



Appeal Decision

Site visit made on 25 June 2020

by David Richards BSocSci DipTP MRTPI

an Inspector appointed by the Secretaries of State for Transport and for Housing, Communities and Local Government

Decision date: 18 November 2020

Appeal Ref: APP/HS2/7

Land within the Colne Valley in proximity to Harvil Road and Moorhall Road in the London Borough of Hillingdon UB9 6JL

- The appeal is made under paragraph 22(1) of Schedule 17 to the High Speed Rail (London - West Midlands) Act 2017 (the Act) against a failure to determine within the specified timescale a request for approval for plans and specifications submitted under Schedule 17 of the Act relating to the design and external appearance of the Colne Valley Viaduct and associated earthworks and the location of fencing.
 - The appeal is made by High Speed Two (HS2) Limited against the London Borough of Hillingdon.
 - The request for approval Ref 74320/APP/2019/3187, was dated 26 September 2019.
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Decision

1. The appeal is allowed and approval is granted for the application.

Procedural Matters

2. I have been appointed, under paragraph 23(1), Schedule 17 of the High Speed Rail (London to West Midlands) Act 2017 (the Act) by the Secretaries of State for Transport and for Housing, Communities and Local Government to determine the appeal on their behalf. I have followed the procedures set out in the High Speed Rail (London – West Midlands) (Planning Appeals) (Written Representations Procedure) (England) Regulations 2017 (the Regulations), March 2017¹. I visited the area affected by the submission and surroundings on an un-accompanied basis on 25 June 2020, viewing the land from the public highway, and publicly accessible footpaths including the Colne Valley Trail and the Grand Union Canal towpath.

Main Issues

3. The main issues are i) whether the information submitted with the application is sufficient for the purposes of making the determination, and ii) whether the design or external appearance of the works for which approval is sought ought to, and could reasonably be, modified or carried out elsewhere within the development's permitted limits, in accordance with the appeals procedure set out in Schedule 17 to the Act.

¹ <https://www.gov.uk/government/publications/high-speed-rail-london-to-west-midlands-act-2017-schedule-17-statutory-guidance>.

The submission

4. This case is concerned with the design and external appearance of the Colne Valley Viaduct (CVV), part of Scheduled Work 2/1 for which consent was granted by the High Speed 2 (London - West Midlands) Act 2017. It relates to land lying within the London Borough of Hillingdon. Details relating to that part of the project lying within Buckinghamshire have already been approved by the relevant authority. In that case, the approval was granted subject to conditions which were subsequently found to be unlawful in an appeal by HS2 to the Secretaries of State for Transport and for Communities and Local Government².
5. The details for which approval is sought are:
 - The Colne Valley Viaduct south embankment earthworks and abutment, associated fencing, pedestrian access to railway details, and drainage earthworks;
 - The Colne Valley Viaduct structure, including noise barriers and associated earthworks for drainage and lake edge treatment. This includes the crossing of the Grand Union Canal, Moorhall Road and the A412 – North Orbital Road;
 - The Colne Valley Viaduct north abutment, associated fencing, pedestrian access to railway details, and drainage earthworks;
 - Earthworks to facilitate wetland habitat creation beneath the viaduct between the A412 North Orbital Road and the River Colne;
 - Earthworks to provide replacement floodplain storage to the north-east of Harefield No.2 Lake and the north of Newyears Green Bourne;
 - The location of a new vehicle restraint barrier in proximity to the proposed viaduct crossing of the A412 – North Orbital Road, approximately 170 metres to the north of the existing Denham Waterski access.

Relevant Legislation and Guidance

6. Under section 20(1) of the Act planning permission is deemed to be granted for the construction of Phase One (London to West Midlands section) of the High Speed Two (HS2) development as authorised by the Act. Section 20(3) specifies that Schedule 17 to the Act imposes conditions on that deemed planning permission.
7. Paragraph 22(2), Schedule 17 of the Act states:

“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 -

(a) the refusal of approval, or

(b) the imposition of conditions on approval,

on a ground open to that authority.”

² Appeal Ref: APP/HS2/4

8. The Submission relates to the design and external appearance of the CVV, together with associated earthworks and the location of fencing. Accordingly, paragraphs 2 and 3 of Schedule 17 set out the relevant conditions subject to which planning permission is deemed to have been granted under the Act.
9. The Council is identified as a qualifying authority in the High Speed Rail (London – West Midlands) (Qualifying Authorities) Order 2017. In respect of the works relating to the Colne Valley Viaduct, 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,*
- 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."* and
- "(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)."*
10. For earthworks and fencing, paragraph 3 provides that the relevant planning authority may only approve plans or specifications on the following specified grounds:
- "(6) Table- 2 Earthworks*
- That the design or external appearance of the works ought to, and could reasonably, be modified—*
- (a) to preserve the local environment or local amenity,*
- (b) to prevent or reduce prejudicial effects on road safety or on the free flow of traffic in the local area, or*
- (c) to preserve a site of archaeological or historic interest or nature conservation value.*
- 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."*
- "(6) Table- 5 Fences and walls (except for sight, noise and dust screens)*
- That the development ought to, and could reasonably, be carried out elsewhere within the development's permitted limits."* and

"(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 subparagraph (6) in relation to the work in question."

