



Department
for Transport



Department for Levelling Up,
Housing & Communities

Kate Radford
Eversheds Sutherland (International) Ltd
115 Colmore Row,
Birmingham
B3 3AL

Our ref: APP/HS2/18
Your ref: HS2/2021/0005

14 May 2024

Dear Madam

**HIGH SPEED RAIL (LONDON TO WEST MIDLANDS) ACT 2017 – SCHEDULE 17
APPEAL MADE BY HIGH SPEED TWO LIMITED (HS2 LTD) AGAINST THE DECISION
OF NORTH WARWICKSHIRE BOROUGH COUNCIL TO DECLINE TO DETERMINE THE
REQUEST FOR THE APPROVAL OF PLANS AND SPECIFICATIONS MADE UNDER
SCHEDULE 17 COMPRISING THE WATER ORTON CUTTING INCLUDING THE
BROMFORD TUNNEL EAST PORTAL AND ATTLEBORO LANE OVERBRIDGE AND
ANCILLARY WORKS
APPLICATION REF: HS2/2021/0005**

This decision was made by Lord Davies of Gower, Parliamentary Under Secretary of State (Maritime and Security) on behalf of the Secretary of State for Transport, and Baroness Scott of Bybrook, Parliamentary Under Secretary of State (Faith and Communities and Lords Minister) on behalf of the Secretary of State for Levelling Up, Housing and Communities

1. We are directed by the Secretary of State for Transport and the Secretary of State for Levelling Up, Housing and Communities (henceforth “the Secretaries of State”) to say that consideration has been given to the report of the Inspector, Grahame Gould BA MPhil MRTPI, dated 31 March 2023 and addendum report dated 13 December 2023, regarding your client’s appeal against the decision of North Warwickshire Borough Council (the Council) to decline to accept and determine your client’s application under Schedule 17 to the High Speed Rail (London – West Midlands) Act 2017 (the HS2 Act) for the following works:
 - The undertaking of engineering earthworks, including the formation of a concrete lined cutting, to become part of the “Water Orton Cutting” (the cutting). The cutting would comprise concrete retaining walls, including “diaphragm” (buried) walls, with the parallel facing retaining walls being supported by concrete joists (props) above the diaphragm walls.

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- A new road bridge, the Attleboro Lane overbridge, consisting of a two lane carriageway with footways on either side, which would carry the diverted Attleboro Lane over the cutting. The diverted Attleboro Lane would in part be on newly formed embankments.
- The formation of a concrete tunnel portal structure, the 'Bromford Tunnel East Portal' (the BTEP) at the western end of the cutting. The portal would be of a porous design, i.e. have openings in its roof. The porous nature of the portal being intended to control the build-up of noisy pressure waves (piston effect) as trains exit a tunnel.
- Ancillary works including the provision of: maintenance vehicle parking areas; a balancing pond; and boundary and security fencing and vehicle restraint barriers.

under application ref: HS2/2021/0005, dated 22 September 2021 ("the Schedule 17 application").

2. On 9 August 2022, the parties were notified that this appeal would be subject to joint determination by the Secretaries of State, in pursuance of paragraph 23(1) of Schedule 17 to the HS2 Act. The HS2 Act authorises the construction of the HS2 railway from London to the West Midlands and comprises Phase One of the project. The HS2 Act gives the appellant the power to construct and maintain the works specified in Schedule 1 and the scheduled works are listed in full in that schedule. The appealed Schedule 17 application relates to the area covered by scheduled work number (WN) 3/157.

Inspector's recommendation and summary of the decision

3. The Inspector recommended that the appeal be dismissed with regards to the request for the approval of details relating to the formation of the BTEP. He recommended that the appeal be allowed with regards to the request for the approval of details concerning: the formation of the Water Orton Cutting, insofar as those works would be unconnected with the tunnel portal; and the Attleboro Lane Overbridge.
4. For the reasons given below, the Secretaries of State disagree with the Inspector's conclusions, and disagree with his recommendation. They have decided to allow the appeal in full. A copy of the Inspector's report (IR) and the addendum report (AR) are enclosed. All references to paragraph numbers, unless otherwise stated, are to these reports.

Policy and statutory considerations

5. In reaching their decision, the Secretaries of State have had regard to Schedule 17 of the HS2 Act and the High Speed Rail (London – West Midlands) Act 2017 Statutory Guidance (the Statutory Guidance).

Main issues

6. The Secretaries of State consider the main issues in determining this appeal are:
 - a. whether the Bromford Tunnel Extension (BTE) and relocation of the BTEP are authorised under the HS2 Act;
 - b. whether none, some or all of the proposed works subject to the request for the approval of details under Schedule 17 would benefit from the deemed planning permission (DPP) granted under section 20 of the HS2 Act; and

- c. for any proposed works included in the application benefiting from the DPP, whether those works should be approved or refused having regard to the conditions stated in either paragraphs 2 or 3 of Schedule 17 to the HS2 Act.

Whether the BTE and associated BTEP relocation are authorised under the HS2 Act

7. As set out at IR31, the Secretaries of State note that the BTE is an unscheduled work, i.e. one not listed in Schedule 1 to the HS2 Act. They further note that the appellant argued (as recorded at IR33) that the relocated BTEP would be within the ambit of section 2(1)(i) of the HS2 Act which states:

'The nominated undertaker may, for the purposes of or in connection with the scheduled works or otherwise for Phase One purposes, do any of the following within the Act limits ... (i) carry out and maintain such other works, of whatever description, as may be necessary or expedient.'

8. Contrary to the Inspector's conclusion (in particular at IR39), the Secretaries of State agree with the interpretation of section 2(1)(i) of the HS2 Act advanced by the appellant. They find that section 2(1)(i) is sufficiently broad to cover an extension to a tunnel, and ancillary works to such an extended tunnel such as the BTEP relocation. The Secretaries of State therefore consider that the BTEP is authorised under the HS2 Act.

Whether the proposed works benefit from DPP

BTEP relocation

9. The Secretaries of State note that to establish whether the BTEP has DPP, consideration must next be given to sub-section (2) of Section 20 of the HS2 Act. Sub-section (2) states that the deemed planning permission granted by sub-section (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; (c) the development is not covered by an environmental assessment in connection with the High Speed Rail (London – West Midlands) Bill. Sub-section (2)(b) does not apply to the application.
10. The Inspector found that as an environmental assessment for the BTE was not reported on in the original ES he was not persuaded that a portal associated with the proposed BTE should be looked upon as benefitting from the DPP (IR43).
11. The Secretaries of State disagree with this conclusion. They find that for the purposes of sub-section (2)(c) of Section 20 development is "covered by an environmental assessment in connection with the High Speed Rail (London – West Midlands) Bill" where there are no new or different likely significant effects to those reported in the environmental assessment. The Secretaries of State do not agree that sub-section (2)(c) should be construed as excluding any development which differs from the detailed description set out in the ES which was placed before Parliament.
12. The interpretation favoured by the Secretaries of State is supported by the Environmental Minimum Requirements (EMRs) and HS2 Information Paper E1: Control of Environmental Impacts. These were published in draft during the passage of the HS2 Bill, and published in final form about the time of Royal Assent. The EMRs state that the intention of the provisions of the HS2 Act and the EMRs is to *'ensure that impacts which have been assessed in the ES will not be exceeded'*. The Secretaries of State therefore consider that development where there are no new or different likely significant effects to

those reported in the ES can fall within sub-section (2)(c). When read in their proper context, sections 20(2)(c) and 68(4) of the HS2 Act should be regarded as bringing within the ambit of the DPP those works which would not result in new or different likely significant effects to those assessed in the ES.

13. The Secretaries of State note that the BTE now proposed is longer and the BTEP is in a different location to that assessed in the ES which was placed before Parliament. However, the Secretaries of State are mindful that, as recorded at IR19, in February 2021 the appellant made an Environmental Impact Assessment (EIA) screening request for the BTE. This concluded that no new or different significant effects would be generated by the revised scheme. Accordingly, the BTE and the relocation of the BTEP is not a scheduled work, but does not introduce any new or different likely significant effects to those assessed in the ES. In reaching this conclusion the Secretaries of State have had regard to the matters referred to in the IR and AR (including at IR41, IR 45, AR16 and AR23) as potential environmental effects of the proposals, but conclude that none of these matters amounts to a new or different likely significant effect to those assessed in the ES.
14. The Secretaries of State therefore conclude that the BTE and the relocation of the BTEP benefits from deemed planning permission under the HS2 Act.

All other non BTEP related works

15. Taking the works not associated with the BTEP in isolation, for the reasons given at IR49 the Secretaries of State agree that the overbridge and diversion of Attleboro Lane; formation of the cutting insofar as that work does not form part of the tunnel portal; balancing pond; formation of the maintenance vehicle parking areas insofar as they do relate to the tunnel portal; and installation of permanent fencing, are all works benefitting from DPP.

Whether the works benefitting from the DPP should be approved or refused

BTEP relocation

16. The Secretaries of State have found that the BTEP relocation benefits from DPP. They requested that the Inspector submit an AR which provided recommendations relating to the BTEP's design with reference to the conditions included within Schedule 17 or any changes to operational noise levels or air quality or to comment on any of the benefits that the appellant has attributed to an extension to the Bromford Tunnel.
17. The Secretaries of State agree at AR11 that the BTEP would largely be a subterranean structure. They further agree that the above ground elements of the BTEP, for which approval has been sought at this time, of themselves would not be unduly prominent and their appearance would be capable of being softened through the undertaking of soft landscaping (AR11). Whilst the BTEP is not a scheduled work, details for soft landscaping could form part of a future bringing scheduled works into use request pursuant to paragraph 9 of Schedule 17 in relation to the railway.
18. The Secretaries of State note that above ground structures would be required to facilitate the BTEP's operation as described at AR12-13. They further note that the appellant has expressly excluded a request for the approval of the plans and specifications for the

above ground structures from the appealed Schedule 17 application (AR15). The Secretaries of State agree with the Inspector's conclusion at AR16 that no conditions should be imposed under paragraph 2 of Schedule 17 to the HS2 Act because the portal building and other above ground structures associated with the proposed BTEP are not within the appealed application's scope. The Secretaries of State do not consider that the Inspector's reservations about landscape mitigation provide a good reason to dismiss the appeal.

