The Planning Inspectorate

Appeal Decisions

Site visit made on 3 October 2022

by Adrian Hunter BA(Hons) BTP MRTPI

an Inspector appointed by the Secretary of State

Decision date: 24 May 2023

Appeal A Ref: APP/HS2/20
Land to the south of the M6-M42 Link Motorway, west of the M42 and north of Gilson Drive.

- 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 validate and therefore determine within the specified timescale a request for approval for plans and specifications submitted under Schedule 17 of the Act for works comprising excavation and restoration of a borrow pit.
- The appeal is made by High Speed Two (HS2) Limited against the decision of Warwickshire County Council.
- The application was dated 11 February 2022.

Appeal B Ref: APP/HS2/21
Land to the south of Vicarage Lane and Coleshill Road, Water Orton and to the north of the M6-M42 Link Motorway.

- 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 validate and therefore determine within the specified timescale a request for approval for plans and specifications submitted under Schedule 17 of the Act for works comprising excavation and restoration of a borrow pit.
- The appeal is made by High Speed Two (HS2) Limited against the decision of Warwickshire County Council.
- The application was dated 18 January 2022.

Decision

1. Appeal A is allowed and the Submission Ref APP/HS2/20, dated 11 February 2022, for a Schedule 17 submission for the approval of plans and specifications for the provision of a borrow pit at land to the south of the M6-M42 Link Motorway, west of the M42 and north of Gilson Drive X (Easting): 418472, Y (Northing): 289987 is approved.

2. Appeal B is allowed and the Submission Ref APP/HS2/21, dated 18 January 2022, for a Schedule 17 submission for the approval of plans and specifications for the provision of a borrow pit at land to the south of Vicarage Lane and Coleshill Road, Water Orton and north of the M6-M42 Link Motorway X (Easting): 418368, Y (Northing): 290307 is approved.

Procedural Matters

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 Levelling Up, Housing and Communities to determine the

appeals 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[1].

4. I visited the area affected by the submissions on an un-accompanied basis on 3 October 2022, viewing the land from both the public highway and publicly accessible footpaths.

5. Both appeals were made on the basis of the Council's failure to validate, and thereby fail to determine the submissions within the prescribed period. Paragraph 22(3) of Schedule 17 requires the planning authority to notify the nominated undertaker, in this case the Appellant, of its decision on the application within the appropriate period. In failing to determine the submissions within this timeframe, the Council are deemed to have refused the applications.

6. In considering the submissions, I have dealt with both appeals together. However, where a particular issue relates to a specific appeal, then I have clearly identified this. Any reference to the proposed development should be read as referring to both Appeal A and Appeal B.

Main Issues

7. I consider the main issues in both appeals to be; whether the proposed development falls within the remits of the Act and, if so, whether the proposed development would satisfy the requirements as set out in Schedule 17 for such submissions.

The Submissions

8. The appeals relate to the proposed provision of two borrow pits.

9. Borrow Pit 1 (Appeal B) would be located on land to the south of Vicarage Lane and Coleshill Road, Water Orton and to the north of the M6-M42 Link Motorway. The proposal would involve the excavation of bulk materials to a maximum depth of 3.17m below existing ground level, temporary stockpiling of construction material and arisings within the site, along with a scheme of backfill and restoration.

10. Borrow Pit 2 (Appeal A) would be located on land to the south of the M6-M42 Link Motorway, west of the M42 and north of Gilson Drive. The proposal would involve the excavation of bulk materials to a maximum depth of 5.92m below existing ground level, temporary stockpiling of excavated material within the Site, along with a scheme of backfill and restoration.

Relevant Legislation and Guidance

11. 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. Where works are proposed that are not specifically identified as Schedule 1 works, section 20(2) identifies that:

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

Where development authorised by this Act consists of the carrying out of a work which is not a scheduled work, subsection (1) does not apply if—

(a)the development is likely to have significant effects on the environment by virtue of factors such as its nature, size or location,

(b)the development is not exempt development within the meaning of the Environmental Impact Assessment Regulations, and

(c)the development is not covered by an environmental assessment in connection with the High Speed Rail (London - West Midlands) Bill

12. Section 20(3) specifies that Schedule 17 to the Act imposes conditions on that deemed planning permission.

13. With regards to determination of a submission via appeal, 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."

14. The Council is identified as a qualifying authority in the High Speed Rail (London – West Midlands) (Qualifying Authorities) Order 2017.