11. Paragraph 26(1) of Schedule 17 to the Act empowers the Secretary of State to give guidance to planning authorities in the exercise of their functions under that Schedule. Paragraph 26(2) states that a *"planning authority must have regard to that guidance"*. In exercise of this power, the Secretary of State published Guidance in February 2017. Paragraph 4.4 of the Guidance states that: *"Planning authorities should not through the exercise of the Schedule seek to modify or replicate controls already in place, either specific to HS2 Phase One such as the Environmental Minimum Requirements, or existing legislation such as the Control of Pollution Act or the regulatory requirements that apply to railways."*
12. A Development Agreement between the SoS for Transport and the Appellant requires HS2 Limited to adhere to arrangements provided for in the "Environmental Minimum Requirements" (EMRs) in designing and constructing the works for Phase One of the HS2 project. The EMRs comprise a suite of documents which have been developed in consultation with local planning authorities and other relevant stakeholders in relation to the control of the environmental impacts of the design and construction of Phase 1.
13. The content for a Schedule 17 submission is set out in a series of 'Planning Forum Notes' (PFNs) including: PFN1 – Content and submission of Standard Templates; PFN2 – Drawings for Plans and Specifications Approvals; PFN3 – Written Statements and Design and Access Statements; and PFN10 – Indicative Mitigation.
14. The operation of the law in respect of this approvals process under Schedule 17 of the Act has recently been considered by the High Court: *London Borough of Hillingdon v the Secretary of State for Transport and others* [2019] EWHC 3574 (Admin). The Application related to a previous decision³ by the Secretaries of State on an appeal concerned with a submission under Section 17 relating to a wetlands mitigation site, also made to LB Hillingdon.
15. That judgment was successfully challenged by the local planning authority in the Court of Appeal (CoA), which gave its judgement on 31 July 2020 [Neutral Citation Number: [2020] EWCA Civ 1005]⁴. The Appeal Court judges concluded at paragraph 10 that *"... the duty to perform an assessment of impact, and possible mitigation and modification measures under Schedule 17, has been imposed by Parliament squarely and exclusively upon the local authority. It cannot be circumvented by the contractor taking it upon itself to conduct some non-statutory investigation into impact. We also conclude that the authority is under no duty to process a request for approval from HS2 Ltd unless it is accompanied by evidence and information adequate and sufficient to enable the authority to perform its statutory duty."*
16. The CoA judgment set out a number of other principles that are relevant to this appeal determination:

³ Ref APP/HS2/1

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/783136/hs2-colne-valley-appeal-decision-letter.pdf

⁴ <https://www.judiciary.uk/wp-content/uploads/2020/07/R-oao-Hillingdon-LBC-v-Secretary-of-State-for-Transport-judgment-31-July-2020-002.pdf>

17. Para 68: "*.. Schedule 17 operates on the clear premise that an authority is under a duty to perform an evaluation of the impact of submitted plans and specifications on the identified planning interests ... there is no basis in the Schedule for the duty that is imposed on the authority to be delegated or sub-contracted to any third party, including of course HS2 Ltd, or for that duty to be abrogated by any other instrument (save for primary legislation) and in particular non-legislative guidance material.*"
18. Para 69: "*With respect, in our judgment, both the Judge and the Secretaries of State erred in concluding that references in the Statutory Guidance which urged planning authorities to avoid "replicating controls already in place" served to limit the power and duties of an authority. Such Guidance simply cannot in law have the effect of stripping from an authority the powers and duties it has imposed upon it under statute in relation to "control". If the Guidance is, fairly read, to be construed otherwise then, as the Guidance itself expressly acknowledges the Act, including Schedule 17, take precedence. The same inevitably goes for the EMRs.*"
19. Para 70: "*It follows from the statutory scheme that, if HS2 Ltd fails to furnish an authority with information and evidence sufficient to enable the authority to perform its duty, then the authority is under no obligation to determine the request. It is also evident from the statutory scheme that, since HS2 Ltd cannot proceed to carry out works without an approval, it has a concomitant duty to furnish an authority with such evidence as is necessary and adequate to enable the authority to perform its allotted statutory task. If for some reason, HS2 Ltd does not do this then the correct approach is not to refuse the request for approval ... but instead to decline to process the request until such time as adequate evidence and information has been furnished.*"

The case for the London Borough of Hillingdon (LBH)

20. LBH requested a further extension of the period for determination on 3 March 2020. It was stated that the Council was currently unable to determine the submission, largely as a consequence of a lack of effective engagement on material considerations from the Environment Agency (EA) but also related to outstanding information requests from Align JV (through HS2 Ltd). The Council acknowledged the provision of further information concerning ecology by Align JV and considered that a further extension would allow the information to be shared and explored in more detail.
21. LBH acknowledges that its remit with regards to the design of the viaduct is very limited. If the Council identifies a particular concern with for example nature conservation (Stage 1), the provisions of Schedule 17 require the Council to identify possible modifications to the design assuming they are reasonably capable of being achieved (Stage 2). The Council considers that insufficiency of information prevents it from proceeding to Stage 2. This problem has been exacerbated by the responses of the statutory consultees, who have provided responses with little or no substance. The Council has concerns about bird strike and suggests it is not clear that the design of the viaduct has taken these factors into consideration. Similarly with regard to flood levels, the Council has requested further information from the EA, as these are crucial to the bearing height and in turn the design of the superstructure of the Viaduct.