19. The Secretary of State notes at AR17 that a Noise Demonstration Report (NDR) was submitted with the appealed application, but is excluded from the submitted documents for which approval has been sought. They agree that noise is a matter for a future bringing scheduled works into use request pursuant to paragraph 9 of Schedule 17 (AR24).
20. For the reasons given at AR25 the Secretaries of State agree that air quality is not a matter requiring further consideration as part of the determination of the appealed application.
21. For the reasons given at AR27 the Secretaries of State agree that because the appealed application does not seek approval for the BTE, it would be inappropriate to comment on the benefits claimed by the appellant.

Overbridge and diversion of Attleboro Lane

22. For the reasons given at IR50-52 the Secretaries of State agree that the overbridge would have an acceptable appearance. Further, they agree that the embanked diverted road would be an extensive engineered structure, its visual impact would be capable of being reduced by the undertaking of soft landscaping works, details for which would form part of a future bringing scheduled works into use request pursuant to paragraph 9 of Schedule 17 to the HS2 Act (IR52).
23. For the reasons given at IR53-54, the Secretaries of State agree that while the provision of a viewing platform would be desirable, its absence would not be grounds for refusing either the overbridge or the diversion of Attleboro Lane or imposing a condition requiring the provision of a viewing platform (IR54). The Secretaries of State further agree that a viewing platform would not be necessary '... to preserve the local environment or local amenity... ', the relevant test under either paragraphs 2 (sub-paragraphs (5) and (7)) or 3 (sub-paragraphs (6) and (7)) of Schedule 17 to the HS2 Act (IR54).
24. The Secretaries of State agree at IR55 that the provision of the proposed overbridge and the diversion of Attleboro Lane would be an acceptable form of development under the provisions of paragraphs 2 and 3 of Schedule 17 to the HS2 Act.

Water Orton cutting (the cutting)

25. The Secretaries of State note that the section of the cutting for which approval is being sought would form part of the longer Water Orton Cutting, scheduled WN3/157 (IR57). They also note that the plans accompanying the ES appear to show a cutting formed by undertaking earthworks, as opposed to being something comprising an extensive concrete structure (IR57). They agree with the Inspector at IR58 that because neither the

ES nor scheduled WN3/157 specify what form the cutting should take, the cutting for which approval is being sought is compatible with the works authorised by the HS2 Act, namely a cutting.

26. The Secretaries of State agree at IR59 that the bulk of the cutting would not be readily visible because it would be 10 metres or more below ground level and/or would be screened from view by established vegetation to the south that adjoins the M6 and to the east by a combination of the formation of the embankments associated with the diversion of Attleboro Lane and the undertaking of soft landscaping. They further agree that the cutting when viewed from the east would not be unduly prominent or alien to its surroundings (IR59).
27. For the reasons given at IR60-65 the Secretaries of State agree that neither the cutting's design nor its external appearance would need to be modified to preserve the local environment or local amenity (IR65).
28. The Secretaries of State agree at IR66 that the provision of the proposed cutting would be an acceptable form of development under the provisions of paragraph 3 of Schedule 17 to the HS2 Act.

Balancing Pond

29. The Secretaries of State agree at IR67 that it would be possible to provide soft landscaping around the perimeter of the balancing pond to ensure it would be respectful of its context. They further agree that the precise form of any soft landscaping could be considered as part of a future bringing scheduled works into use request pursuant to paragraph 9 of Schedule 17 to the HS2 Act in relation to the railway (IR67).
30. The Secretaries of State agree at IR68 that the provision of the proposed balancing pond would be an acceptable form of development under the provisions of paragraph 3 of Schedule 17 to the HS2 Act.

Maintenance vehicle parking areas

31. As the Secretaries of State have found that the extension of the BTE tunnel and ancillary works such as the BTEP relocation have DPP, they disagree with the Inspector at IR70. The Secretaries of State consider that the vehicle parking and manoeuvring areas intended to serve the BTEP should be considered as part of the appealed Schedule 17 application.
32. The Secretaries of State find that all parking and manoeuvring areas forming part of this appeal scheme would be likely to be of a functional appearance, but with the implementation of suitable landscaping works need not be obtrusive. This would be a matter for consideration as part of a future bringing scheduled works into use request pursuant to paragraph 9 of Schedule 17 to the HS2 Act in relation to the railway.
33. The Secretaries of State find that the provision of all the proposed parking and manoeuvring areas in the appeal proposal would be an acceptable form of development under the provisions of paragraph 3 of Schedule 17 to the HS2 Act.

Fencing

34. The Secretaries of State agree at IR74 that the siting of the three types of fencing would, in effect, be self-determining and that the fencing and barriers could not reasonably be carried out elsewhere. They further agree that the appellant's fencing proposals are generally unobjectionable (IR74). For the reasons given at IR75 the Secretaries of State agree that that while the design of the architectural guardrail has not been specified in the application documentation, its siting in this location would be unobjectionable and given its purpose it could not be reasonably be located elsewhere. At IR76 the Secretaries of State further agree that a condition requiring the submission of further details ought not to be imposed as none of the grounds specified in sub-paragraph (6) of paragraph 3 of Schedule 17 to the HS2 Act apply.
35. The Secretaries of State agree at IR77 that the provision of the proposed fencing would be an acceptable form of development under the provisions of paragraph 3 of Schedule 17 to the HS2 Act.

Other Matters

36. For the reasons given at IR78 the Secretaries of State agree that there is a regime in place to address the wellbeing for any bats that may be affected by the proposals contained within the appealed Schedule 17 application.

Planning conditions

37. The Secretaries of State have given consideration to the Inspector's analysis at IR83 and AR28 and agree that no conditions should be imposed, because their imposition could not be justified having regard to the grounds for imposing conditions under the provisions of paragraphs 2 and 3 of Schedule 17 to the HS2 Act.

Overall conclusion

38. The Secretaries of State conclude that the appeal should be allowed.

Formal decision

39. Accordingly, for the reasons given above, the Secretaries of State disagree with the Inspector's recommendations. They hereby allow your client's appeal and grant approval to the Schedule 17 application.
40. This letter does not convey any approval or consent which may be required under any enactment, bye-law, order or regulation other than Schedule 17 to the Act.
41. A copy of this letter has been sent to the LPA.

Yours faithfully

Phil Barber

Authorised by the Secretary of State
for Levelling Up, Housing and Communities
to sign in that behalf

Paul Stewart

Authorised by the Secretary of State
for Transport to sign in that behalf

This decision was made by Lord Davies of Gower, Parliamentary Under Secretary of State (Maritime and Security) on behalf of the Secretary of State for Transport, and Baroness Scott of Bybrook, Parliamentary Under Secretary of State (Faith and Communities and Lords Minister), on behalf of the Secretary of State for Levelling Up, Housing and Communities



The Planning Inspectorate

Report to the Secretaries of State for Transport and for Levelling Up, Housing and Communities

by Grahame Gould BA MPhil MRTPI

**an Inspector appointed by the Secretaries of State for Transport and for Levelling Up, Housing and
Communities**

Date: 31 March 2023

HIGH SPEED RAIL (LONDON – WEST MIDLANDS) ACT 2017

NORTH WARKWICKSHIRE BOROUGH COUNCIL

APPEAL AGAINST THE NON-DETERMINATION OF SCHEDULE 17 SUBMISSION

Hearing held on 27 April 2022
Site visit made on 29 April 2022

Water Orton Cutting including the Bromford Tunnel East Portal and Attleboro Lane
Overbridge and ancillary works
Appeal Ref: APP/HS2/18

Appeal Ref: APP/HS2/18**South south-west of Water Orton and north east of junction 4A of the M6 motorway**

- The appeal is made under paragraph 22(3) of Schedule 17 of the High Speed Rail (London to West Midlands) Act 2017.
- The appeal is made by High Speed Two Limited against the decision of North Warwickshire Borough Council to decline to determine the request for the approval of plans and specifications made under Schedule 17.
- The application, reference HS2/2021/0005, is dated 22 September 2021 and the decision refusing to accept and determine the application was dated 8 October 2021.
- The development proposed comprises the Water Orton Cutting including the Bromford Tunnel East Portal and Attleboro Lane overbridge and ancillary works.

Summary of Recommendation: That the appeal 1) be dismissed with regards to the request for the approval of details relating to the formation of the Bromford Tunnel East Portal and 2) be allowed with regards to the request for the approval of details concerning: the formation of the Water Orton Cutting, insofar as those works would be unconnected with the tunnel portal; and the Attleboro Lane Overbridge.

Legal Framework, Procedural Matters and Background

1. The Secretaries of State (SoSs) directed on 9 August 2022 that they will jointly determine this appeal made under paragraph 23(1) of Schedule 17 (Sch¹⁷) of High Speed Rail (London – West Midlands) Act 2017 (the HS2 Act). That is because the SoSs consider this appeal raises *'important or novel issues of development control and/or legal difficulties and being a proposal against which another government department has raised major objections or has a major interest'*.
2. The HS2 Act having approved phase 1 of the High Speed 2 from London to Birmingham (HS2/the railway). Section 1 of the HS2 Act gives the appellant the power to construct and maintain the works specified in Sch1 and the scheduled works are listed in full in that schedule. The appealed Sch17 application relates to the area covered by scheduled work number (WN) 3/157, which is described as:

'A railway (1.13 kilometres in length) partly on viaduct commencing by a junction with the termination of Works Nos. 3/151, 3/152, 3/153 and 3/154 passing westwards and terminating by a junction with Work No. 3/200 at a point 317 metres north-west of the bridge carrying Water Orton Road over the M6 Motorway.'
3. Section 2 of the HS2 Act sets out what the appellant may for the purposes of or in connection with scheduled works or otherwise may do within the *'Act limits'*. Section 20 of the HS2 Act grants *'deemed planning permission'* (DPP)² for the railway, subject to conditions stated in Sch17.

