker to determine whether, in any given case, the economic assessment submitted in response to paragraph 4.5 of the NPSNN should be revisited in order to reflect the updated WebTAG guidance. That point is reinforced by the WebTAG guidance note on *"The Proportionate Update Process"* to which reference is made in the footnote to paragraph 4.7, of which I have quoted relevant passages in paragraph 23 above.

79. In the light of this analysis of the relevant policy guidance in chapter 4 of the NPSNN, I turn to the Defendant's reasoning and conclusions in DL22.

80. The Defendant took as his starting point the ExA's conclusion in paragraph 4.5.11 of their report, that the Interested Party's approach to economic assessment of the Proposed Development was consistent with paragraph 4.5 of the NPSNN. As already noted, there is no suggestion that the ExA's conclusion was vitiated by a misinterpretation of paragraph 4.5. At least at the time of the ExA's report, the information provided by the Interested Party in chapter 4 of the planning statement from its economic assessment of the economic, environmental and social benefits and adverse impacts was properly judged to be proportionate to the Proposed Development.

81. From that sound starting point, the Defendant went on to consider whether the subsequent changes and updates to departmental WebTAG guidance and HM Treasury's Green Book, which had been drawn to his attention by the Claimant and Dr Boswell, resulted in the need to require the Interested Party to submit a revised economic assessment, including recalculation of the BCR for the Proposed Development.

82. The Defendant's approach to that issue is evident from his stated reasons for deciding that it was unnecessary to require the Interested Party to do so. In DL22 he said –

> *"Given the economic assessment that has already been undertaken (and its assessment of effects), along with all of the information now available on the economic, environmental and social impacts of the Proposed Development and the*

way in which the BCR is used to inform investment decisions, the Secretary of State is satisfied that the information already provided is proportionate".

83. As he went on to say, it was principally for those reasons that the Defendant did not consider it to be necessary to recalculate the BCR in the light of the updates to WebTAG guidance, for the purposes of his decision on the application for development consent. His reasoning is plainly founded upon and applies the relevant policy guidance in paragraph 4.7 of NPSNN. In my judgment, the Defendant asked the right question which was whether, in the light of the updated WebTAG guidance, the information which had been made available from the economic assessment of the Proposed Development remained proportionate to his consideration of the economic, environmental and social benefits and adverse impacts of the project. In approaching matters in that way, the Defendant addressed the question whether the Interested Party's economic assessment of the Proposed Development required to be reviewed in the light of subsequently updated WebTAG guidance, for the purpose of informing the Defendant's consideration of the adverse impacts and benefits of the Proposed Development. Far from revealing a misinterpretation of paragraph 4.5 of the NPSNN, that approach was in accordance with the policy stated in that paragraph, read together with and in the context of paragraphs 4.3 and 4.7 of the NPSNN. It is, moreover, an approach which is consistent with the observations made by Holgate J at [134] of *R (Save Stonehenge World Heritage Site Limited) v Secretary of State for Transport* [2024] EWHC 339 (Admin), that a cost benefit analysis forms part of a value for money exercise, and is not a proxy for the overall planning balance and judgment to be made by the Defendant.

84. In conclusion, I reject the Claimant's contention that DL22 is vitiated by a misinterpretation of paragraph 4.5 of the NPSNN. That paragraph must be read in context, in particular with the policy guidance given in paragraph 4.7 of the NPSNN. It was not in dispute that since the ExA submitted its report, there had been changes in and updates to departmental WebTAG and other guidance on the economic assessment of road and rail projects. Necessarily, the information provided in the Interested Party's planning statement, including the calculated BCR for the Proposed Development, did not reflect those subsequent changes and updates. That information was, in that sense only, not up to date. The policy response to that state of affairs as promulgated in paragraphs 4.5 and 4.7 of the NPSNN was not to mandate that the Interested Party should produce a revised economic assessment and BCR calculation based on the updated guidance and methodology. Properly understood, that policy response was to require the Defendant to judge whether, in those circumstances, a revised economic assessment and BCR calculation based on the updated guidance and methodology should be provided. That judgment was to be guided by considering whether those were needed for the purpose of properly informing his evaluation of the benefits and adverse impacts of the Proposed Development. The Defendant addressed that matter in DL22. He did so in accordance with paragraphs 4.5 and 4.7 of the NPSNN. There is no direct challenge to his reasoning. I reject ground 1(a) of the claim.

