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## Appeal Decision

Site Visit made on 17 January 2024

by Alan Novitzky BArch(Hons) MA(RCA) PhD RIBA

an Inspector appointed by the Secretaries of State

Decision date: 19 February 2024

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### Appeal Ref: APP/HS2/24

**The site comprises the Princes Risborough to Aylesbury (PRA) Railway Line, which is located to the south-east of Aylesbury from West of Brooker Park School and extends Southwards to Marsh Lane, Buckinghamshire (Easting 482172 Northing 210523)**

- The appeal is made under paragraph 22(1), Schedule 17 of the High Speed Rail (London – West Midlands) Act 2017 (the HS2 Act) against the imposition of conditions on an approval of a Schedule 17, paragraph 9 submission.
- The appeal is made by High Speed Two Limited (HS2 Ltd) against the decision of Buckinghamshire Council.
- The application Ref 23/01921/HS2, dated 23 June 2023, was granted approval by notice dated 26 October 2023 subject to conditions.
- The approved submission relates to Work No 2/39 – A railway (1.47 kilometres in length) being a realignment of the Princes Risborough to Aylesbury Line Railway, commencing on that railway at a point 260 metres north of Marsh Crossing and terminating on that railway at a point 110 metres south-east of the junction of Batt Furlong with Westfield, and a scheme submitted for the purpose of mitigating the effect or operation of that Work.
- The conditions in dispute are:

**Condition 1: Landscape Management Plan**

*Pursuant to Schedule 17 paragraph 9(5) High Speed Rail (London – West Midlands) Act 2017 and notwithstanding the planting scheme of mitigation approved on drawing numbers Sheet 1 1MC06-CEK-TP-DPL-CS03\_CL17-000045 Revision 01, Sheet 2 1MC06-CEK-TP-DPL-CS03\_CL17-000045 Revision 01, and Sheet 3 1MC06-CEK-TP-DPL-CS03\_CL17-000046 Revision C01, the scheme is to be modified to include a landscape management plan. This landscape management plan has been prepared and approved as part of this consent (PRA LMP Rev01) and should be followed and adhered to for the operational lifetime of the Schedule Work 2/39.*

**Condition 2: Drainage Management and Maintenance Plan**

*Pursuant to Schedule 17 paragraph 9(5) High Speed Rail (London – West Midlands) Act 2017 and notwithstanding the scheme of mitigation hereby approved, the scheme is to be modified to include a drainage management plan. This drainage management plan has been prepared and approved as part of this consent (2022s1393) and should be followed and adhered to for the operational lifetime of the Scheduled Work.*

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## Decision

1. The appeal is allowed and the approval of application Ref 23/01921/HS2, granted by notice dated 26 October 2023, is varied by the deletion of Conditions 1 and 2.

## Preliminary Matters

2. I have been appointed under Schedule 17, paragraph 23(1) of the Act to determine the appeal on behalf of the Secretaries of State. I visited the Site and its surroundings on 17 January 2024, was given access to land within the Site and saw the principal features of the Work.

## Legislation and Guidance

3. The Council is identified as a qualifying authority in the High Speed Rail (London – West Midlands) (Qualifying Authorities) Order 2017. As such, the Council may only refuse to approve plans or specifications on the grounds set out in Schedule 17 of the Act.
4. Paragraph 22(2), Schedule 17 of the HS2 Act (Appeals) 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.'*
5. Paragraph 26(1) of Schedule 17 to the HS2 Act empowers the Secretary of State (SoS) 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.
6. In exercise of this power, the SoS published Guidance which was updated on 20 November 2023. Paragraph 20 of the Guidance states that planning authorities should not through the exercise of the schedule seek to modify controls already in place, either specific to HS2 such as the environmental minimum requirements (EMRs), other controls in the Act, or existing legislation such as the Control of Pollution Act or the regulatory requirements that apply to railways.
7. Paragraph 23 of the Guidance states:  
*'Mitigation schemes to be approved under paragraph 9 of Schedule 17, or site restoration schemes to be agreed upon under paragraph 12 relate to the physical measures to be carried out. It is accordingly inappropriate for planning authorities to seek to control maintenance, management and monitoring of mitigation measures through Schedule 17. The requirement to maintain, manage and monitor mitigation is addressed through the EMRs (see, for example, sections 4.6, 4.7 and 4.8 of the environmental memorandum). One specific exception to this is set out in paragraph 8 of Schedule 17 which deals with site restoration schemes for waste and spoil disposal sites and borrow pits. This provides that a scheme may include provision about*

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*aftercare, and it is clear that in this case, the planning authority's responsibilities extend to considering maintenance, management and monitoring of the site.'*

8. Paragraph 58 of the Guidance states that the requirements of paragraphs 55 to 56 of the National Planning Policy Framework (NPPF) apply to the imposition of conditions for approvals under Schedule 17.

## **Main Issues**

9. The main issues are whether the Conditions accord with legislative provisions and statutory Guidance, whether they ought to be applied to preserve the local environment or local amenity and, if so, whether they satisfy the tests set out in the NPPF.