¹ Hereafter in this report references to Schedules 1, 17 and 29 of the HS2 Act are given as Sch1, Sch17 and Sch29

² For the purposes of the Town and Country Planning Act 1990

4. The appealed Sch17 application (the application) seeks approval for the following works, the locations for which are shown on the "revised"³ General Arrangements drawing (drawing 1MC09-BBV_MSD-PL-DGA-NS04_NL11-160400 Revision C02 [appeal document HS2-18a]) (see Appendix 1 to this report):
 - The undertaking of engineering earthworks, including the formation of a concrete lined cutting, to become part of the "Water Orton Cutting" (the cutting). The cutting would comprise concrete retaining walls, including "diaphragm" (buried) walls, with the parallel facing retaining walls⁴ being supported by concrete joists (props) above the diaphragm walls.
 - A new road bridge, the Attleboro Lane overbridge, consisting of a two lane carriageway with footways on either side, which would carry the diverted Attleboro Lane over the cutting. The diverted Attleboro Lane would in part be on newly formed embankments.
 - The formation of a concrete tunnel portal structure, the 'Bromford Tunnel East Portal' (the portal) at the western end of the cutting. The portal would be of a porous design, ie have openings in its roof. The porous nature of the portal being intended to control the build-up of noisy pressure waves (piston effect) as trains exit a tunnel.
 - Ancillary works including the provision of: maintenance vehicle parking areas; a balancing pond; and boundary and security fencing and vehicle restraint barriers.
5. Within the cases made by the appellant, the Council and residents/interested parties and in the rest of this report references have been/are made to the appellant's Bromford Tunnel extension proposal (the BTE). The Bromford Tunnel authorised by the HS2 Act is 2.86 kilometres (km) long and its eastern portal (extremity) forms part of WN 3/203. That portal would be located around 2.9km to the east of the tunnel portal included in the application. The appellant intends that the BTE would extend the authorised tunnel by around 2.9km, hence the inclusion of what would be a relocated eastern portal in the application. The appellant expects that the BTE would replace a viaduct primarily authorised as part of WN3/200 and as such the tunnel extension would be an unscheduled work. It is, however, important to recognise that the BTE is not a work for which the appellant has requested approval for as part of the appealed application. Whether or not the proposed BTE would be authorised by the HS2 Act or would need to be authorised by other legislation is a matter which, of itself, is not for determination in connection with the consideration of this appeal.
6. The Council declined to determine the application because the BTE is not authorised by the HS2 Act (Council appeal Appendix [CaA] 11). That being a matter I have reported on more fully below. The appellant has treated the Council's decision to decline to determine the application as a deemed refusal of permission under paragraph 22(3) of Sch17 of the HS2 Act, enabling an appeal to be made to the SoSs under paragraph 22.
7. Following the appeal's original submission, the Council contended that because of its declining to determine the application that an appeal could not

³ See paragraphs 11 to 14 below for the explanation for the submission of revised drawings

⁴ Ranging between 300 metres (north side) and 470 metres (south side) in length

be made and determined under paragraph 22. I am, however, content that there is a right of appeal available to the appellant and that there is a duly made appeal for the SoSs to determine, having regard to the procedural representations made by the appellant and the Council, as well as the provisions of the HS2 Act and associated appeal regulations⁵. That is because the appellant and the Council have had the opportunity to make written and oral cases about whether all, some or none of the works subject to the application would benefit from the DPP.

8. Paragraph 25 of Sch17 explains that appeals made under paragraph 22 are '*... to be dealt with on the basis of written representations, unless the person deciding the appeal directs otherwise*'. Given the legalistic nature of the reasons underpinning the Council's decision to decline to determine the application a decision was taken by the Planning Inspectorate that a public hearing should be held. I held that hearing on-line on 27 April 2022, essentially adopting the procedure used for appeal hearings held under the provision of the Town and Country Planning Act 1990. At the hearing the appellant and the Council made extensive oral submissions about whether or not the works included in the application would benefit from the DPP and I report on those submissions below.
9. Other aspects of the appeal cases made by the appellant, the Council and members of the public have been handled using the written representations procedure. My reporting below is also informed by the site visit that I undertook on 29 April 2022, when I was accompanied by the appellant and the Council. In response to one of my hearing questions the appellant advised the following works had been commenced on site:
 - Water Orton cutting: the installation of temporary platforms and, amongst other things, the construction of diaphragm walls and capping beams.
 - The tunnel portal: the installation of temporary platforms and reinforced concrete foundations, diaphragm walls, drilling of dewatering wells and the installation of capping beams and reinforced concrete props at ground level. Additionally, works of excavation within the portal box to reach a temporary propping level had been started.
 - The formation of a temporary balancing pond in the location of the proposed permanent pond and works access.
10. In undertaking my site visit I observed that the above mentioned works had either been completed or were in the process of being undertaken. Some photographs of those works are included in Appendix 2 to this report.
11. At the hearing I raised a concern about the adequacy of the application drawings, most particularly the absence of chainage and existing and proposed levels details. The undertaking of my site visit reinforced my concerns about the originally submitted drawings. I considered the drawings would need to show chainage and existing and proposed levels details to allow the proposed works to be properly understood and to give the Council, should all or part of the appeal be allowed, the ability to enforce compliance with any approved details. Being mindful of the Court of the Appeal's '*Hillingdon 1*'

⁵ The High Speed Rail (London – West Midlands)(Planning Appeals) (Written Representations Procedure) (England) Regulations 2017

judgement (most particularly paragraph 70⁶) the appellant was given the opportunity to submit revised drawings following content discussions with the Council.

12. Revised drawings were submitted on 4 November 2022 and are listed in Appendix 5 of this report as documents HS2-18a to HS2-18i. At my request the Council arranged for those drawings to be publicly consulted on between 8 and 22 November. Consultation responses were received from Historic England, Special Management Zone Group North Warwickshire (a resident's group) and a local resident and I have had regard to those representations.
13. Given the length of time that elapsed between my site visit and the submission of the revised drawings, the appellant was requested to submit an aerial photograph showing how the works on site had progressed since the end of April 2022. That photograph was submitted on 12 December (HS2-20) and is included in Appendix 3.
14. In revising the application plans the appellant has incorporated a piece of land previously excluded from the 'blue land' area (extent) for the appealed Sch17 application. That piece of land had previously been earmarked as the location for an electricity substation with access and was shown on the General Arrangements drawing for approval (1MC09-BBV_MSD-PL-DGA-NS04_NL11-160400 Revision P04, appellant's appeal Appendix [AaA] 5). The appellant now proposes to locate the substation elsewhere. The newly incorporated land can be seen on the revised General Arrangements drawing (document HS2-18a⁷, see also Appendix 1 to this report). The incorporated land is shown on the revised indicative Landscaping and Environmental Masterplan as an area for soft landscaping (HS2-18h).
15. The change to the site area that has been made as part of the submission of the revised drawings does not directly affect the works subject to the appellant's request for the approval of details under paragraphs 2 and 3 of Sch17. That is because the intended landscaping within the incorporated land would be for approval by the Council as part of a future "bringing into use" application to be made under paragraph 9 of Sch17. I therefore consider that the change to the application site's extent would not be prejudicial to the Council or any other party and has no bearing on the SoSs ability to determine this appeal.

Main Issues

16. The main issues are:

- whether none, some or all of the proposed works subject to the request for the approval of details under Sch17 would benefit from the DPP granted under section 20 of the HS2 Act; and
- for any proposed works included in the application benefiting from the DPP, whether those works should be approved or refused having regard to the conditions stated in either paragraphs 2 or 3 of Sch17 of the HS2 Act.

⁶ R. (on the application of London Borough of Hillingdon Council) (1) Secretary of State for Transport (2) Secretary of State for Housing, Communities and Local Government and High Speed Two (HS2) Limited [2020] EWCA Civ 1005

⁷ Hereafter documents referred to as HS2-1, HS2-2 etc, NWBC-1, NWBC-2 etc and IP-1, IP-2 etc were respectively submitted by the appellant, the Council and interested parties

The Case for the Council

17. The DPP (authorisation) for works applies to the scheduled works set out in Sch1 of the HS2 Act, as well as to un-scheduled works. Section 1 of the HS2 Act provides the powers to construct and maintain scheduled works, ie the principal works stated in Sch1 and shown on the "*deposited plan*", with works that are not specified being works that are not authorised by Sch1. Parliament through the operation of section 1 and Sch 1 has therefore authorised specific works in particular locations.
18. Section 2 of the HS2 Act lists works that may be authorised, with sub-section 1 listing various categories of works, with tunnels being excluded from that the list of works. It is considered that the sub-section 1 of section represents a "*closed list*" and that tunnels should be treated only as main (scheduled) works and not ancillary works coming within the ambit of sub-section (1)(i) of section 2, namely the carrying out of '*... such other works, of whatever description, as may be necessary or expedient*'. The relocated tunnel portal would therefore not benefit from the DPP, with that permission having been granted on the basis of the impacts that were assessed and reported on in the Environmental Statement (ES) that accompanied the Bill laid before Parliament. The BTE being a post enactment proposal, with the eastern portal for the Bromford Tunnel currently proposed being in an entirely different location to that authorised as part of WN3/203.
19. In February 2021 the appellant in making an Environmental Impact Assessment (EIA) screening request (CaA17) for the BTE to the Department for Transport (DfT) recognised that the proposed tunnel extension in its entirety was not authorised by the HS2 Act and would need to be the subject of a Transport and Works Act Order (TWAO). In response to that screening request the DfT concluded that the tunnel would be EIA development (CaA8). Although the Council in making representations about the EIA screening request did not identify significant environmental effects would arise from the BTE (CaA7), further to DfT issuing its screening request decision, the Council having sought advice has re-evaluated its position with regards to the BTE's environmental effects⁸. Following the receipt of that screening opinion the appellant has tried a different approach to the BTE, contending that it would be authorised by the DPP. The appellant has been inconsistent about what needs to be authorised.
20. The Council declined to determine the appealed application because it included works going beyond the DPP, because the relocated portal would be ancillary to a tunnel extension that is currently unauthorised and which would be likely to have a significant environmental effect. It is unclear what works included within the application would be authorised by the HS2 Act and would be severable from any works associated with the BTE.

The Case for the Appellant

21. The Sch17 application seeks approval for a number of works, namely: a portal for the BTE; the Attleboro Lane overbridge comprising a two lane carriageway with footpaths on either side; maintenance vehicle parking areas; engineering earthworks for the cutting, earthworks associated with the diversion of

⁸ Page 1 of the Council's pre hearing written submissions of 26 April 2022

Attleboro Lane over the cutting; and the formation of bunds, maintenance access roads and a balancing pond, a realignment of the highway and the installation of permanent fencing. The overbridge and portal being buildings for the purposes of paragraph 2 of Sch17, while the rest of the proposed works would be within the '*other construction works*' category for the purposes of paragraph 3 of Sch17.