22. The Council also identifies concerns with the design of the deck structure above the arches, which is considered to be bulky and not reflective of the important environment in which it sits. It considers that the design of the viaduct ought to be modified to preserve the local environment and to align with the expectations put forward by Parliament and adopted by local people. It seeks clarification on how (if at all) the design of the viaduct can reasonably be modified to: a) reduce the bulk of the upper deck as seen in profile; b) the height between water level and the soffit; c) the noise barriers (height and finish); and d) the materials for both the lower superstructure and upper deck.
23. With regard to impacts on ecology the Council considers that the viaduct design has not been able to fully integrate landscape and ecological design because up to date ecological information has not been provided by the Appellant, and the indicative mitigation details provided are yet to be informed by updated assessments. The submission contains no information about how the design of the viaduct and earthworks will impact on the nature conservation value of the Colne Valley. Consequently the Council requested the Appellant to provide full baseline survey information relevant to the location of the built form and where the piers are located, baseline information on the aquatic environment and in particular winged species that may be impacted by the Viaduct and movement of trains and ecological baseline associated with the earthworks element of the application.
24. With regard to impacts on the water environment, the Council considers that more information should be provided to assess the effect of support piers being drilled down into the aquifer below, which could adversely impact public water supplies, the wider water environment and the lake systems which contribute the rich abundance of flora and fauna. It is inappropriate to divorce the above ground design from the below ground impacts. It is insufficient to rely on the information compiled for the Environmental Statement (ES) as no intrusive investigations were undertaken. The conclusions in the ES is that the viaduct could have adverse impacts, but this was subject to further intrusive investigations to determine the impacts with more certainty. It is believed that such investigations have been undertaken, but the conclusions have not been shared, so that the Council (and ultimately the Inspector) does not have the information to make a rational assessment.
25. In the event of the Council's submissions not being accepted, five conditions were proposed:
- A landscaping condition requiring submission of a scheme for the protection of flora and fauna of the Colne Valley;
 - A noise condition, requiring a scheme for the monitoring and reporting of noise and vibration to be agreed in writing by the local planning authority;
 - A graffiti condition, requiring a scheme for the management of graffiti on the viaduct structure;
 - A flood risk condition, requiring the applicant to provide full details of the flood risk investigation works including surface water impacts, surveys and details for managing drainage;

- A fish protection condition, requiring a fish stock survey to be undertaken to be accompanied by a detailed plan for the protection of the stocks and remedial measures in the event of adverse impacts.
26. Following the handing down of the CoA judgment referred to above, the Council submitted further comments at my request.
 27. LBH states that the Appellant has relied on its purported compliance with the Planning Forum Notes (PFNs) and it contends that it has provided LBH with all the necessary documentation in order to enable it to determine the submission. It also makes the case that the PFNs are part of the EMRs. In contrast, LBH has set out the reasons why it considers the PFNs are not part of the EMRs and that qualifying authorities are not bound by them. The most that is required is that the Appellant and LBH must both have regard to the conclusions of the Planning Forum and the PFNs. The Council cites Para 69 of the CoA judgment (as set out above) in support of its contention.
 28. LBH also cites para 76 of the CoA judgment to the effect that nothing in the Statutory Guidance or the EMRs can, in law, oust the statutory duty of a local planning authority or in any way modify or limit it. At their highest, they contain matters which, in the performance of its statutory duty, an authority should take into account, but they do not bind it. Furthermore nothing in the EMRs indicate that HS2 Ltd can decline to furnish an authority with the relevant and necessary information in order for the authority to perform its statutory duty.
 29. By refusing to determine the viaduct application in the absence of sufficient information being provided by the Appellant, LBH considers that it has acted consistently with the CoA's ruling in paragraph 70 of the CoA judgment.
 30. Para 75 of the CoA judgment is a rejection of the Appellant's case that the burden of proof lies with the Council (or the Inspector/Secretaries of State on appeal) that the design or appearance of the proposed works should reasonably be altered. It is therefore wrong in principle to reverse the responsibility to require LBH to 'justify' a refusal in the absence of information on the basis that there is some burden of proof imposed by statute on LBH.

