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## Appeal Decision

No site visit made

**by Martin Whitehead LLB BSc(Hons) CEng MICE**

**an Inspector appointed by the Secretaries of State**

**Decision date: 27 May 2020**

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### Appeal Ref: APP/HS2/3

### Land within the Colne Valley in proximity to the A412 North Orbital Road, Denham Green, Buckinghamshire

- The appeal is made under paragraph 22(1), Schedule 17 of the High Speed Rail (London to West Midlands) Act 2017 (the Act) against the imposition of conditions on an approval of a Schedule 17 submission.
- The appeal is made by High Speed Two Limited (HS2 Ltd) against South Bucks District Council.
- The application Ref PL/19/3332/HS2, dated 26 September 2019, was approved on 19 February 2020 subject to conditions.
- The approved submission is relating to the design and external appearance of the Colne Valley Viaduct (part of Scheduled Work 2/1) and associated earthworks and the location of fencing.
- The conditions in dispute are Nos 1 and 2 which state that:
  1. *'Not to cause or permit the use of any part of the development until detailed planting plans have been submitted to and approved by the LPA specifying the species, distribution and maturity of all trees, plants and shrubs to be planted in accordance with 1MC05-ALJ-TP-DGA-CS01\_CL01-100243, 1MC05-ALJ-TP-DGA-CS01\_CL01-100244, 1MC05-ALJ-TP-REP-CS01\_CL01-000006 (Written Statement), and 1MC05-ALJ-TP-REP-CS01\_CL01-000005 (Design and Access Statement)] as part of the development and detailing the timescale for such planting and thereafter to carry out the development in accordance with the mitigating landscaping plans.'*
  2. *'No development approved by this permission within the highway boundary shall take place until full details of the means of vehicular access and any realignment of the A412 at Denham have been submitted to and approved in writing by the local highway authority under the provisions of Schedule 4 of the High Speed Rail (London to West Midlands) Act 2017. The approved details shall be completed to the satisfaction of the local highway authority before the commencement of the use of the Colne Valley Viaduct and the proposed access.'*
- The reasons given for the conditions are:
  1. *'To guarantee the landscape/ecological mitigation is delivered as per the indicative plan details and not thereafter altered.'*
  2. *'In the interests of public safety and to ensure that all road works associated with the proposed development are planned, approved in good time (including the statutory processes), undertaken to a standard approved by the local highway authority and are completed before the proposed development is brought into use.'*

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### Decision

1. Under paragraph 22(2), Schedule 17 of the Act, the appeal is allowed and the application Ref PL/19/3332/HS2 for a Schedule 17 submission relating to the design and external appearance of the Colne Valley Viaduct (part of Scheduled Work 2/1) and associated earthworks and the location of fencing on land within the Colne Valley in proximity to the A412 North Orbital Road, Denham Green,

Buckinghamshire, approved on 19 February 2020 by South Bucks District Council, is varied by deleting Conditions 1 and 2.

### **Procedural Matters**

2. Following the appeal, Buckinghamshire Council (the Council) replaced South Bucks District Council, Buckinghamshire County Council and Aylesbury Vale, Chiltern, and Wycombe District Councils in April 2020.
3. 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 2017. Acting as the determiner under the powers specified in Regulation 12 of the Regulations, I have determined that a site visit is unnecessary.

### **Main Issues**

4. The main issues are whether the Conditions satisfy the relevant statutory tests; and whether Condition 1 is necessary to ensure that adequate landscape/ecological mitigation would be provided; and whether Condition 2 is necessary to protect public safety.

### **Relevant Legislation and Guidance**

5. 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.
6. 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.'*
7. The Submission relates to the design and external appearance of The Colne Valley Viaduct, 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.
8. 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).'*

9. For earthworks and fencing, paragraph 3 provides:

*'(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 sub-paragraph (6) in relation to the work in question.'*

10. 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....*'.