22. While the Council has taken exception to the tunnel portal it has taken no issue with the proposed revisions to: the overbridge (authorised WN3/156); and the cutting, balancing pond and fencing (variously authorised under WN3/153, WN3/154 and WN3/157), all of those works being severable from the tunnel portal. Those aspects of the application could have been approved by the Council because they are not associated with the proposed BTE.
23. With respect to the tunnel portal the submitted application only seeks approval for the relocated tunnel portal and neither the BTE per-se nor a portal building, with the siting of the latter only being shown on the application plans for information. While the relocated tunnel portal would be an unscheduled work it would be provided in connection with a railway that has been authorised by the HS2 Act. The Council does not appear to be objecting to the portal itself, with its concern being with the tunnel's relationship with the proposed BTE.
24. Section 1 and Sch1 of the HS2 Act are permissive and Sch1's wording is descriptive rather than being prescriptive. Accordingly, the appellant does not have to build a railway as totally described in the HS2 Act and some of the authorised works could be omitted. The HS2 Act allows for flexibility so that the railway's design can be refined when compared with the reference design used in the ES.
25. Section 2 of the HS2 Act (Further provisions about works) refers to ancillary works that can be undertaken and this section identifies broad provisions and is not a closed list. In that regard sub-section (1)(i) of Section 2 allows the undertaker to '*carry out and maintain such other works, of whatever description, as may be necessary or expedient*' and that provision anticipates that there could be changes to the reference design that was put before Parliament.
26. Flexibility in constructing the railway can be seen in the wording of paragraph 1 of Sch1 and Sch 29 (Application of other railway legislation). Sch1(2) identifies deviations that may be made from scheduled works, including deviating downwards to any extent from the levels shown for works on the deposited sections (Sch1(2)(b)). Parliament in including paragraph 1 of Sch1 envisaged that some amendments could be made to the railway's design. The authorised main work is for the construction of a railway and it is the norm for the definitions of works to be set out in an act's schedule, such as Sch1 of the HS2 Act, but that does not mean that the design for HS2 cannot be changed.
27. Paragraph 5 of Sch29 allows for the wide powers of change contained in section 4 of the Railway Clauses Act of 1863 (as amended) (the RCA) to be applied to HS2's engineering works. Section 4 of the RCA1863 states:

'Notwithstanding anything in the said Railways Clauses Consolidation Acts, respectively contained, the company, in the construction of the

railway may deviate from the line or level of any arch, tunnel or viaduct, described on the deposited plans or sections, so as the deviation be made within the limits of deviation shown on those plans, and so as the nature of the work described be not altered, and may also substitute any engineering work not shown on the deposited plans or sections, for an arch, tunnel, or viaduct, as shown thereon; provided, that every such substitution be authorised by a certificate of the Board of Trade; and the Board of Trade may grant such certificate in case it appears to them, on due inquiry, that the company has acted in the matter with good faith, and that the owners, lessees, and occupiers of the lands in which the substitution is intended to be made consent thereto, and also that the safety and convenience of the public will not be diminished thereby.'

28. It is considered that the BTE is authorised by the HS2 Act, with the application that has been submitted for TWAO to change the description for part of WN3/157 being a "belt and braces approach"⁹. The appellant's lawyers have considered the provisions of the HS2 Act, as outlined in the appellant's letter of 22 June 2021 to the Council (CaA10). The lawyers' advice being that the BTE would benefit from the DPP conferred under section 20 of the HS2 Act. That advice should be relied on as opposed to the views expressed in the TWAO EIA screening opinion issued by the DfT on 31 March 2021 which identified the BTE as being EIA development (CaA8). It is considered that the BTE would benefit from the DPP because it would not have significant effects on the environment and would be development that was covered by the environmental assessment undertaken in connection with the Bill that preceded the HS2 Act (section 20(1)(a) and (c)). In that regard the Council reached the conclusion that the BTE would not give rise to the likelihood of significant environmental effects and did not require a separate EIA when it made its representations to DfT on 10 March 2021 further to the request for a TWAO screening opinion (CaA7).
29. Should the SoSs be of the view that the tunnel portal does not benefit from the DPP there is no reason why the other elements of the application should not be considered as part of this appeal.

Inspector's Assessment and Reasons

Whether the proposed works benefit from the DPP

30. Prior to the hearing there was considerable disagreement between the appellant and the Council as to whether none, some or all of the works included in the Sch17 application benefitted from the DPP granted under section 20 of the HS2 Act. However, during the course of the hearing there was some narrowing of the disagreement, with the Council accepting that certain works comprised within the application might benefit from the DPP.
31. There, however, remains disagreement, as to whether the proposed tunnel portal for the BTE, in particular, benefits from the DPP and could therefore be the subject of an approval under Sch17. That disagreement boiling down to whether the BTE as an unscheduled work, ie one not listed in Sch1, would nevertheless benefit from the DPP. In that regard the appellant contends that

⁹ As stated during the hearing and in paragraph 2.3.2 of the appellant's response to the third party appeal representations

the relocated tunnel portal, which would be around 82 metres long¹⁰ would benefit from the DPP. To facilitate a change to the design of the railway authorised by the HS2 Act to include the proposed BTE the appellant clarified at the hearing that it is relying on a combination of sections 1, 2, 20 and 42 (Other railway legislation etc) and Sch29 (Application of other railway legislation etc) of the HS2 Act. Section 42 and Sch29 collectively apply the provisions of section 4 of the RCA1863 to the development authorised by the HS2 Act.

32. As part of facilitating the proposed BTE, via the provisions of the RCA1863, the appellant has applied to the SoS for Transport for a TWAO under section 6 of the Transport and Works Act 1992¹¹. If that TWAO is made it would amend the wording of WN3/157, on what the appellant has described as a 'belt and braces' basis, removing the phrase 'partly on viaduct' from WN3/157's description so that the railway could be housed in a tunnel rather than being on a viaduct. That change to WN/157 would affect a 30 metre or so length of the authorised railway at the termination of that work and the commencement of WN3/200, several hundred metres up line (west) of the location for the now proposed tunnel portal.
33. The TWAO application's determination will be quite separate to that of this appeal, not least because it concerns land beyond the realms of the Sch17 application. The appellant's narrative for the TWAO application's submission, both in writing and orally, however helps to explain why it considers a relocated tunnel portal benefits from the DPP, notwithstanding it would be ancillary to the unscheduled and proposed 2.9km long BTE. The appellant arguing that the relocated tunnel portal would be within the ambit of section 2 (Further provisions about works) of the HS2 Act. Section 2(1)(i) stating:
- 'The nominated undertaker may, for the purposes of or in connection with the scheduled works or otherwise for Phase One purposes, do any of the following within the Act limits ... (i) carry out and maintain such other works, of whatever description, as may be necessary or expedient.'*
34. The Council does not accept the appellant's interpretation of sections 2 and 20 of the HS2 Act primarily for two reasons. Firstly, the Council has argued tunnels are a category of work which the HS2 Act has expressly authorised, with their details being listed in Sch1. Secondly, the Council contends that the proposed BTE and any works ancillary to it, such as a relocated eastern tunnel portal, cannot be considered as benefiting from the DPP granted under section 20. That is because the BTE would be development not covered by the environmental assessment reported on in the ES that accompanied the HS2 Bill and would therefore not be compliant with section 20(2)(c) of the HS2 Act.
35. As to whether a relocated tunnel portal would benefit from the DPP, I find the Council's line of argument to generally be more compelling for several reasons.
36. Firstly, at the hearing the appellant was unable to explain why in paragraph 3.2.8 of its written statement accompanying the appealed Sch17 it

¹⁰ Based on the dimension quoted in the fifth bullet point in paragraph 2.3.4 of the Bromford Tunnel Extension Environmental Impact Assessment Screening Report February 2021 (CaA17) and between around chainages 164.770 and 164.850

¹¹ In lieu of being able to obtain an 'authorisation' from the then Board Trade under section 4 of the RCA1863

had stated a "... *standalone consent will also be required for the formation of the Bromford Tunnel and associated systems, to be progressed by a separate contractor*" (AaA2). The inclusion of that text in the written statement suggests that some members of the appellant's team were of the view when the appealed Sch17 application was submitted that the BTE would require some form of further consent. Had that meant obtaining a TWAO I would expect that to have been referred to in this part of the written statement and I am not persuaded the later reference to applying for a TWAO in the written statement's Table 6 provides an adequate explanation for what is stated in paragraph 3.2.8 of the same document. Allied to this point I consider the advice given to DfT by its lawyers, as quoted in the appellant's letter of 22 June 2021 to the Council (pages 3 and 4 of CaA10), to be of note. In that letter DfT's lawyers are reported as advising:

'Our view on the section 2 option is that carrying out the ancillary works (ie all the works other than the railway itself, and therefore including the tunnel and the tunnel portal) would be within the scope of section 2 ...

*We think that the risk of successful challenge relying on section 2 is small but we would reiterate that **the deemed planning permission under section 20 will only apply in so far as HS2 can demonstrate that these works will not generate new or different environmental impacts beyond what has been assessed in the ES.** It seems more likely that there might be argument as to whether they do exceed the impacts assessed in the ES. If they do then while the statutory powers under section 2 would remain available there would need to be an application for planning permission to the two local planning authorities.'* (emphasis added by Inspector)

37. I consider the legal advice provided to DfT and quoted above to be far from equivocal, especially as it is apparent that a tunnel of the length now proposed was not subject to either an environmental impact assessment or reported upon in the ES put before Parliament. The significance of what was and was not reported on in the ES is a matter I return to below.
38. Secondly, a relocated tunnel portal would clearly be ancillary to the proposed BTE, with there being no need for it to be sited a little to the west of Water Orton if there was no proposal for the 2.9km long BTE. In reply to one of my hearing questions the appellant advised around 51km of the railway's entire 225km would be tunnelled (HS2-12). Approximately 22% of the authorised railway will therefore be in tunnels. I consider that to be a significant proportion and it is therefore unsurprising that works involving tunnels have been scheduled and thus expressly authorised by Parliament.
39. Thirdly, while sub-section (1)(i) of section 2 of the HS2 Act is broadly worded, it is the last of nine types of works listed in sub-section (1) and the preceding eight work types cover some quite substantial matters. Had Parliament intended something as notable as extending tunnels to be a work type covered by section 2, then I would have expected tunnelling to have been expressly included in the wording of sub-section (1), rather than being left to what the appellant is interpreting as a catchall provision, ie section (1)(i). I therefore consider the appellant's interpretation of sub-section (1)(i) to be extremely benevolent in the absence of any other provision within the HS2 Act enabling it to construct extended tunnels under the DPP. If the appellant's

interpretation of section 2 was to be favoured, then for practical purposes there would be little, if any, point in scheduling any tunnels under Sch1, with the appellant effectively having carte blanche to substitute any scheduled works with tunnels.