The Appellant's case

31. In accordance with the requirements of the Environmental Minimum Requirements (EMRs) and the relevant Planning Forum Notes (PFNs), the Appellant has provided the Council with the necessary documentation in order for it to determine the submission. Given the failure of the Council to submit evidence that the Submission ought to and is reasonably capable of being modified, the Appeal should be allowed. The first appeal decision and the related High Court judgment are clear that in such circumstances the Schedule 17 submission should be approved. The EMRs create a framework which governs the Appellant's future conduct in implementing the project.
32. The Appellant has provided the authority with extensive plans, drawings, visualisations and photomontages together with a written statement and Design and Access Statement as detailed in Section 6 of the statement of case. These include details of proposed works and any necessary mitigation relating to landscaping, ecology, and operational noise. The submission is fully compliant with the EMRs and in particular the PFNs.

33. The Appellant has provided additional information which addresses the Council's concerns, though they emphasise that it is not required for the determination of the appeal. The Council was dissatisfied with the response of the EA. Despite repeated requests the EA confirmed that it is content with the submission. The Council highlighted concerns about the impact of bird strike, either from collision with the noise barriers or with moving trains. However it has not demonstrated how the design and appearance ought to be and is reasonably capable of being modified to address these concerns, as required by paragraphs 2 and 3 of Schedule 17. This requirement is clearly set out in Paragraphs 80 and 81 of the earlier judgment:

80. *"In my view, the Defendants were correct to hold that, on a proper construction of paragraph 3(6) of schedule 17, the onus is on the local planning authority to demonstrate that the design or external appearance of the earthworks ought to and could reasonably be modified to preserve the site of archaeological interest; or that the earthworks ought to and could reasonably be carried out elsewhere within the development's permitted limits (DL30). This is also confirmed in paragraph 7.7.2 of the Planning Memorandum.*

81. *The Defendants were entitled to go on to find that the Claimant's reasons for refusal did not put forward any evidence or submissions to address the criteria in paragraph 3(6) (DL28). The Claimant did not indicate how, in its view, the earthworks should be modified to preserve matters of archaeological interest, nor that the earthworks ought to, and could reasonably be, carried out elsewhere. In my view, the Claimant could not do so, on the state of the evidence before it, and therefore it erred in relying on paragraph 3(6) when the criteria were not made out. For reasons which I explain further below, the Defendants were not suggesting at DL28 that the Claimant should commission its own evidence, in addition to assessing the information provided by the IP."*

34. Notwithstanding the judge's conclusion on the matter, the Appellant responded to the Council on 8 April 2020, setting out how *"the viaduct design has paid explicit attention, on a precautionary basis, to reducing the risk of bird and bat collisions with the viaduct structure"*.

35. The Council also sought further information from the EA on Flood Risk. While the EA confirmed that it had no objection to the submission, it also pointed out⁵ that *"Schedule 33 of the Act contains the relevant powers of the environment agency to regulate the HS2 development to reduce any impact on water supplies"* and that it would seek to rely on these powers rather than through the submission which *"offers no additional value over and above [the EA's powers] under Schedule 33."* The letter goes on to say that *"we are only likely to provide a detailed response to a Schedule 17 application where we wouldn't also be consulted under Schedule 33. This approach has been generally accepted by Local Planning Authorities along the route to date"*.

36. On the basis of the advice in the Statutory Guidance, the Appellant considers that where the EA can handle matters under Schedule 33, the Council should not be seeking their duplication under Schedule 17. Despite its allegations in the statement of case (paras 9.7.4 to 9.7.6), the Council has been unable to articulate where the powers of the EA would not be duplicated. This is not

⁵ Letter from EA to Hillingdon Council dated 18 February 2020

surprising as Part 5 of Schedule 33 extends to "*... any permanent or temporary work or operation authorised by this Act...*"

37. Section 16.1 of the Code of Construction Practice (CoCP) provides for the undertaker to require contractors to "*manage site activities to protect the quality of surface water and groundwater resources from other adverse effects, including significant changes to the hydrological regime ...*"
38. With regard to the Council's concerns regarding the design of the viaduct, the Appellant considers that the Council was extensively involved in the design process at the pre-application stage. The Council has not provided any evidence as to why the design or external appearance of the works ought to be modified, or that such modification is reasonably capable of being made; nor has it shown that the works ought to, and could reasonably, be carried out elsewhere within the development's permitted limits. Accordingly the Council has no basis for refusing the submission on design grounds.
39. In relation to the Submission, the final report of the Independent Design Panel (IDP) is included in the Design and Access Statement ("Final IDP Report"). The IDP concludes on the CVV as follows: "*The panel finds much to admire in the Schedule 17 stage design for Colne Valley Viaduct. It thinks the proposals, including the landscape vision which is to be subject to subsequent Schedule 17 requests (Bringing into Use and Site Restoration Agreements), meet the aspirations of the HS2 Design vision – subject to continuing further design work through to delivery. It offers comments for consideration as detailed design work progresses towards construction. In general, the efforts made to minimise the scale and visual impact of the viaduct, in this sensitive landscape context, are to be applauded. It urges HS2 Ltd to explore how this standard of design, can be championed across the route.*"
40. While the Appellant considers that it has delivered a viaduct which meets all of the aspirations of the Specimen Design, the Council has wrongly focused on it rather than on the form of the CVV that was subject to environmental impact assessment and envisaged at the time of Royal Assent. It is clear from the Appellant's Written Statement and the Design and Access Statement that the Submission not only meets the requirement to not exceed the effects of the viaduct envisaged by the Act but has also further mitigated the impacts of the CVV as required by paragraph 1.1.5 of the General Principles. The Council's analysis has not even considered the Submission in the context of the viaduct considered by the time of Royal Assent. In the absence of such an analysis it cannot have met the statutory test.
41. With regard to the Council's concerns over weathering, the Appellant has considered this issue and, for the reasons set out in section 3.7 of the Align JV Design Response, does not consider that the structure will weather and age in an unacceptable way. In any event, the Council has not proposed any modification to address its concern and so has not met the statutory test.
42. With regard to the Council's concerns on ecology, Natural England (NE) confirmed in response to consultation that it had no objection to the submission, by letter dated 30 October 2019. Based on the plans submitted, NE considered that the proposed development will not have significant adverse impacts on statutorily protected sites. NE offered advice on the planting mix listed within the mitigation details. With regard to protected species it pointed out that proposals must be designed in accordance with the various licences