Reasons

The case for the Council

15. The Council consider that both borrow pits fall outside the scope of the Act. The basis for this conclusion is their position that both borrow pits are intrinsically linked to the works associated with the Bromford Tunnel Extension (BTE), given that the arisings from the BTE work would be used to backfill them both. The proposed developments were not specifically included within the proposals that were originally considered and subsequently approved by the Government. In the view of the Council, they have been introduced by the Appellant to provide an area for the disposal of the arising from the BTE project, which in their view also falls outside of the Act.

16. Furthermore, the Council submit that, due to their link to the BTE, the proposed developments should be subject to Environmental Impact Assessment (EIA). The Council's view is that due to the significant effects that would occur, the BTE should be subject to EIA, with any assessment work required to include an assessment of the environmental impact from the deposition of the material arising from the tunnelling operations. As no EIA has been undertaken for the proposed BTE and the fact that there is no mention or assessment of either borrow pits in the 2013 ES Vol 2 Community Forum Area Report CFA19 Coleshill Junction, the Council's view is that the proposed developments therefore do not qualify for deemed planning permission under Schedule 20(2).

17. In the opinion of the Council, unless the Appellant can show the proposed developments are related to scheduled work, they are not authorised development. Therefore, they do not form part of the Act, and do not benefit from deemed planning permission and therefore cannot be dealt with under Schedule 17 of the Act.

The case for the Appellant

18. The Appellant submits that both borrow pits fall within the Act Limits and, whilst not specifically identified as scheduled works, they are authorised under section 2(1) which identifies a number of activities that the nominated undertaker may carry out within the Act Limits. In support of their position, the Appellant refers specifically to 2(1)(i) which states - *carry out and maintain such other works, of whatever description, as may be necessary or expedient.*

19. As a result, the Appellant submits that, within the Act Limits, they can do anything listed within section 2(1) of the Act, provided it is for the purposes or in connection with the development as authorised by the Act and is necessary or expedient.

20. In the view of the Appellant, the description of works in the Act is purposefully broad to reflect the need for flexibility and to enable opportunities to be taken to reduce the impact of the development. As such, there is no legal requirement for section 2 works to be related to scheduled work in order to fall within the scope of the works authorised by the Act. In any event, the Appellant considers the proposed developments to be connected to a number of scheduled works, namely the construction of the embankments as part of the new Delta Junction. The sourcing of locally won material is considered by the Appellant to be expedient for the delivery of these works.

21. The Appellant therefore submits that the proposed works fall under 20(1) and, subsequently, fall to be dealt with under Schedule 17. The Appellant carries on to highlight that, even if it were considered they did not fall within 20(1), the proposed developments would not conflict with any of the criteria in section 20(2), which allows for non-scheduled works to be carried out. Therefore, in any event, the proposed developments benefit from deemed planning permission under the Act and the submissions fall to be dealt with under Schedule 17.

22. In relation to the link to BTE, the Appellant accepts that it is intended to use the arisings from this work to backfill the borrow pits. However, the Appellant submits that the primary purpose of the borrow pits is to source material locally to enable the development of the proposed earthworks associated with the Delta Junction. The opportunity to use the borrow pits for the disposal of arisings from BTE is considered to be a benefit in that it would see a reduction in the number of HGV movements on the public highway, with materials being delivered to the borrow pits via an internal haul road, as opposed to being disposed of off-site. The Appellant's position is that the proposed developments would be used to construct the Delta Junction regardless of the BTE project. Should BTE not proceed, then the Appellant's have submitted that material to backfill them would be sourced from elsewhere.

Inspector's conclusions

Whether the proposed developments fall to be considered under the Act

23. From the evidence before me, both borrow pits fall within the Act Limits, therefore on this basis, subject to the relevant sections, the proposed developments can be considered against the relevant provisions contained within the Act.

24. The Council have referred me to a number of ongoing appeals and legal issues in relation to BTE. In this respect, whilst there is a link between the BTE and the proposed developments, with the borrow pits having been identified as a potential location for the disposal of arisings from this tunnelling work, I do not agree with the Council that the proposed developments are intrinsically linked and therefore form part of the BTE. Given the location of the proposed developments and the need for substantial earthworks within their immediate vicinity in the form of the Delta Junction, in my view, the principal purpose of the proposed developments is to support this activity and not primarily the BTE.