40. I therefore consider section 2 of the HS2 Act is not as benevolent as the appellant has sought to portray through the making of this appeal. I find support for that view can be found in the appellant's submission of its TWAO application, in which the appellant has recognised that a post enactment variation to the wording of WN 3/157 should be made to remove the reference to part of the railway being on a viaduct.
41. Fourthly, a number of the appellant's written submissions made prior to the hearing implied that the proposed BTE had been assessed in the ES submitted to Parliament. However, in response to one of my hearing questions the appellant conceded the BTE had not been included in its original environment assessment. In that regard the ES states:

'The potential for a longer tunnel, moving the eastern tunnel portal to the east of the B4118 Birmingham Road, was raised at the 20th March 2013 community forum. Lengthening the tunnel would have the potential benefit of avoiding disruption to the Castle Bromwich Business Park and also not requiring the realignment of the River Tame and associated impacts on floodplain and the Park Hall nature reserve. It would, however, likely require two tunnel shafts, and would require a complicated connection with the Proposed Scheme Delta junction to the east. It has not been included in the Proposed Scheme.

The Proposed Scheme option of the tunnel is considered to offer the greatest environmental benefits in comparison to the other options.'

(Paragraphs 2.6.18 and 2.6.19 of Community Forum Area (CFA) report 25 - Castle Bromwich and Bromford HS2-8)

42. It is therefore evident that when the ES was written the appellant was of the view that siting the eastern portal in the Castle Bromwich Business Park (as part of WN3/203) formed part of a set of proposals for the Bromford Tunnel that Parliament should accept as having the '*greatest environmental benefits*'.
43. As an environmental assessment for the BTE was not reported on in the original ES I am not persuaded that a portal associated with the proposed BTE should be looked upon as benefitting from the DPP. That is because sub-section (2)(c) of section 20 of the HS2 Act expressly refers to the DPP only benefitting development that has been subject to an environmental assessment undertaken as part of the process of laying the railway's Bill before Parliament. On the information available to me I further consider it has not been clearly demonstrated that extending the Bromford Tunnel eastwards by 2.9km would be without significant effects on the environment by virtue of factors such as that development's nature, size or location and thus meet the first test stated in sub-section (2)(a) of section 20. I say that in the context of the appellant indicating that it would be necessary to site a portal building and an autotransformer immediately to the north of and above the proposed tunnel portal and install service roads to provide access for maintenance.

44. Neither the portal building nor the autotransformer structures form part of the works subject to the appealed Sch17 application, although their indicative locations are shown on the revised General Arrangement drawing (HS2-18a) and the illustrative three dimensional image included with sections A and B submitted in November 2022 (HS2-18b)¹². In a similar vein no soft landscaping works are for determination at this time, with the appellant relying on those works being included in a bringing into use submission to be made to the Council in the future, pursuant to paragraph 9 of Sch17. That said an indicative Landscaping and Environmental Masterplan accompanies the appealed Sch17 application (HS2-18h)¹³.
45. Based on what is shown on the above mentioned drawings it would seem likely that the structures and service roads allied with the portal's now proposed location would significantly reduce the amount of land that could be landscaped to the north of the cutting. That land having been identified in the ES as being for the undertaking of '*landscaped earthworks*' including scrub and woodland planting (map number CT-06-135a, electronic page 41 in CFA19 Map books [HS2-7]). The boundary for the appealed Sch17 application is coterminous with the 'Act limits' for this part of HS2. I therefore consider it is far from clear whether the relocated tunnel portal, with its attendant structures, could be acceptably accommodated within the land available for building and operating the railway on the outskirts of Water Orton.
46. The appellant has explained that '*Staying within the Act limits is unavoidably a key design constraint, and the avoidance of additional land take is afforded high priority in the design process*' (HS2-3)¹⁴. Be that as it may, my concern about whether or not what is now being proposed could adequately be accommodated within the available land is symptomatic of a significant design change being promoted by the appellant on what I consider has been a piecemeal basis, without that change having been previously fully assessed in the ES.
47. Accordingly, I am not persuaded the relocated eastern portal, as a structure that would be ancillary to the far more extensive proposed BTE, should be regarded as meeting the tests stated in sub-sections (2)(a) and (2)(c) of section 20 of the HS2 Act. I consider the tunnel portal would not be authorised by the HS2 Act and I therefore conclude that this part of the appellant's proposals would not benefit from the DPP. Accordingly, I am of the view that any works associated with the proposed tunnel portal should be treated as being beyond the scope of a request for the approval of details under Sch17.
48. Should the SoSs agree with me that the proposed relocated tunnel portal would not benefit from the DPP that would mean the portal would require authorisation via other legislation. Given that context, in order to avoid the potential for any predetermination by the SoSs I consider it would be inappropriate for me to make any recommendations about the portal's design with reference to the conditions included within Sch17 or any changes to operational noise levels or air quality¹⁵ or to comment on any of the benefits

¹² Drawing 1MC09-BBV_MSD-PL-DSE-NS04_NL11-160401 Revision C02

¹³ 1MC09-BBV_MSD-PL-DGA-NS04_NL11-160403 Revision C02

¹⁴ Paragraph 3.17.6 of the appellant's written response to the Council's statement of case

¹⁵ The potential for a changes to the local noise climate and air quality are matters that have been raised by residents in their appeal representations

that the appellant has attributed to an extension to the Bromford Tunnel. I consider it would in any event not be possible for either the SoSs or myself to arrive at an informed assessment of the tunnel portal's visual effects, given the piecemeal way the appellant is seeking to go about obtaining approvals for what would be a new set of works in this location, given the absence of definitive details relating to the tunnel portal building, the autotransformer and any soft landscaping works.

49. With respect to the request for approvals for the: overbridge and diversion of Attleboro Lane; formation of the cutting insofar as that work does not form part of the tunnel portal; balancing pond; formation of the maintenance vehicle parking areas insofar as they do relate to the tunnel portal; and installation of permanent fencing, I conclude those works are capable of benefitting from the DPP. That is because while some revisions to the ES reference design are being proposed, those works would either come within the ambit of WN3/156 or would be ancillary to works WN3/151, WN3/152, WN153, WN3/154 and WN3/157, insofar as they are severable from the proposed tunnel portal, and would come within the ambit of sections 2 and 20 of the HS2 Act. I now turn to the consideration of whether the works included in the appealed application benefitting from the DPP should be approved or refused.

Whether the works benefitting from the DPP should be approved or refused

Overbridge and diversion of Attleboro Lane

50. The provision of the overbridge and the diversion of Attleboro Lane would be necessitated by the railway's severance of Attleboro Lane and the need to provide access for users of this public highway, ie motorists, cyclists, pedestrians and horse riders either side of the railway line. That would include providing maintenance access to a retained National Grid gas valve compound.
51. The design of the overbridge and diverted public highway, in terms of their length, height and alignment being governed by the standards for highway geometry and the clearance required for the railway cutting. The overbridge and the diverted road at their maximum would be around 9.0 metres above the existing ground levels, as shown on section F of the revised drawings (HS2-18d)¹⁶. The bridge would be a concrete structure and its parapets would be of a common design for HS2. Constructing the overbridge and diverting Attleboro Lane were assessed in the ES and no party has raised a concern about the design for either the overbridge or the diverted road departing from the worst case design that the ES's assessment was based on.
52. The overbridge would be of a typical and functional appearance for such structures. That said I consider the overbridge would have an acceptable appearance, with that design being driven by its function and the need to span the railway's cutting. While the embanked diverted road would be an extensive engineered structure, its visual impact would be capable of being reduced by the undertaking of soft landscaping works, details for which would form part of a bringing into use request for the approval of details to be made pursuant to paragraph 9 of Sch17. I am content that neither the overbridge nor the diverted Attleboro Lane would look out of place, having regard to what

¹⁶ Drawing 1MC09-BBV_MSD-PL-DSE-NS04_NL11-160405 Revision C02

would be their context, namely a newly constructed railway line, a nearby motorway and a siting beyond Water Orton's built-up area.

53. The Council has promoted the incorporation of a permanent public viewing platform into the overbridge's design, something that was referred to by the appellant when presenting to HS2's Independent Design Panel (paragraph 6.32 of the Council's Statement of Case [SoC]). The appellant has submitted that the highway authority has been resistant to the provision of a viewing platform because there would be no parking to serve such a facility and that could result in either parking occurring on a road with blind bends or taking place on the footways to be provided as part of the overbridge or the diverted road¹⁷.
54. While the provision of a viewing platform would be desirable, I am of the view that its absence would not be grounds for refusing either the overbridge or the diversion of Attleboro Lane or imposing a condition requiring the provision of a viewing platform. That is because I consider providing a viewing platform would not be necessary '*... to preserve the local environment or local amenity...* ', the relevant test under either paragraphs 2 (sub-paragraphs (5) and (7)) or 3 (sub-paragraphs (6) and (7)) of Sch17.
55. I therefore conclude that the provision of the proposed overbridge and the diversion of Attleboro Lane would be an acceptable form of development under the provisions of paragraphs 2 and 3 of Sch17. I therefore recommend that this aspect of the appellant's proposals be approved by the SoSs.