and ecological standards developed for the project, but gave no indication that the submission fell short in this respect.

43. In accordance with its EMR obligation to use reasonable endeavours to adopt mitigation measures that will further reduce any adverse environmental impacts the Appellant has produced a design solution which reduces the likelihood of collisions occurring as much as possible within the necessary design requirements. These measures are detailed in paragraph 2.2.48 of the Indicative Mitigation Details and include:
- an increase in noise barrier height to 4 m in most sections of the viaduct (12.17.1);
 - provision of markers attached to catenary support wires (12.17.2); and
 - operational monitoring surveys (12.17.3).
44. The noise barrier is the most critical mitigation measure in this regard as the risk of strike generally arises from the unexpected arrival of a fast moving train. In seeking to provide a transparent barrier and provide visual consistency, the Appellant has adopted a higher and more consistent noise barrier along most of the viaduct when compared to the Environmental Statement. This is not only a more expensive solution for the benefit of the visual aesthetic, it also provides a barrier in the crucial risk zone for collisions between the track and the top of the train with four metre noise barriers extending almost to the top of the train. This blocking of the risk zone makes it much more likely that bats or birds will either fly under or over the viaduct structure rather than across it at train height. Dark wirelines will also be embedded within the transparent barrier to further reduce the risk of any collisions with the viaduct structure.
45. In response to my request, the Appellant submitted further comments following the handing down of the CoA judgment. The Appellant states that the judgment changes nothing in terms of the substance and merits of the appeal. The principal issue before the Inspector remains whether he has sufficient information to enable him to determine the appeal. The Appellant accepts that the EMRs cannot usurp the statutory regime, but that does not render them irrelevant. As the CoA notes in paragraph 15 of the judgment, the Planning Memorandum (which itself incorporates the other EMRs) binds the Council and shall be taken into account when determining Schedule 17 submissions. Therefore it is down to the Inspector's planning judgement as to how much weight he wishes to attach to the Planning Memorandum and the other EMRs. Notwithstanding the Council's position that the information provided is inadequate, it remains open to the Inspector to rely on the conclusions of the Planning Forum as to the information required in any given submission. The Appellant is clear that it has provided the Council with all of the information (and more) which is necessary to determine the submission, irrespective of the PFNs. If the Inspector concludes he needs more information then he should not refuse the appeal. The CoA judgment is clear that the correct approach would be for the Inspector to request further information from the Appellant and refrain from determining the appeal until sufficient information was provided, bearing in mind the limited specified grounds identified in paragraph 3(6) of the Schedule.