Ground 1(b) – regulation 21 of the 2017 Regulations.

Discussion

85. The issue is whether in deciding to make the Order, the Defendant not only examined the environmental information but also, as required by regulation 21(1)(b) of the 2017

Regulations, reached a reasoned conclusion on the significant effects of the Proposed Development on the environment, taking that examination into account.

86. Regulation 21(2) of the 2017 Regulations required that reasoned conclusion to be up to date at the time that the Defendant took the decision to make the Order. Regulation 21(2) deems that to be the case if, in the opinion of the Defendant –

> *"it addresses the significant effects of the proposed development on the environment that are likely to arise as a result of the development described in the application".*

87. In *Girling v East Suffolk District Council and others* [2020] EWHC 2579 (Admin); [2021] JP 553, Holgate J explained what was required in order to discharge a duty enacted, in substantially similar terms to regulation 21(1)(b) and 21(2) of the 2017 Regulations, under regulation 26 of the Town and Country Planning (Environmental Impact Assessment) Regulations 2017. In [56] Holgate J drew attention to regulation 3 of those Regulations, which prohibited a planning authority from granting planning permission for EIA development unless an EIA had been carried out in respect of that development. He said –

> *"…regulation 26(2) is dealing with whether the competent authority is satisfied that its "reasoned conclusion" under regulation 26(1)(b) on the significant environmental effects of the proposal is up to date. The legislation, in particular regulation 3, does not make the validity of the development consent depend upon a formal conclusion by the authority that all the environmental information is up to date. The deeming provision in the second half of regulation 26(2) does not indicate otherwise. A "reasoned conclusion" of the authority is taken to be up to date if the authority judges that its conclusion addresses the likely significant environmental effects. Here the Council judged that the surveys relating to breeding birds were sufficiently reliable for present purposes. The object of regulation 26(2) is straightforward, namely to prevent a planning permission being granted if there has been a delay since the time when the authority's "reasoned conclusion" was reached without the authority being satisfied that it may still be relied upon. This deals with the risk of a material change of circumstances occurring between an authority reaching its "reasoned conclusion" and the grant of planning permission".*

88. Regulation 4 of the 2017 Regulations, which prohibits the making of an order granting development consent unless an EIA has been carried out in respect of the application, likewise does not require a formal conclusion by the Defendant that all the environmental information is up to date. On Holgate J's analysis, the question for the Defendant to address under regulation 21(1)(b) of the 2017 Regulations was whether he was satisfied that his conclusion addressed the likely significant effects of the Proposed Development.

89. The Claimant contended that the Defendant was not in a position to be so satisfied, and indeed was not so satisfied, because he had chosen to rely on an economic assessment and a BCR which did not reflect the updated WebTAG and other guidance on the weighting of carbon emissions generated by the Proposed Development. It was submitted that both the Interested Party's economic assessment and the Claimant's and Dr Boswell's representations on the changes in methodology and guidance which had

been made since that assessment was prepared, formed part of the *"environmental information"* for the purposes of regulation 21(1)(a) of the 2017 Regulations. Having examined that environmental information and, as he was obliged to do, taken it into account, the Defendant was clearly not of the opinion that his reasoned conclusion under regulation 21(1)(b) of the 2017 Regulations was up to date. Instead of addressing that material change of circumstances in that element of the environmental information before he granted the Order, the Defendant had left over the recalculation of the BCR for the Proposed Development until after the Order had been granted.

90. In considering these arguments, it is vital to keep in mind that regulation 21(1)(b) and 21(2) of the 2017 Regulations are concerned primarily with the Defendant's own judgment of the reliability of his consideration of the likely significant effects of the Proposed Development on the environment. In particular, assuming in the Claimant's favour that the BCR mentioned in the Interested Party's planning statement formed part of the *"environmental information"* which fell to be examined under regulation 21(1)(a), it is necessary to ask to what degree, if at all, did that BCR actually weigh with the Defendant in the conclusions that he reached as to the likely significant effects of the Proposed Development on the environment.

91. It is appropriate to address that question by looking at the Defendant's conclusions on the issue of carbon emissions, since that goes directly to the gravamen of the Claimant's and Dr Boswell's complaint about the Defendant's failure to require a revised BCR to be calculated to reflect current WebTAG and other guidance. That complaint founded upon the argument that, in the result, the BCR calculation relied upon by the Interested Party undervalued the Proposed Development's environmental impact through its carbon emissions and contribution to climate change.