11. Paragraph 10.5 of the Guidance provides that the requirements of paragraph 206 of the National Planning Policy Framework (2012) (2012 NPPF) apply to the imposition of conditions under Schedule 17 of the Act. The 2012 NPPF has since been replaced by the National Planning Policy Framework published in February 2019 (NPPF) and paragraph 55 is now the relevant paragraph relating to planning conditions. This states that: '*Planning conditions should be kept to a minimum and only imposed where they are necessary, relevant to planning and to the development to be permitted, enforceable, precise and reasonable in all other respects.*'

## **Reasons**

12. The Appellant has indicated that the submission is required to facilitate the delivery of the Colne Valley Viaduct, part of its northern embankment and abutment, its southern embankment and abutment, replacement floodplain storage earthworks for the River Colne and Newyears Green Bourne, earthworks for drainage ditches and wetland habitat creation and the location of fencing, including a vehicle restraint system. The Council has approved the submission but has attached two conditions to its approval, against which the Appellant is appealing under the Act.
13. With regard to the statutory test, in order to justify the imposition of the Conditions under the terms of the Act, the Council must demonstrate that the Works ought to be modified and that they are reasonably capable of being so modified. The reasons given for Condition 1 state that it is to ensure that landscape/ecological mitigation is delivered as per the indicative plan details, referred to as '*the mitigating landscaping plans*' in the Condition. As such, it requires compliance with indicative measures which have been submitted and does not involve any modifications. Condition 2 refers to the provisions of Schedule 4 of the Act and is therefore a compliance condition that seeks no modification. Consequently, neither Condition is seeking to modify the submission and so both Conditions are not within the constraints on decision making provided in paragraphs 2(5) and 3(6) of Schedule 17 to the Act.
14. Condition 1 effectively duplicates the controls set out in Schedule 17 paragraph 9, which prevents work to which that paragraph applies from being brought into use without the approval of the qualifying authority; and paragraph 12, which requires the restoration of the site in accordance with a scheme agreed with the relevant planning authority. The Council has indicated that Condition 1 seeks to do no more than ensure that the landscaping scheme that has been provided with the Schedule 17 submission is subsequently delivered at the appropriate time. As such, the Council, as the 'qualifying authority', has accepted that there are existing controls. It has stated that it would like to clarify these controls at the later stages during the implementation of the constructed works and indicates that it is a matter of timing which is the most imperative aspect. However, this conflicts with paragraph 4.4 of the Guidance, as it seeks to replicate controls already in place.
15. The Condition also requires the mitigation measures to be delivered in accordance with indicative plans previously provided for information purposes only. This amounts to a modification of paragraphs 9 and 12, which directly conflicts with the Guidance. In this respect, the Council has referred to the HS2 Independent Design Panel (IDP) that has been consulted throughout the

design process. However, the Final IDP Report notes that the landscape proposals are 'indicative' and does not suggest that a condition should be applied to secure those indicative works. Although the Report states that the IDP's support of the landscape design is to be, '*intrinsically linked to the delivery of the indicative landscape presented,*' it also accepts that this cannot be secured at the current stage and '*welcomes the intention to provide the local planning authorities with a level of assurance on the landscape through the Design and Access Statement and the Indicative Mitigation Details document.*' As such, the Final IDP Report does not suggest that a condition to require compliance with the mitigating landscaping plans is required and it recognises that these plans are indicative.

16. The Council has indicated that Condition 2 is to ensure the timely delivery of all highway works to safeguard the appropriate design standards in advance of the super structure of the Colne Valley Viaduct in order to satisfy the requirements of Buckinghamshire County Council as the local highway authority. The Condition requires the submission of details to be approved under the provisions of Schedule 4. Schedule 4 gives the nominated undertaker powers for Phase One purposes to form and lay out means of access and improve existing means of access at any place within the Act limits. The Council has accepted that Schedule 4 gives the local highway authority the opportunity to consider the impacts of development and the ability to withhold consent if safety is compromised. Therefore, the controls contained in the Act that bind the Appellant to comply with Schedule 4 already cover the requirements of the Condition. As such, the Condition, which effectively requires compliance with Schedule 4, is unnecessary.
17. Condition 2 requires full details of the means of vehicular access and any realignment of the A412 at Denham to be submitted to, for approval by, the local highway authority which gives a greater level of control than is given under Schedule 17. This is in direct conflict with the Guidance, as it could result in a modification of Schedule 4.
18. The National Planning Practice Guidance advises that conditions requiring compliance with other regulatory regimes will not meet the test of necessity under the NPPF. Therefore, Conditions 1 and 2 are not necessary and fail to comply with the Guidance.
19. For the reasons given above, I conclude that Conditions 1 and 2 fail to satisfy the relevant statutory tests and Condition 1 is not necessary to ensure that adequate landscape/ecological mitigation would be provided; and Condition 2 is not necessary to protect public safety. Therefore, having regard to all matters raised, I conclude that the appeal should succeed. I will vary the approval of the submission by deleting the Conditions.

*M J Whitehead*

INSPECTOR