Water Orton cutting (the cutting)

56. The concrete lined cutting would be between 300 metres (northern side) and 470 metres (southern side) long (paragraph 3.2.10 in AaA2). With the exception of the cutting's upstanding concrete capping beams (in essence parapets), security fencing¹⁸ and the multiple transverse concrete props, it would largely be below ground level. The appellant intends that the cutting's west end would merge into the proposed tunnel portal.
57. The section of the cutting for which approval is being sought would form part of the longer Water Orton Cutting, scheduled WN3/157. The plans accompanying the ES (electronic page 41 in HS2-7) appear to show a cutting formed by undertaking earthworks, as opposed to being something comprising an extensive concrete structure. To assist with the consideration of this appeal the appellant has submitted a drawing comparing the proposal assessed in the ES and the proposal subject to the appealed Sch17 application (HS2-2, see also Appendix 4 to this report).
58. The ES's written statement for this part of HS2 (CFA19, HS2-6) does not definitively explain whether the cutting was to be formed by simply excavating earth or would be accommodated within a concrete lined structure, with the drawings accompanying the ES showing a cutting notated as '*engineering earthworks*'. That said I am content even if the original intention was for the cutting to be formed from the excavation of earth rather than being accommodated in a concrete lined structure, the latter of itself would be compatible the works authorised by the HS2 Act, namely a cutting. That is

¹⁷ Paragraphs 3.17.30 and 31 of the appellant's written response to the Council's SoC (HS2-3)

¹⁸ In some instances referred to as "*Architectural Guardrail*" by the appellant

- because neither the ES nor scheduled WN3/157 specify what form the cutting should take.
59. A concrete lined cutting would have a very utilitarian appearance, which in part can be appreciated from the revised application drawings and my site visit photographs included in Appendix 2 to this report. However, the bulk of the cutting would not be readily visible because it would be 10 metres or more below ground level and/or would be screened from view by established vegetation to the south that adjoins the M6 and to the east by a combination of the formation of the embankments associated with the diversion of Attleboro Lane and the undertaking of soft landscaping. Some views down into the cutting would potentially be possible from the overbridge, although the presence of that bridge's parapets would be likely to significantly limit the views into the cutting. Taking those factors into account I consider the cutting when viewed from the east would not be unduly prominent or alien to its surroundings.
 60. Less clear is what screening would be available to the north, especially given the appellant's intention to install a portal building and autotransformer in the vicinity of the proposed tunnel portal, which as I have explained above would in part occupy land earmarked for '*landscape earthworks*' in the ES. However, the nearest dwellings and closest public vantage points would be several hundred metres from the northern side of the cutting.
 61. The Council is concerned that the proposed stepped parapet transitions for some parts of the cutting would lack a sleekness or elegance of design, as shown for example on sections O and P (HS2-18g). The Council contends that this aspect of the railway's design would be inconsistent with the approach that is being taken to designing of the structures that would form the '*Delta Junction*'. The Council has therefore suggested a condition be imposed, requiring details for '*angular sloped transitions*' (in effect a canted form) for the parapet's height transitions be submitted for its approval (NWBC-9).
 62. The Delta Junction will lie to the south-east of Water Orton and will comprise two spurs on viaducts linking the main HS2 line with Birmingham. The Council has further argued that the design approach for the cutting is inconsistent with how the appellant has handled obtaining an approval for a tunnel portal with earthworks in the Colne Valley in Hertfordshire.
 63. The cutting will commence at the western end of the Delta Junction and because of that the appellant has argued that the cutting would be in a more urban location, as compared with other parts of the Delta Junction (paragraph 3.17.7 in HS2-3). The appellant has also submitted that unlike the Delta Junction and the Colne Valley the cutting subject to the appealed Sch17 application does not have the status of being an HS2 '*key design element*' (KDE) and there would be limited visual connectivity between the cutting and the Delta Junction (paragraphs 3.17.14 and 3.17.16 in HS2-3).
 64. As the cutting has not been identified as an HS2 KDE I consider parallels should not be drawn between the way the appellant has approached obtaining detailed design approvals for the Colne Valley and the Delta Junction. It is intended that the cutting's parapets to the east of the overbridge would have stepped changes in level. I consider that design detail would not look out of place, when regard is paid to the differences in levels relative to the length of parapet sections in question and the reengineered

topography of the area that would arise from the formation of the cutting. Although the Council favours a canted detail where there would be marked changes in the levels for the cutting's parapets, I consider that the introduction of such a detail could serve to accentuate the height transitions for the parapets. Accordingly, I do not recommend the imposition of the Council's suggested condition.

65. Although the cutting would be in the green belt, this area is not subject to any national landscape designations, nor has it been identified as a "*valued landscape*"¹⁹. While the cutting's appearance would be devoid of architectural merit and its presence would undoubtedly affect the appearance of the area, it would clearly have a functional relationship with the railway. I therefore consider that neither the cutting's design nor its external appearance would need to be modified to preserve the local environment or local amenity.
66. I therefore conclude that the provision of the proposed cutting would be an acceptable form of development under the provisions of paragraph 3 of Sch17. I therefore recommend that this aspect of the appellant's proposals be approved by the SoSs.

Balancing Pond

67. The balancing pond would be located immediately to the north-west of the new overbridge, downslope of the bridge's northern abutment. I am in no doubt that it would be possible to provide soft landscaping around the perimeter of the balancing pond to ensure it would be respectful of its context. The precise form of any soft landscaping would be a matter for consideration as part of a future bringing into use application to be submitted by the applicant under the requirements of paragraph 9 of Sch17.
68. I therefore conclude that the provision of the proposed balancing pond would be an acceptable form of development under the provision of paragraph 3 of Sch17 and recommend that this aspect of the appellant's proposals be approved by the SoSs.

Maintenance vehicle parking areas

69. The submitted General Arrangements drawing identifies the locations for the proposed maintenance vehicle parking areas and associated vehicle accesses and manoeuvring areas (HS2-18a). Those parking and manoeuvring areas would serve the tunnel portal and balancing pond, as well as enabling the cutting to be maintained.
70. Above I have concluded the tunnel portal would not benefit from the DPP and that the portal and any works associated with it would be outwith the mechanism for requesting approvals under Sch17. I am there of the view that the vehicle parking and manoeuvring areas intended to serve the tunnel portal should not be considered as part of the appealed Sch17 application and should be excluded from any approval the SoSs might give.
71. The parking and manoeuvring areas benefitting from the DPP would be likely to be of a functional appearance. That said with the implementation of suitable landscaping works I consider the presence of the maintenance vehicle

¹⁹ As referred to in the National Planning Policy Framework of 2021

parking areas need not be obtrusive and I therefore consider this aspect of the appellant's proposals to be unobjectionable.

72. I therefore conclude that the provision of the proposed parking and manoeuvring areas, with the exception of any such areas relating to accessing the proposed tunnel portal, would be an acceptable form of development under the provision of paragraph 3 of Sch17 and recommend that this aspect of the appellant's proposals be approved by the SoSs.

Fencing

73. Paragraph 3.2.20 of the written statement (AaA2) advises that there is an intention to install three types of fencing. Firstly, vehicle restraint barriers along the elevated sections of the Attleboro Lane diversion. Secondly, 1.4 metre high plastic mesh fencing around the perimeter of the land subject to the Sch17 application. The third type of fencing being 1.8 metre high plastic mesh fencing topped with barbed wire to prevent trespassing within the rail corridor.
74. While the siting for three fencing types is shown on the General Arrangements drawing (HS2-18a) approval for their detailed design is not being sought (paragraph 3.2.21 in AaA2). The installation of the proposed fencing would be for the purposes of boundary demarcation or safety/security. Given the purpose for each of the fencing types for which approval is being sought, I consider their siting would, in effect, be self-determining and that the fencing and barriers could not reasonably be carried out elsewhere. I am therefore of the view that the appellant's fencing proposals are generally unobjectionable.
75. Sections B, O and P (HS2-18b and HS2-18g)²⁰ included in the suite of revised drawings show the installation of what the appellant has described as an '*Architectural Guardrail*' fixed to the top of the cutting's concrete retaining walls and possibly overlapping with some of the proposed tunnel portal. On the General Arrangements drawing '*security fencing*' is shown above the cutting's retaining walls (HS2-18a). No distinction is made between the security fencing and the architectural guardrail in the Written Statement originally submitted with the Sch17 application (AaA2) and given what is shown on the General Arrangements drawing I have treated the cutting edge security fencing and architectural guardrails as being one in the same. I am of the view that it is likely that what has been described as architectural guardrail would have a functional appearance that would not look out of place fixed to the top of a concrete lined cutting sited on the outskirts of Water Orton and adjoining the M6 motorway corridor. So, while the design of the architectural guardrail has not specifically been specified in the application documentation, I consider its siting in this location would be unobjectionable and given its purpose it could not be reasonably be located elsewhere.
76. Notwithstanding the Council's request that the architectural guardrail be made the subject of a condition requiring the submission of further details, should the SoSs agree with me that this form of proposed fencing would be unobjectionable, such a condition ought not be imposed. That is because under sub-paragraph (7) of paragraph 3 of Sch17 a condition on an approval

²⁰ Revised drawings 1MC09-BBV_MSD-PL-DSE-NS04_NL11-160401 Revision C and 1MC09-BBV_MSD-PL-DEL-NS04_NL11-160405 Revision C

may only be imposed by a planning authority²¹ on a ground specified in the table set out in sub-paragraph (6) of paragraph 3. In the case of fencing the grounds for imposing a condition stated in sub-paragraph (6) is '*That the development ought to, and could reasonably, be carried out elsewhere within the development's permitted limits*', which under a scenario of there being no in principle objection to the siting of the proposed architectural guardrail would preclude the imposition of a condition.

77. I therefore conclude that the installation of the proposed fencing, with the exception of any relating to the proposed tunnel portal, would be an acceptable form of development under the provisions of paragraph 3 of Sch17 and recommend that this aspect of the appellant's proposals be approved by the SoSs.

Other Matters

78. The Council has raised a concern about the impacts of the proposed works for bats. In response to those representations the appellant has advised that under the provisions of the Local Environmental Management Plan the management for the presence of bats will be in accordance with route wide activity licences for this protected species. I am therefore content that there is a regime in place to address the wellbeing for any bats that may be affected by the proposals contained within the appealed Sch17 application.

Conclusions

79. With the exception of the formation of the proposed tunnel portal deemed planning permission (DPP) has been granted on the basis of the impacts that were assessed in the ES placed before Parliament. Those impacts were considered by Parliament at the Bill stage for phase 1 of HS2.
80. The Council declined to determine the Sch17 request for the approval of details in their entirety because it took the view that the tunnel portal would not benefit from the DPP. I agree that the tunnel portal would not benefit from the DPP and it should not be considered as part of the appealed Sch17 application. I therefore recommend that the appeal insofar as it concerns the proposed relocated tunnel portal should be dismissed.
81. However, I accept the appellant's proposition that the works unconnected with the tunnel portal included in the Sch17 application should have been considered and determined by the Council.
82. I consider the originally submitted details concerning the overbridge, the diversion of Attleborough Lane and the Water Orton Cutting, in particular, were of an inadequate standard to be considered, with there being a lack of comprehensive chainage and levels information. Given that I found it necessary to request that the appellant submit better quality drawings, so that the effects of the works could be assessed. I am content that the revised drawings submitted in November 2022 provide a sufficient level of detail for the SoSs to be able to consider the works included in the appealed application that I consider benefit from the DPP.