92. I have analysed the Defendant's consideration of the issue of climate change and assessment of the Proposed Development's impact on carbon emissions in paragraphs 45 to 47 above. It is correct to say that the Defendant's assessment is comprehensive, detailed and, on the face of it, up to date. It was not suggested that the information and technical guidance which forms the basis for the analysis of the issue of climate change in DL97 to DL148 was deficient or unreliable by virtue of being out of date. It follows that the Defendant's actual conclusion on the likely significant effects of the Proposed Development in relation to its impact on climate change and carbon emissions was one to which the deeming provision in regulation 21(2) of the 2017 Regulations applied.

93. The Defendant's assessment, in DL97 to DL148, of the likely significant effects of the Proposed Development in relation to its impact on climate change and carbon emissions, neither mentioned nor sought to derive assistance from the BCR calculation stated in the Interested Party's planning statement. There is nothing to indicate that the Defendant attached any weight or significance to that information in drawing his conclusions on climate change in DL144 to DL148.

94. It follows that the Defendant's reasoned conclusion on the likely significant effects of the Proposed Development in relation to its impact on climate change and carbon emissions was unaffected by his resolution in DL22 of the question whether a revised BCR should be calculated to reflect the updated WebTAG and other guidance on the weighting of carbon emissions. His assessment of the Proposed Development's impact on climate change and his conclusions on that issue were simply not contingent upon

his acceptance in DL22 of the Interested Party's position that a revised BCR would be prepared in the context of a final investment decision.

95. In written and oral submissions, the Claimant sought to develop an argument which was not included in her statement of facts and grounds, that the failure to bring the economic assessment up to date and recalculate the BCR for the Proposed Development had resulted in the environmental information relating to alternative options also being unreliable, for the purposes of reaching a reasoned conclusion under regulation 21(1)(b) of the 2017 Regulations. I was taken to passages in the environmental statement which indicated that economic performance and value for money considerations were taken into account in comparing alternative options. Two alternative options had been rejected by the Interested Party because they were assessed to have substantially lower economic cost/benefit ratios in comparison to the Proposed Development. The Claimant's argument was that in order to discharge his duty under regulation 21(1)(b) having regard to the assessment of alternatives, the Defendant needed an updated comparison of benefit/cost ratios against which to judge the performance of the Proposed Development and alternatives in the light of current WebTAG guidance and methodology.

96. In my view, there is no force in that argument. The statutory requirements for consideration of alternatives in the EIA process are stated in regulation 14(2)(d) of the 2017 Regulations. An environment statement in support of an application for development consent is required to include –

> *"(d) a description of the reasonable alternatives studied by the applicant, which are relevant to the proposed development and its specific characteristics, and an indication of the main reasons for the option chosen, taking into account the effects of the development on the environment...".*

97. That requirement was fulfilled in the present case. Chapter 3 of the environmental statement included the Interested Party's assessment of alternatives to the Proposed Development. National policy on the assessment of alternatives is set out in paragraphs 4.26 and 4.27 of the NPSNN. Paragraph 4.27 states –

> *"For national road and rail schemes, proportionate option consideration of alternatives will have been undertaken as part of the investment decision making process. It is not necessary for the Examining Authority and the decision maker to reconsider this process, but they should be satisfied that this assessment has been undertaken".*

98. In DL23, the Defendant considered whether these statutory and policy requirements had been fulfilled in the case of the application for development consent for the Proposed Development. He concluded that they had. In her grounds of claim, the Claimant has not advanced any challenge to the validity of the Defendant's reasoning and conclusions in that paragraph of his decision. There is, therefore, no issue as to the adequacy of the Defendant's examination of that element of the environmental information in accordance with regulation 21(1)(a) of the 2017 Regulations. It is beyond argument that the Defendant took the assessment of alternatives in the environmental statement into account in reaching his reasoned conclusion on the significant effects of the proposed development. On a fair reading of DL22 and DL23, there is no basis for the assertion that the Defendant failed to have regard to the

possibility that the results of that assessment might be subject to some degree of change, were the assessment to be revisited in the light of the updated WebTAG and other guidance on the weighting of carbon emissions.