25. The delivery of the Delta Junction is a fundamental element of Phase 1, which would be developed regardless of the outcome of the issues around BTE. Given their proximity, the potential to use the proposed developments for arisings from BTE is something that HS2 should be exploring in the interest of efficiency. To my mind therefore, the proposed developments are directly related to the scheduled works associated with the delivery of Delta Junction. From the evidence, I do not consider that the proposed developments are dependent upon the delivery of the BTE works. Neither do I consider the BTE works to be dependent upon the proposed developments. For this reason, I conclude that any link to the delivery of BTE is purely opportunistic, with the proposed developments not intrinsically linked to BTE.

26. In terms of the environmental impacts of the borrow pits, whilst both North Warwickshire Borough Council (NWBC) and Warwickshire County Council (WCC) have highlighted that they consider both developments to require EIA, there is limited evidence before me to support these conclusions. In contrast, the Appellant has provided an assessment of the proposed developments against a number of environmental issues, which concludes that neither of the borrow pits would give rise to any significant effects. On this basis, whilst I accept that the proposed developments would have some impact upon the environment, I am not persuaded by the submission of the Council that these would be significant so as to require the preparation of an EIA for either of the borrow pits, or in combination.

27. The HS2 London-West Midlands Environmental Statement (ES) provides an assessment of the impact of the proposed Delta Junction on a number of environmental issues. The ES was considered by the Parliamentary Select Committee when Phase One was approved through the passage of the Act and therefore these matters should also have been considered when the Act was passed. HS2 Ltd, as the nominated undertaker, is contractually bound to comply with the controls set out in the Environmental Minimum Requirements (EMRs). These controls, along with the powers contained in the Act and the Undertakings and Assurances, will ensure that impacts which have been assessed in the ES (as amended) will not be exceeded. Therefore, whilst the proposed developments may not have been included within the ES, there is no

substantive evidence before me to show that this assessment and these measures and controls would be exceeded.

28. In relation to the impact of the proposed developments upon biodiversity, NWBC raised concerns with regards to the lack of information in relation to presence or absence of protected species, and that, without this information it was not possible to fully consider either proposal. However, in this respect I note that, the ES assumed that all habitat would be cleared from the entire land within the Act Limits during the construction of Phase One. Therefore, in both cases, the baseline position for their consideration is that all habitat has been removed. As such, the appeal proposals would not result in any significant changes when compared against this baseline.

29. Based on the above, I conclude none of the conditions set out in section 20(2) of the Act apply to either of the proposed developments and they therefore benefit from deemed planning permission under the Act. It therefore follows that both appeals fall to be considered against the process set out in paragraphs 7 and 8 of Schedule 17.

Schedule 17

30. As both applications relate to the provision of borrow pits, paragraph 7 (Conditions relating to waste and soil disposal and excavation) of Schedule 17 applies. Paragraph 7 (6) identifies that the relevant planning authority may only refuse to approve plans or specifications for the purposes of this paragraph on a ground specified in sub-paragraph (7) or (8).

31. Sub-paragraph (7) identifies that:

The grounds in this sub-paragraph are that—

(a)the design or external appearance of disposal sites (in the case of the disposal of waste and soil) or borrow pits (in the case of excavation of bulk material from such pits) on land within the Act limits,

(b)the methods by which such sites or pits are worked, or

(c)the noise, dust, vibration or screening arrangements during the operation of such sites or pits,

ought to, and could reasonably, be modified.

32. Sub-paragraph (8) identifies that:

The grounds in this sub-paragraph are that in order to—

(a)preserve the local environment or local amenity,

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

(c)preserve a site of archaeological or historic interest or nature conservation value,

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

33. The Appellant's appeal submissions are supported by an Environmental Assessment Summary Paper, which, when compared to the baseline position, concludes that the proposed developments are unlikely to give rise to any significant environmental effects. The Council's view on the other hand is that the proposed developments would give rise to significant effects, however they have failed to produce any evidence to support this position.

34. With regards to the potential for the proposed development to generate noise dust and vibration, I note that both borrow pits are located within the working area for the construction of the Delta Junction. As a result, the surrounding area is subject to extensive and intensive construction activity, such that any additional effect that might occur from the working of the borrow pits would be seen and experienced within this context. Furthermore, such activities are controlled by the existing EMRs.