²¹ Via the operation of paragraph 22(2) of Sch17 the SoSs are also required to have regard to what is stated in paragraph 3(6) and 3(7) of Sch17

83. For the reasons given above I recommend that the appeal be allowed for: 1) the overbridge; 2) the diversion of Attenborough Lane; 3) the balancing pond; and 4) the Water Orton Cutting, vehicle parking and manoeuvring areas and fencing, insofar as those works are unrelated to the tunnel portal. I further recommend that no conditions should be imposed, because their imposition could not be justified having regard to the grounds for imposing conditions under the provisions of paragraphs 2 and 3 of Sch17.

Grahame Gould

INSPECTOR

Hearing Attendees

High Speed Two (HS2) Limited (Appellant)

Jacqueline Lean	Counsel
Harley Ronan	Counsel
Kate Radford	Solicitor, Eversheds Sutherland
Paul Maile	Solicitor, Eversheds Sutherland
John Grimbley	Solicitor, Eversheds Sutherland
Jim McAvan	Planning Lawyer, HS2
Matt Dormer	Town Planning Lead – Phase 1, HS2
Paul Gilfedder	Head of Town Planning, HS2
James Mumby	Senior Town Planning Manager, HS2
Tara Mal	Trainee solicitor, HS2
Sunita Burke	Planning Consents Manager, BBV (HS2's contractor)
Khalid Razman	In-house counsel, BBV

North Warwickshire Borough Council (NWBC)

Craig Howell Williams	King's Counsel
Melissa Murphy	King's Counsel
Steve Maxey	Chief Executive, NWBC
Erica Levy	Development Control Manager, NWBC
Andrew Horne	HS2 Project Planning Officer, NWBC

David Lowe

Ecologist, Warwickshire County Council

Matthew Green

Environmental Health Officer, NWBC

Interested Parties

Ms Felicitas Freeman

Local resident

Appendix 2 Inspector's Site Visit Photographs

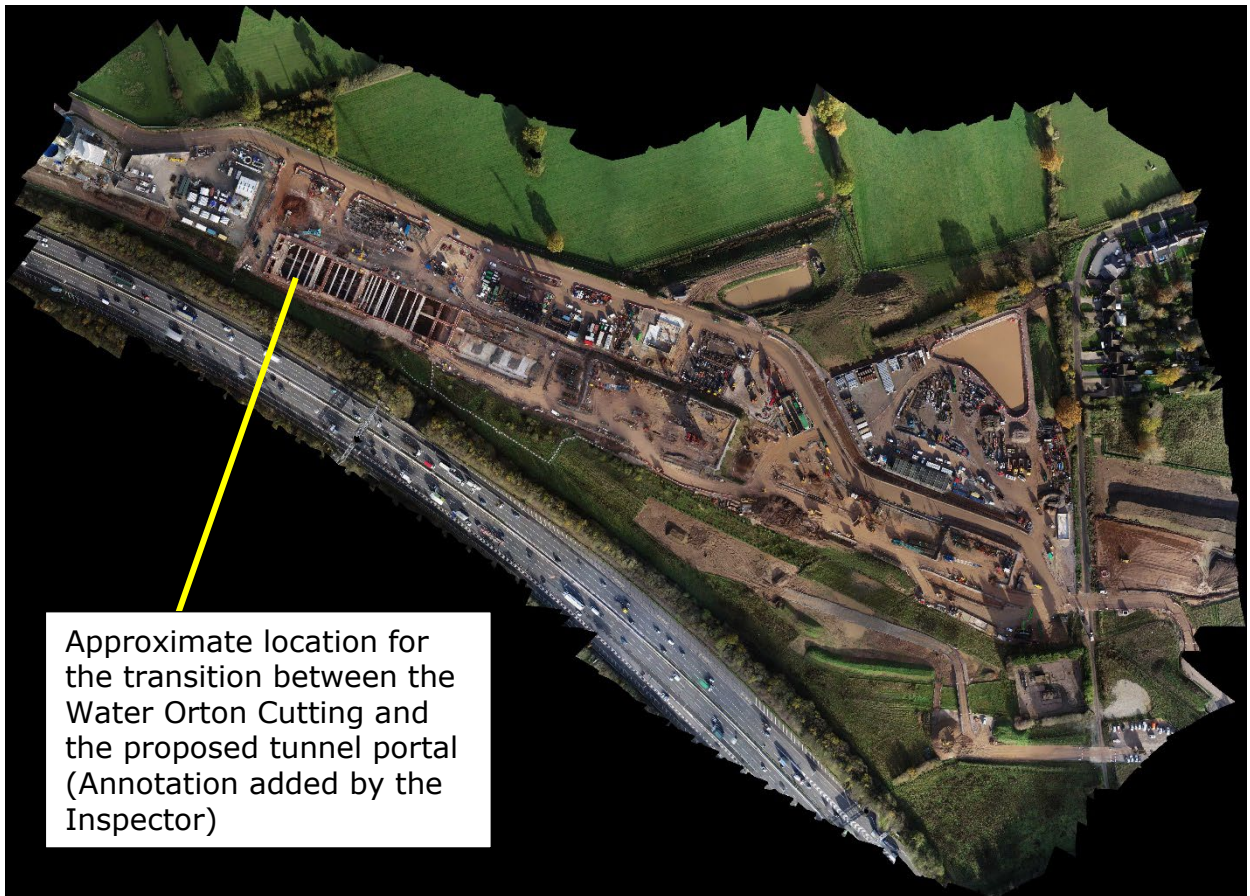


Water Orton Cutting looking eastwards, west of the cutting's merging with the proposed relocated tunnel portal



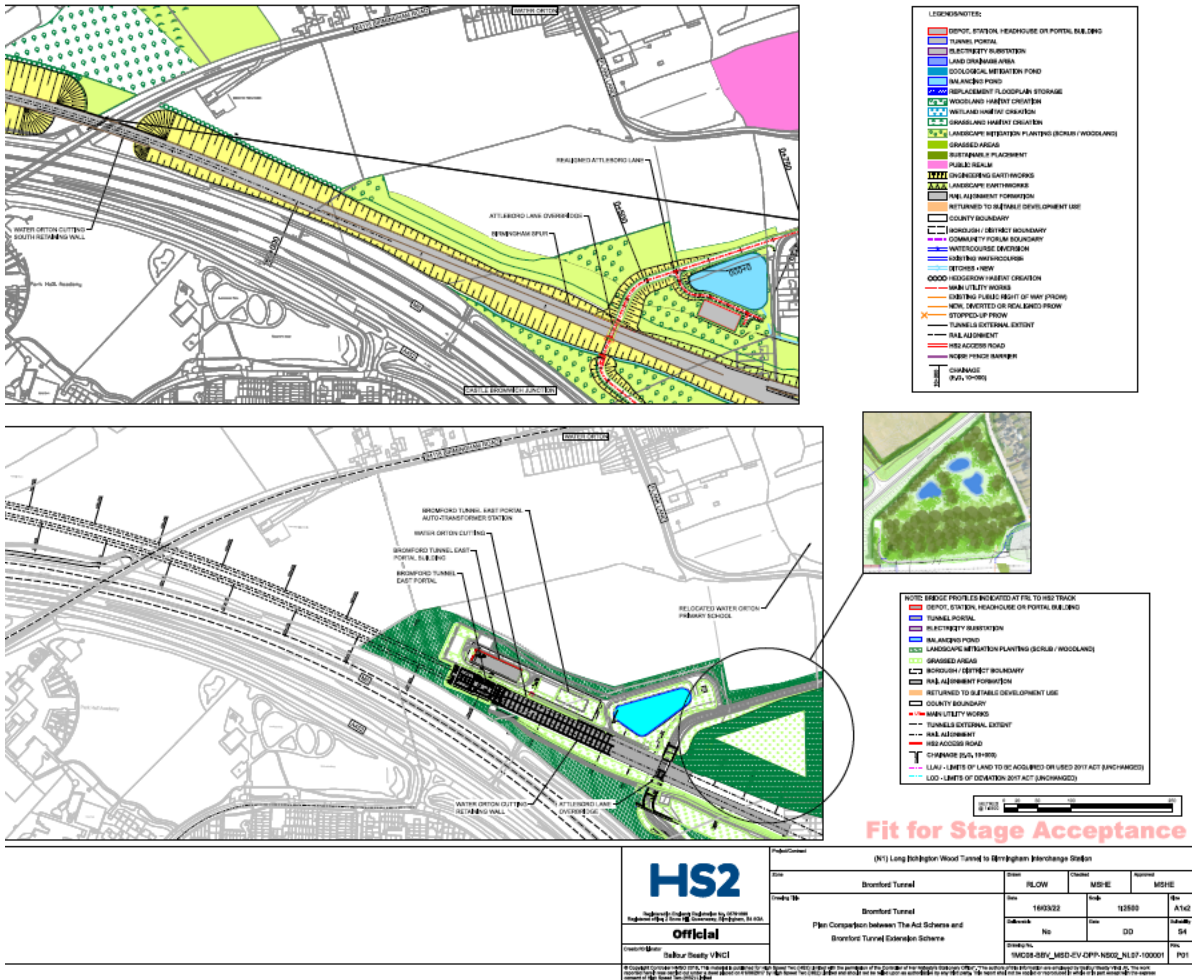
View looking northwards across the cutting, showing in-situ concrete props running between the northern and southern retaining walls and the partial excavation of the ground between a pair props

Appendix 3 Appellant's aerial photograph of December 2022



Approximate location for the transition between the Water Orton Cutting and the proposed tunnel portal (Annotation added by the Inspector)

Appendix 4 Extract from the Appellant's comparison drawing



Scheme assessed in the Environmental Statement shown in the upper image and the proposals subject to the appeal shown in the lower image