## **Reasons**

10. The Council suggests a reasonable interpretation of Schedule 17 para 9 (bringing into use) could include taking measures to ensure that the mitigation endures for the whole life of the operation.<sup>1</sup> However, whilst the longevity of the physical measures comprising the mitigation should be seriously considered, the Guidance makes clear that planning authorities should not seek to control the maintenance, management and monitoring of mitigation measures.
11. The Council observes that the High Speed Rail (London – West Midlands) (Greatmoor Sidings, Etc.) Order 2018 has conditions applying to both landscape maintenance and surface water drainage maintenance.<sup>2</sup> However, for ecological and other reasons, this order was made under the Transport and Works Act (TWA), which provides for the importation of the provision of such conditions from the Town and Country Planning Act 1990 (TCPA). Schedule 17 of the HS2 Act provides for maintenance conditions only in the limited circumstances set out in the Schedule and noted in the Guidance.

### *CONDITION 1 - LANDSCAPE*

12. The Council suggests that the Landscape Maintenance, Management and Monitoring Plan (LMMMP) included in the bringing into use approval dated 17 March 2022 for Bottom House Farm Lane set a precedent for future use.<sup>3</sup> However, the approval predates the recent revision of the Guidance. Moreover, the Appellant observes that the approach was followed in error in that particular case.
13. Except for the small number of sensitive sites listed, EMR Annex 4: Environmental Memorandum does not require any form of landscape management plan. It sets out aims, mechanisms, and principles for landscape design and maintenance, but does not specify the means of achieving them. Paragraph 4.6.10 states that the nominated undertaker shall maintain to an appropriate horticultural standard landscaped areas to ensure that the project's essential planting scheme successfully establishes and develops to achieve its mitigation objective for an appropriate period of time in-line with principles set out in HS2 Information Paper *E16: Maintenance of Landscaped Areas*.

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<sup>1</sup> Council's Statement of Case (CSC) para 2.3

<sup>2</sup> CSC para 2.23

<sup>3</sup> Council's Ref PL/21/4324/HS2, CSC Appendices D4 and D5

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14. Paragraph 4.6.11 notes that after an initial period of maintenance, where agreement can be reached, the nominated undertaker will seek to return the majority of land to previous landowners or other interested parties to ensure the continued objectives of landscaped areas are maintained into the future. In addition, the Register of Undertakings and Assurances confirms and adds detail to these processes.<sup>4</sup>
  15. Under the Development Agreement between the SoS and HS2, however, the ultimate responsibility for maintenance of the landscaped areas remains with the nominated undertaker. It would be for the SoS to enforce the requirements of the Development Agreement on any matter, including landscape maintenance.
  16. The Council is concerned that the EMR suite and the HS2 Information Paper E16 are too generalised, do not recognise the variability both in mitigation proposals and in the sites on which the mitigation is proposed, and do not provide sufficient certainty. Further, that once planted, the mitigation will require different management operations to ensure it establishes and develops correctly depending on where it is found. For instance, planting on exposed embankments subject to high winds may require staking for longer periods, and planting on poor soils will establish more slowly and may need watering or replacement at greater frequency than would planting on deep rich soils.<sup>5</sup>
  17. The Council also refers to the report of the HS2 Independent Design Panel following its involvement in the pre-application process for a separate project, the Colne Valley Viaduct. The panel, whose comments are advisory, recommended setting up a strategy for the long-term management and maintenance of the landscape, identifying responsibilities and liabilities and suggested there would be significant advantages in making this explicit in the Schedule 17 application.<sup>6</sup>
  18. Whilst the Council's concerns are understandable, it cannot be assumed that, without control by the Council, matters will be neglected. Had the site been particularly sensitive, the EMR would have required a landscape management plan and HS2 would have been responsible for its administration, just as it will for the present project mitigation works. Moreover, unlike the Colne Valley Viaduct, which comprises a key design element within a landscape context warranting special consideration, the former PRA line occupied a similar alignment to its replacement on the present site, providing an existing landscape framework to repair and develop.
  19. In these circumstances, I see no reason to depart from the statutory Guidance regarding control of the maintenance, management and monitoring of the landscape mitigation measures proposed, which makes explicit the Schedule 17 provisions.

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<sup>4</sup> The Register, which form part of the EMR suite, records commitments given by the Promoter during the passage of the Bill. In particular, Assurance 69 states that for the smaller percentage of land that is required to remain under railway ownership, the nominated undertaker will appoint a managing company to ensure the adequate maintenance of landscapes. Also, Assurance 1946 suggests that the other interested parties to whom land could be returned might include local wildlife trusts, woodland trusts, or local authorities.