99. For these reasons, I conclude that the object of regulation 21(2) of the 2017 Regulations was fulfilled in the Defendant's decision to grant the Order. The Defendant reached a "reasoned conclusion" for the purposes of regulation 21(1)(b). He did so on the basis of his opinion that he had addressed the likely significant effects of the Proposed Development on the environment. That was an opinion that he was entitled rely upon for the purposes of reaching his reasoned conclusion, notwithstanding his decision not to require the provision of a revised BCR calculation to reflect the updated WebTAG and other guidance on the weighting of carbon emissions.

Ground 1(c) – breach of Tameside duty

100. The issue is whether, in declining to require the submission by the Interested Party of a revised economic assessment of the Proposed Development, including a recalculation of the BCR, the Defendant failed to fulfil his duty of reasonable enquiry.

101. The principles are well established. See *R(Balajigari) v Secretary of State for the Home Department* [2019] EWCA Civ 673; [2019] 1 WLR 4647 at [70]. Of particular relevance to the present case are the principles that (i) the decision maker's obligation is only to take such steps to inform himself as are reasonable; (ii) subject to *Wednesbury* challenge, it is for the decision maker and not the court to decide upon the manner and intensity of inquiry to be undertaken; and (iii) the court should intervene only if no reasonable authority could have been satisfied on the basis of the inquiries made that it possessed the information necessary for its decision.

102. Applying those principles to the Defendant's decision in the present case, the Claimant's argument that the Defendant breached his *Tameside* duty of enquiry is unsustainable. In DL22, the Defendant gave a detailed explanation for his conclusion that it was unnecessary for the purposes of re-determining the application for development consent, to require the Interested Party to update its economic assessment or recalculate the BCR for the Proposed Development. I am quite unable to accept that his explanation for that conclusion was irrational. Essentially, he considered that when set alongside the totality of information which was before him concerning the economic, environmental and social impacts of the Proposed Development, the information already available to him relating to the economic assessment, including the BCR calculation, was proportionate to what he required for the purposes of reaching his decision. That was indisputably a rational basis for him to conclude that he had the information which he needed, in order to determine the application for development consent and to assess the likely significant effects of the Proposed Development on the environment.

Conclusion on ground 1

103. For the reasons I have given, ground 1 is rejected.

Application to admit Professor Goodwin's report

104. In the Administrative Court as in any court proceedings, expert evidence will be admitted only where that evidence is reasonably required to resolve the proceedings. See CPR 35.1. There are only limited circumstances in which expert evidence is likely to be admissible in proceedings for judicial review. See *R (Law Society) v Lord Chancellor* [2018] EWHC 2094 (Admin) at [37]-[38].

105. In this case, the Claimant submitted that Professor Goodwin's evidence was admissible to explain technical matters in relation to the preparation and development of a transport business case on WebTAG and HM Treasury Green Book principles and to inform the court's consideration of the *Tameside* challenge under ground 1(c).

106. Had there been any merit in those contentions, the need for Professor Goodwin's expert evidence would have been identified and submitted, and the necessary application made for permission to admit that evidence, when the claim was lodged. In fact, the Claimant made her application to admit Professor Goodwin's evidence much later, following receipt of the witness statement filed on behalf of the Interested Party by David Lane. Mr Lane's witness statement was made on 25 January 2024. On 16 February 2024 the Claimant's solicitors gave notice of their intention to apply for permission to admit and rely on expert evidence from Professor Goodwin. Part C of the application made on 5 April 2024 makes clear that the primary purpose of that evidence was to *"refute"* the Interested Party's contention based on Mr Lane's evidence, that recalculation of the BCR would produce similar results to those before the Defendant when he determined the application for development consent.

107. As I have already noted, prior to the hearing of this claim, both the Defendant and the Interested Party stated that they no longer relied on section 31(2A) of the 1981 Act or on Mr Lane's evidence in defence of this claim. Self-evidently, it was unnecessary for the court to admit Professor Goodwin's evidence for the purpose of resolving an issue that was no longer before the court for decision.

108. I have not found it necessary to refer to or to rely on the expert evidence of Professor Goodwin to address the issues that remain before the court for determination under ground 1. That being so, I am unable to conclude that his evidence is reasonably required to resolve these proceedings for judicial review. I therefore decline to admit it.

Disposal

109. The claim is dismissed. I am very grateful to counsel and those instructing them for their assistance both in written and oral submissions.