Inspector's conclusions

i) Sufficiency of information

46. The Council has focused on an alleged paucity of information provided in respect of the works and specifications submitted for approval, and has commented that the statutory consultees have failed to engage sufficiently with the detail to enable the Council to determine the application.
47. To my mind, the Appellant's submission is fully compliant with the relevant guidance and regulations. I accept that, in the light of the CoA judgment that the Council is not bound by the advice in the PFNs and that it is entitled to seek further information if it is considered necessary to inform a proper assessment of the impacts of the schemes in relation to the matters identified in Paragraphs 5 & 6 of Schedule 17. The judgment also urges the parties to adopt a collaborative approach to avoid undue delay in the determination of Schedule 17 applications. However, the parties including the Council are expected to have regard to the advice in the PFNs regarding the extent and nature of information which should be provided, and to the Statutory Guidance, which advises that: *'Planning authorities should not through the exercise of the Schedule seek to modify or replicate controls already in place, either specific to HS2 Phase One such as the Environmental Minimum Requirements, or existing legislation such as the Control of Pollution Act or the regulatory requirements that apply to railways'*. There is also a general principle applicable to project approvals that information requests should be reasonable and proportionate to the matters under consideration.
48. The drawings provided as part of the submission are at an appropriate scale and present three-dimensional information as to the nature, form and content of all specific works, including photomontages and perspective drawings, in compliance with the requirements of PFN2.
49. The submission is accompanied by a full written statement and a comprehensive Design and Access Statement which describe the proposal and assess key impacts, in accordance with PFN3.
50. With regard to PFN10, the Appellant submitted an Indicative Mitigation Details document including plans which show areas of habitat creation together with an outline programme of habitat establishment, together with proposals in respect of noise and flood risk mitigation. With regard to landscaping, a planting strategy for each sub-area is set out in Section 6 of the Design and Access Statement, to illustrate how landscape planting would integrate into the wider environment. To my mind, these provide an appropriate level of detail to inform the decision on the Schedule 17 application, and provide a satisfactory context for the extensive programme of further work on mitigation, compensation, monitoring and opportunities for enhancement secured through the EMRs and associated documents. This includes the preparation of Local Environment Management Plans and site specific management plans for 'key environmentally sensitive worksites' (including those in the Colne Valley) required by Annex 4 to the EMRs at Table 5.1.
51. I conclude that the information accompanying the application, and that provided subsequently by the Appellant satisfies Planning Forum Notes 1, 2, 3 and 10 with regard to the form and content of the items submitted for a plans and specifications approval. In my judgement it is sufficient and at least

adequate to have enabled the Council to determine the Schedule 17 application in accordance with its statutory duty.

ii) Whether the works for which approval is sought ought to be modified and are capable of being so modified.

Design

52. The Council's critique of the design focuses on what it describes as the oppressive form and sheer weight of the concrete structure, the bulk and prominence of the upper deck, the 'cluttered' arrangement of overhead lines, and the broken noise barrier. It is suggested that the submission design contrasts poorly with the elegant specimen design, as a result of value engineering at the expense of architectural elegance. An additional concern was the potential for graffiti on the piers adjacent to the Grand Union Canal.
53. The evolution of the design has been subject to review by the HS2 Ltd IDP throughout the process. The Appellant states that the design has responded to both stakeholder and public engagement feedback wherever reasonably practicable and within the constraints provided by the Act, EMRs and engineering requirements of the structure. Considerable engagement has taken place with the local communities and the wider public, the local planning authorities, Colne Valley Regional Park Panel, statutory bodies and adjacent HS2 contractors regarding these Schedule 17 requests for approval. Section 7 of the Appellant's Written Statement provides a record of 7 meetings concerned with design, at which the Council was represented.
54. The IDP has commented favourably on the design proposed in the submission as set out above in Paragraph 39.
55. While the Council points to disparities between the submitted design and the Specimen Design, the appropriate comparison to be made is with the form of the Viaduct that was subject to Environmental Impact Assessment as envisaged at the time of Royal Assent. The Appellant reasonably points out that the structure must function as part of a high-speed railway, which imposes engineering constraints, together with other considerations such as the catenary system and noise mitigation which must be accommodated for operational and environmental reasons. Any viaduct design requires that it must have a deck and an envelope that comprises at least the deck soffit, track-bed, train and overhead line equipment envelope and associated noise barriers.
56. I acknowledge that the submission design is less elegant in appearance than the Specimen Design. However, I understand that it has been explained to and accepted by Council officers that the Specimen Design was not realistically deliverable, and that good design must sit alongside the practical need to deliver and operate a railway.
57. In that context, I consider that the information contained within the submission demonstrates that the submission design for the CVV not only meets the requirement to not exceed the effects of the viaduct envisaged by the Act but has also further mitigated the impacts as required by paragraph 1.1.5 of the General Principles.
58. Similar considerations apply to the Council's concern about weathering. The Appellant has explained the measures that have been adopted to minimise the

effects of weathering in section 3.7 of the Align JV Design Response. The design incorporates an inward sloping sill to capture the majority of rainwater run-off from above. Ultra High Performance Concrete is proposed for the parapets which has less susceptibility to weathering over time than typical concrete.

59. There is no question that the CVV represents a major intervention in a highly sensitive landscape. However the impact has been assessed as acceptable in the ES which was prepared for the parliamentary approval process. There is no requirement or provision in the Schedule 17 approval process to revisit the conclusions of the ES where the assessed impacts are not exceeded. While there is always a subjective element in the evaluation of design I consider that the submission design would be a landmark structure which achieves a high degree of elegance and sophistication, and responds satisfactorily to the character of its unique landscape setting, taking into account the engineering and operational requirements which are fundamental to the operation of a high speed railway. The design has been the subject of wide and thorough consultation, and has been refined in the light of the feedback received, as set out in Align JVs Design Response to the Council's statement on behalf of the Appellant.
60. As I have found the design to be acceptable there is no reason to conclude that the design or appearance of the CVV ought to be modified, or to show that it is capable of being so modified. It is not practicable to build the structure elsewhere within the permitted limits other than within the specified limits of deviation. There is accordingly no reason to withhold approval of the submitted details by reference to the provisions of paragraph 2 (5) of Schedule 17 of the Act on grounds of design and external appearance.