35. In relation to the proposed methods of working, no evidence is before me to suggest any alternative methods for the working of the proposed borrow pits. Whilst WCC raised a doubt that the proposed material to be extracted from both borrow pits may be unsuitable for the construction of embankments and other railway development, no detailed evidence is before me to support this.

36. The proposed developments would be likely to result in the provision of temporary spoil heaps, which, given the relatively flat nature of the surrounding area would have some visual effect. However, given the extent and scale of the surrounding construction activities, I do not consider this would be so adverse as to justify modification to the proposed developments.

37. It is intended that the borrow pits would be used to support and enable the development of the surrounding Delta Junction embankment work. Given the proximity of the borrow pits to these works, there would be efficiencies made within the construction programme through the use of the borrow pits. It therefore follows that it has not been demonstrated that the proposed development ought or can reasonably carried out elsewhere within the development's permitted limits under paragraph 7(8). I acknowledge the Council's submission in relation to consultation and the reference to HS2 Information Paper D12, but note this refers to Phase 2a, rather than Phase 1 and is therefore not material to the consideration of these appeals.

38. In conclusion, I have found the design and proposed method of working the borrow pits and that the noise, dust, vibration, and screening arrangements to be acceptable. As a result, there is no reason to conclude that the design or appearance of the borrow pits ought to be modified. There is no substantive evidence to conclude that the proposed developments can reasonably be carried out anywhere else within the development's permitted limits. Accordingly, there is no reason to withhold approval of the submitted details by reference to the provisions of paragraph 7 and 8 of Schedule 17 of the Act.

Other matters

39. Although there is no statutory obligation to consult on planning submissions under Schedule 17, I have noted the comments which the Council received in respect of the submission. Many of these comments relate to matters beyond the scope of the Schedule 17 application and are therefore not relevant in this case. I have had regard to those which are of relevance as set out above.

40. In relation to the level of information submitted in support of each proposal, the Council has expressed a concern in relation to the amount and detail of information before me to enable a proper and informed decision to be made.

41. Having reviewed both submissions, I consider that the Appellant's submissions are fully compliant with relevant guidance and regulations. I am aware of the Court of Appeal judgment, which identifies that the Council is not bound by the advice in the Planning Forum Notes (PFNs) and, if considered necessary to inform a proper assessment of the impacts of the schemes, they are entitled to seek further information in relation to the matters identified in the appropriate paragraphs. I also note that the judgment urges the parties to adopt a collaborative approach to avoid undue delay in the determination of Schedule 17 applications. However, all parties are expected to have regard to the advice in the PFNs regarding the extent and nature of information which should be provided, along with the Statutory Guidance. There is also a general principle applicable to project approvals that information requests should be reasonable and proportionate to the matters under consideration.

42. The drawings provided as part of the submission are at an appropriate scale and present sufficient information in relation to the location, nature, form and content of all specific works in compliance with the requirements of PFN2. Both submissions are accompanied by a written statement, which describes the proposals and assesses key impacts, in accordance with PFN3. Both submissions are accompanied by plans and mitigation measures, along with proposed restoration proposals. To my mind, these provide an appropriate level of detail to inform the decision on the Schedule 17 applications 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.

43. I conclude that the information accompanying the application, and that provided subsequently by the Appellant satisfies PFNs 1, 2, 3 and 10 regarding 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 have determined the Schedule 17 applications in accordance with its statutory duty.

Conclusion

44. 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.

45. The Council did not validate either of the appeal applications on the basis that both proposals fell outside of the Act and therefore could not be dealt with under Schedule 17. I have found that both proposed developments fall within the remit of the Act and therefore can be dealt with under Schedule 17, in particular paragraphs 7 and 8. When considered against these paragraphs, it has not been demonstrated that the proposals ought to be modified and that they can reasonably be carried out anywhere else within the development's permitted limits.

46. I have found that the information provided by the Appellant was sufficient and adequate for the purposes of determining these appeals.

47. No conditions have been put before me by the Council and, having reviewed both proposals, I consider that there are no conditions that could be attached which would be permissible under the terms of paragraphs 7 and 8 of Schedule 17.

48. Accordingly, I conclude that there is no basis for me to withhold approval of the details contained in the Schedule 17 Submissions to which these Appeals relate. Consequently, the appeals should be allowed, and approval should be given to the applications as made under Schedule 17 of the Act, without any modification.

Adrian Hunter

INSPECTOR