<sup>5</sup> CSC para 2.10

<sup>6</sup> CSC para 2.12

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## CONDITION 2 - DRAINAGE

20. The Council's Officer Report notes that the former PRA line discharged water unattenuated from the track, whereas the proposed HS2 line has catchments draining to Stoke Brook, and to an existing land drainage ditch. The Report observes that this arrangement is likely to result in a betterment to the overall drainage scenario following development.<sup>7</sup> HS2's cover letter, dated 23 June 2023, to the bringing into use application, notes that the track drainage has received Schedule 33(5) (Protective Provisions) approval, which deals with elements such as diversions, culverting and outfalls.
21. However, the Officer Report observes that the consideration of SuDS design and associated flood risk is not a requirement of Schedule 33 and has not been assessed by either the Environment Agency (EA) or the Local Lead Flood Authority (LLFA). The Consultees confirm this in their responses, and the LLFA adds that no consenting authority with responsibilities for surface water drainage is specified in the HS2 Act.<sup>8</sup>
22. The Council considers, therefore, that a drainage management and maintenance plan is required as a condition attached to the bringing into use approval, based on the condition attached to the Greatmoor Sidings TWA Order. They add that this would allow enforcement action to be taken through the TCPA, if necessary, since HS2 cannot be relied upon for effective self-regulation.<sup>9</sup>
23. The Appellant maintains that the drainage of the railway does not constitute mitigation, since it is an integral part of the design of the scheme and is essential to allow it to operate. Consequently, it cannot be considered as bringing into use mitigation to be approved under paragraph 9 of Schedule 17. The Appellant points out that Planning Forum Note 7 (PFN7) deals with bringing into use approvals and sets out the information to be supplied relating to mitigation in ecology, landscape, community effects, and noise. However, it does not refer to drainage. Further, the EMR places responsibility on HS2 to maintain the continuity of surface and groundwater flows and its quality by, amongst other methods, the use of SuDS.<sup>10</sup>
24. Further, the Appellant explains that the railway network operator's licence, granted under the Railways Act 1993, obliges it to manage and maintain the railway. This responsibility does not depend on the operator being formally assigned the role of nominated undertaker. Network Rail (NR) has operated the realigned PRA track since it reopened and, from that time, has assumed responsibility for the management and maintenance of its assets, including drainage.<sup>11</sup>
25. NR is bound by the provisions of its own Drainage Systems Manual, which sets out a mandatory system of procedures intended to mitigate the risk of drainage failure by promoting a co-ordinated approach to the management of railway drainage assets. Moreover, NR's adherence to environmental policy,

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<sup>7</sup> Officer Report and Recommendation, pages 18 and 19

<sup>8</sup> Ibid, Appendix A, pages 25 and 28

<sup>9</sup> CSC para 2.19

<sup>10</sup> Annex 4, para 4.10.1 second bullet

<sup>11</sup> NR's Asset Management Policy, Appendix E of the Appellant's Response to CSC confirms at page 4 that drainage is included in NR's assets.

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operational objectives, and management arrangements is regulated by the Office of Rail and Road on behalf of the SoS.<sup>12</sup>

26. NR normally monitors and manages its associated drainage systems, subject to the requirements of its licence and the oversight of regulatory bodies. Moreover, the development appears likely to lead to betterment in drainage effects, easing flooding concerns.
27. In these circumstances, I see no reason to depart from the statutory Guidance regarding control of the maintenance and management of drainage, which makes explicit the provisions of Schedule 17.

#### *RELEVANT CASELAW*

28. The Council refer to the Court of Appeal case known as Hillingdon 1,<sup>13</sup> in which the role of statutory guidance and the EMR suite were tested in relation to the statutory duties of the qualifying authority.
29. Paragraph 68 of the judgment states:
- 'Nothing in the Statutory Guidance or the EMR can, in law, oust the statutory duty [of a qualifying authority] or in any way modify or limit it; and indeed nothing in these instruments even purports so to do.....At their highest, they contain matters which, in the performance of its statutory duty an authority should take into account.'*
30. The Council argues that the reasonably practical measures which need to be taken for the purpose of mitigating the effect of the work or its operation on the local environment or the local amenity under para 9(4) of Schedule 17 includes measures for long-term maintenance and management. They then observe that Hillingdon 1 demonstrates that this provision cannot be overridden by Guidance or the EMR suite.
31. However, para 8(5) of the Schedule, which refers to the restoration of land used for waste and soil disposal and excavation, specifically states that a scheme for the restoration of land may include provision about aftercare. Had the same been intended for the approval of bringing into use schemes, para 9 would have included equivalent wording. Paragraph 23 of the Guidance is explicit about this interpretation.
32. The Council also point to paragraph 76 of the Hillingdon 1 judgment which states, *'....nothing in the EMRs indicate that HS2 Ltd can decline to furnish the authority with the relevant and necessary information in order for the authority to perform its statutory duty...'* The Council argues that the commitments to landscape and drainage management and maintenance within the application fail to provide sufficient details of the effect [of] mitigation measures to ensure preservation of the local environment and local amenity.<sup>14</sup>
33. However, since the approval of management and maintenance measures lies outside of the authority's statutory duties under para 9 of the Schedule, this point carries no weight.

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<sup>12</sup> Appellant's Response to CSC paras 3.11-3.21

<sup>13</sup> Neutral Citation Number: [2020] EWCA Civ 1005

<sup>14</sup> CSC para 2.50

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## *CONCLUSIONS*

34. I conclude on the main issues that the conditions proposed do not accord with legislative provisions or statutory Guidance and that they ought not to be applied to preserve the local environment or local amenity. The tests set out in the NPPF therefore do not need to be considered.

**Alan Novitzky**

INSPECTOR