Ecology and Flood Risk

61. The Council identified concerns about the effect of bird strike and states that it is not clear whether this has been taken into account by the Appellant. The Appellant responded by letter on 8 April 2020 explaining how "*the viaduct design has paid explicit attention, on a precautionary basis, to reduce the risk of bird and bat collisions with the viaduct structure.*" Neither the EA nor Natural England raised any outstanding concern in respect of the potential for collisions, and as the statutory bodies which have the primary duty in these regards, I consider that it is reasonable to expect that the Council should have had regard to the clearly expressed views of these bodies in assessing the potential impacts of the CVV design.
62. The ES underlying the parliamentary approval process concluded that there was a low risk of collisions of either bats or birds taking place and that no additional mitigation is required other than noise barriers. There is no reason to conclude that those now proposed in the current submission (which have been modified to reduce the risk of bird strike) should be further modified or that the impacts addressed in the ES will be exceeded.
63. With regard to the Council's concerns on flood risk, these have not been substantiated. Flood Risk and impacts on the water environment are primary concerns of the EA, and these matters have been addressed comprehensively in the EMR regime. The EA is content with the effectiveness of this process. In response to the Council's concerns that they had failed to engage properly with the approval process, the EA stated that "*we are only likely to provide a*

detailed response to a Schedule 17 application where we wouldn't also be consulted under Schedule 33. This approach has been generally accepted by local planning authorities along the route to date." The response went on to set out the EAs position very clearly:

"As you correctly point out in your letter, the Environment Agency has a very limited remit within Schedule 17 of the Act. Part 5 of Schedule 33 of the Act gives the Environment Agency more robust powers to review any HS2 works that could:

(a) affect any drainage work which is or includes a main river or the volumetric rate of flow of water in or flowing to or from any main river,

(b) affect the flow, purity or quality of water in any main river or other surface waters or ground water, or

(c) affect the conservation, distribution or use of water resources;

As such, any HS2 work that could impact on the conservation features within the area, including flora and fauna reliant on the aquatic habitat, and the River Colne and local groundwater will be regulated through our robust powers under Schedule 33.

We have been working with HS2, their consultants, and other partners including the local water company for over 10 years. This has been vital in understanding the potential impact of the construction and operation of HS2 works on nearby surface waters and ground water, including the local Source Protection Zones.

Schedule 33 of the Act contains the relevant powers for the Environment Agency to regulate the HS2 development to reduce any impact on the environment and water supplies. Our remit under Schedule 17 of the Act does not extend to cover these impacts, which is the reason that we did not respond to this consultation.

The proposed diversion of the River Colne (including any potential impacts on nature conservation interests) will be considered by the Environment Agency under Schedule 33 of the Act. Our remit under Schedule 17 of the Act offers no additional value over and above our powers under Schedule 33."

64. I note the EA's view that the Appellant should 'twin-track' their Schedule 17 and Schedule 33 applications and understand the Council's apparent frustration that this has not occurred. Nevertheless it is reasonable to expect the Council to have had regard to the EA's clearly expressed position in assessing potential impacts of the CVV on the water environment. Accordingly, I do not consider that the Council's request for further information to enable it to determine the application is justified.

Other matters

65. I have also given consideration to concerns raised by the Ministry of Defence (MoD) with regard to the potential for increased bird strike at RAF Northolt. I have noted the Appellant's response that the Colne Valley is already a large area containing numerous waterbodies and riverine environments. Given the proximity of large waterbodies either side of the viaduct that already support large numbers of wildfowl, the Appellant does not consider that the

landscaping proposals for small, shallow ponds and wetlands, which are designed to support, for example, invertebrates, amphibians, and smaller wetland birds (e.g. passerines and rails), will have any meaningful impact on the risk to aircraft using RAF Northolt. Noting that such matters do not form part of the determination of this Submission, the Appellant is willing to work collaboratively with the MoD in terms of its landscaping (whilst continuing to adhere to the EMRs) to ensure that any such risk is mitigated.

66. I agree with the Appellant that these matters are not relevant to the design and external appearance of the CVV and would not provide valid grounds for imposing a condition having regard to the provisions of Schedule 17(2) or (3).

Conditions

67. The Council suggested a number of conditions in the event of its main submissions not being supported at Section 12 of its Statement of Case, including conditions suggested by other parties.
68. The grounds for imposing conditions on a Schedule 17 approval are that the works ought to be modified and are capable of being so modified⁶. Paragraph 8.2 of the Guidance states that 'this power cannot be used to expand the types of things which are subject to approval, or the grounds on which approval may be withheld'. Paragraph 7.8 of the Guidance advises that planning authorities should not seek to control matters that are subject to other approvals under Schedule 17, and para 10.3 that conditions should not be imposed which conflict with or duplicate controls or commitments contained in the EMRs.
69. With regard to the suggested landscaping condition, landscaping works do not relate to the building or construction works that form the substance of the Schedule 17 submission. They will be the subject of a separate submission under paragraph 9 of Schedule 17. It is also the case that the suggested condition would require the Appellant to demonstrate a net gain in the ecological value of the area, which is outside the scope of the power to impose conditions under Schedule 17.
70. With regard to the suggested noise condition, this would be outside the scope of paragraphs 2 and 3 of Schedule 17, as it does not demonstrate why the works ought to be modified or are capable of being so modified.
71. With regard to the suggested Graffiti condition, this is concerned with ongoing management and maintenance, and would be expressly contrary to paragraph 7.5 of the Guidance, that Schedule 17 should not be used to control matters such as cleaning regimes. The Appellant set out the design measures which have been adopted to deter graffiti and vandalism in the JV Align Design Response to the Council's Statement.
72. With respect to the Fish Protection condition, the Council has not provided evidence to demonstrate that fish stocks are likely to be affected, or set out proposed changes to the design to avoid any such impact. Such impacts of the scheme were assessed as part of the ES and were found to be acceptable.
73. With regard to flood risk, the EA has stated that these matters are subject to a separate consenting process under Schedule 33 of the Act, and are addressed

⁶ Guidance Paragraph 8.1

in the EMRs. The proposed condition would therefore be an unnecessary duplication.

74. With regard to the conditions suggested by the MoD regarding bird-strike and construction cranes, the objectives of these proposed conditions (i.e. aviation safety and the operation of air traffic control) are not included in the very limited grounds for the refusal of a submission or the imposition of conditions. I have considered the potential for increased bird-strike above and agree that the submission proposals are very unlikely to have any impact on the safe operation of Northolt Airfield. With regard to construction cranes, the suggested condition would duplicate matters addressed in the EMRs, and Section 4.4 of the CoCP.
75. Finally, the Canals and River Trust (CRT) suggested conditions relating specifically to piers 19 and 20 adjacent to the canal to prevent graffiti, and a condition requiring the submission of additional details of specified building works. With regard to graffiti the Appellant considers that it is not necessary to impose such a condition as appropriate measures to reduce the likelihood of graffiti are already in place and already subject to the agreement with CRT which requires the Appellant to obtain consent from CRT prior to the commencement of any permanent or temporary work across or within 15 metres of the canal. With regard to the submission of additional details, the Appellant points to the need for consistency of design along the length of the CVV, which would make it inappropriate to introduce a requirement for individual elements to be approved separately. The soffit has been treated consistently to ensure it reads as a coherent structure and is already contained within the EMR requirements with which the Appellant is obliged to comply. Deterrence of bird perching would require a different design, rather than additional details and therefore falls outside the scope of paragraph 2(3). In my judgement these conditions would be unnecessary as other provisions are in place to ensure that the Appellant engages with CRT on works affecting the Canal. With regard to measures to discourage climbing of the piers closest to the canal, the Appellant considers that this would be best addressed through landscaping proposals to be part of a separate submission under paragraph 9, to avoid or minimise the need for security fencing. I agree that the objective of these conditions suggested by the CRT can be more appropriately addressed through other controls, and the attachment of the suggested conditions would be unnecessary.

Overall conclusion

76. 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 ES. Parliament has judged such impacts to be acceptable in the context of Phase 1.
77. The Council did not determine the application for approval of details but requested extensions of time for the submission of further information and consultation. I have found that the information provided by the Applicant was sufficient and adequate for the purposes of determining the Application and consider that the Council's request for further information was unwarranted. While the appeal submissions of both parties have been pointedly adversarial in character, HS2 did provide considerable further information and agreed to the Council's first request for an extension of time before resorting to appeal

against non-determination. In accordance with the collaborative approach advocated in the CoA judgment, it would always be far preferable for these matters to be resolved at the local level, and it is hoped that appropriate lessons may be learnt in the submission and determination of future Schedule 17 applications. However, where that is not achieved, the Act makes provision for an appeals process.

78. Paragraph 4.4 of the statutory guidance advises that the approvals process has been *“carefully designed to provide an appropriate level of planning control while not unduly delaying or adding cost to the project. Planning authorities should not, through the exercise of the Schedule seek to ... modify or replace controls already in place, either specific to HS2 Phase One such as the Environmental Minimum Requirements, or existing legislation such as the Control of Pollution Act or the regulatory requirements that apply to railways.”* While I acknowledge that this advice is not binding on the Council, in my view, the Council gave insufficient weight to the clearly expressed views of the relevant statutory consultees, who confirmed that they have no objections to the details submitted in respect of impacts on the water environment and ecology.
79. The conditions suggested by the Council and other parties would not be necessary to protect the environment or amenity and as such would not meet the National Planning Policy Framework and Planning Practice Guidance tests for conditions, or the limited circumstances in which conditions are permissible under the terms of paragraphs 5 and 7 of Schedule 17.
80. Accordingly, I conclude that there is no basis for me to withhold approval of the details contained in the Schedule 17 Submission to which this Appeal relates. The appeal should be allowed and approval should be given to the application as made under Schedule 17 of the Act, without any modification.

David Richards

INSPECTOR