Appendix 5 Additional documents submitted prior to and after the Hearing

Document Reference	
Appellant's Documents	
HS2-1	Inspector requested drawing showing comparison between works authorised by the HS2 Act and subject to the appealed Sch17 application submitted on 28 January 2022
HS2-2	Enhanced Inspector requested drawings showing comparison between works authorised by the HS2 Act and subject to the appalled Sch17 application submitted on 30 March 2022
HS2-3	Appellant's response to the Council's Statement of Case submitted on 30 March 2022
HS2-4	Appellant's appeal summary submitted on 30 March 2022
HS2-5	Appellant's Environmental Statement Position Statement submitted on 30 March 2022
HS2-6	Environmental Statement Volume 2 Community Forum Area Report CFA19 Coleshill Junction submitted on 21 April 2022
HS2-7	Environmental Statement Volume 2 Map Books CFA19 Coleshill Junction submitted on 21 April 2022
HS2-8	Environmental Statement Volume 2 Community Forum Area Report CFA25 Castle Bromwich and Bromford submitted on 21 April 2022
HS2-9	Environmental Statement Volume 2 Map Books CFA25 Castle Bromwich and Bromford submitted on 21 April 2022
HS2-10	Illustrative Plans for the appellant's Transport and Works Act Order application submitted on 21 April 2022
HS2-11	Appellant's comments on third parties' appeal representations submitted on 25 April 2022
HS2-12	Email of 3 May 2022
HS2-13	Response to the post hearing submissions of Ms Felicitas Freeman submitted on 6 May 2022

HS2-14	Email of 17 May 2022 providing clarification about information given during the accompanied site visit undertaken on 29 April
HS2-15	Drawing showing General Arrangements overlain on Aerial Photograph (Drawing 1MC08-BBV_CV-DPL-NS02_NL07-000044 Revision P01.1) submitted on 14 June 2022
HS2-16	Email of 24 August 2022 concerning the High Court handing down its judgement in the matter of Buckinghamshire Council v Secretary of State for Transport, Secretary of State for Levelling UP, Housing and Communities and High Speed Two (HS2) Ltd (CO/3869/2021) (the Buckinghamshire judgement)
HS2-17	Response to the Council's submissions concerning the Buckinghamshire judgement and other matters submitted on 23 September 2022
Suite of revised application drawings submitted by the appellant on 4 November 2022	
HS2-18a	1MC09-BBV_MSD-PL-DGA-NS04_NL11-160400 Revision C02 General Arrangements - For Approval
HS2-18b	1MC09-BBV_MSD-PL-DSE-NS04_NL11-160401 Revision C02 Sections A and B - For Approval
HS2-18c	1MC09-BBV_MSD-PL-DSE-NS04_NL11-160402 Revision C02 Sections C, D and E - For Approval
HS2-18d	1MC09-BBV_MSD-PL-DSE-NS04_NL11-160403 Revision C02 Sections F, G and H - For Approval
HS2-18e	1MC09-BBV_MSD-PL-DSE-NS04_NL11-160404 Revision C02 Sections J, K and L - For Approval
HS2-18f	1MC09-BBV_MSD-PL-DEL-NS04_NL11-160405 Revision C02 Elevations M and N - For Approval
HS2-18g	1MC09-BBV_MSD-PL-DEL-NS04_NL11-160406 Revision C02 Elevations O and P - For Approval
HS2-18h	1MC09-BBV_MSD-PL-DGA-NS04_NL11-160407 Revision C02 Landscaping and Environmental Master Plan - For Information

HS2-18i	1MC09-BBV_MSD-PL-DLO-NS04_NL11-160401 Revision C02 Location Plan - For Information
HS2-19	Response to the Interested Parties' comments concerning the revised application drawings submitted on 1 December 2022
HS2-20	Response to the Council's comments concerning the revised application drawings and updated aerial photograph of November 2022 submitted on 12 December 2022
North Warwickshire Borough Council's (NWBC) Documents	
NWBC-1	Council's Case Summary submitted on 30 March 2022
NWBC-2	Council's comments on third parties' appeal representations submitted on 25 April 2022
NWBC-3	Explanatory Notes accompanying the High Speed Rail Act 2017 submitted on 26 April 2022
NWBC-4	Extract from Hansard of 1 March 2016 submitted on 26 April 2022
NWBC-5	Council's hearing speaking note submitted on 26 April 2022
NWBC-6	Planning Forum Note 5 Model Conditions submitted on 28 April 2022
NWBC-7	Council's comments concerning the Buckinghamshire judgement submitted on 23 September 2022
NWBC-8	Council's Interested Parties consultation letter of 8 November 2022 concerning the submission of the appellant's revised application drawings
NWBC-9	Council's comments concerning the revised application drawings 2 December 2022
HS2/NWBC	Statement of Common Ground between the appellant and the Council submitted on 30 March 2022
Submissions made by Interested Parties (IPs)	
IP-1	Post hearing submission of Ms Felicitas Freeman submitted on 27 April 2022

IP-2	Neil Bevan (a resident of the area) comments concerning the submission of the revised application drawings submitted on 14 November 2022
IP-3	Historic England's comments concerning the submission of the revised application drawings submitted on 16 November 2022
IP-4	The Special Management Zone Group North Warwickshire's comments concerning the submission of the revised application drawings submitted on 18 November 2022
IP-5	Natural England's comments concerning the submission of the revised application drawings submitted on 21 November 2022

Report to the Secretaries of State for Transport and for Levelling Up, Housing and Communities

by Grahame Gould BA MPhil MRTPI

**an Inspector appointed by the Secretaries of State for Transport and for Levelling Up, Housing and
Communities**

Date: 13 December 2023

Inspector's Addendum Report

HIGH SPEED RAIL (LONDON – WEST MIDLANDS) ACT 2017

NORTH WARKWICKSHIRE BOROUGH COUNCIL

APPEAL AGAINST THE NON-DETERMINATION OF SCHEDULE 17 SUBMISSION

Hearing held on 27 April 2022
Site visit made on 29 April 2022

Water Orton Cutting including the Bromford Tunnel East Portal and Attleboro Lane
Overbridge and ancillary works
Appeal Ref: APP/HS2/18

Appeal Ref: APP/HS2/18**South south-west of Water Orton and north east of junction 4A of the M6 motorway**

- The appeal is made under paragraph 22(3) of Schedule 17 of the High Speed Rail (London to West Midlands) Act 2017.
- The appeal is made by High Speed Two Limited against the decision of North Warwickshire Borough Council to decline to determine the request for the approval of plans and specifications made under Schedule 17.
- The application, reference HS2/2021/0005, is dated 22 September 2021 and the decision refusing to accept and determine the application was dated 8 October 2021.
- The development proposed comprises the Water Orton Cutting including the Bromford Tunnel East Portal and Attleboro Lane overbridge and ancillary works.

Addendum Recommendation: No conditions be imposed in connection with to the request for the approval of plans and specifications concerning the formation of the Bromford Tunnel East Portal.

Background

1. On 31 March 2023 I submitted a recommendation report (RR) to the Secretaries of State (SoSs). In that report I recommended that:
 - the appeal concerning the request for the approval of the formation of the proposed Bromford Tunnel East Portal be dismissed; and
 - the aspects of the appeal concerning the request for the approval of details concerning: the formation of the Water Orton Cutting (the cutting), insofar as those works would be unconnected with the tunnel portal; and the Attleboro Lane Overbridge be allowed.
2. On 27 October 2023 the SoSs requested that I submit an "Addendum Report" (AR) providing recommendations relating to "*the portal's design with reference to the conditions included within Schedule 17 or any changes to operation[al] noise levels or air quality or to comment on any of the benefits that the appellant has attributed to an extension to the Bromford Tunnel*".
3. The request for the AR having been made further to what I had stated in paragraph 48 of my RR, namely:

'Should the SoSs agree with me that the proposed relocated tunnel portal would not benefit from the DPP¹ that would mean the portal would require authorisation via other legislation. Given that context, in order to avoid the potential for any predetermination by the SoSs I consider it would be inappropriate for me to make any recommendations about the portal's design with reference to the conditions included within Sch17 or any changes to operational noise levels or air quality or to comment on any of the benefits that the appellant has attributed to an extension to the Bromford Tunnel. I consider it would in any event not be possible for either the SoSs or myself to arrive at an informed assessment of the

¹ The deemed planning permission granted pursuant to section 20 of the High Speed Rail (London to West Midlands) Act 2017

tunnel portal's visual effects, given the piecemeal way the appellant is seeking to go about obtaining approvals for what would be a new set of works in this location, given the absence of definitive details relating to the tunnel portal building, the autotransformer and any soft landscaping works.'

4. This AR should be read in combination with my RR, with this addendum only addressing the matters that the SoSs have requested I make additional recommendations about.

Proposed Bromford Tunnel East Portal (BTEP)

5. The appealed Schedule 17 (Sch17) application, amongst other things, seeks approval for the formation of a concrete tunnel portal structure at the western end of the proposed cutting. Given the appellant's intention to extend the Bromford Tunnel by 2.9km approval is being sought for a portal that would be located in the countryside on the fringes of Water Orton's built-up area. That would be instead of a portal being sited within the Castle Bromwich Business Park.
6. The following description of what the cutting would comprise is provided in paragraph 3.2.10 of the written statement accompanying the appellant's originally submitted application (appellant's appeal Appendix [AaA] 2):

"The earthworks associated with the Water Orton Cutting are held by a retaining diaphragm wall structure approximately 470m in length on its south side, and by a retaining diaphragm wall structure of approximately 300m in length on its north side. This retaining structure comprises open cut sections of concrete diaphragm wall supported by concrete props."

7. The BTEP is described in paragraph 3.2.15 of the written statement [AaA2] as:

"A concrete structure will be built within the cutting at its western end, forming the eastern portal of the Bromford Tunnel. This structure will continue eastwards from the portal itself within the Water Orton Cutting, with concrete retaining diaphragm walls to the flanks and props forming structural joists above train level. Retaining diaphragm walls will continue within the railway cutting, where a concrete retaining headwall will be constructed, with two circular openings to form the tunnel portal. The tunnel portal will be located completely below existing ground level."

8. Within the written statement [AaA2] it is explained that when high speed trains exit tunnels significant noise can be generated because of soundwaves being produced as part of a "**piston effect**". The proposed tunnel portal would be of a porous nature, with its design including openings in portal's roof. In section 3 of the application proforma (AaA1) it is stated that the cutting would extend approximately 470 metres north westwards from the existing Attleboro Lane. It is therefore my understanding that the transition between the western end of the cutting and the proposed BTEP would approximate to where "Section K" is shown on the appellant's General Arrangements plan (reproduced in Appendix 1 to this report and notated with a red hatched line by myself).
9. The portal would have a rectangular profile and it would terminate in the region of 50 metres to the north west at the proposed tunnel's eastern

headwall. The portal's eastern cross section (ie in the vicinity of Section K) is shown in Figure 1.

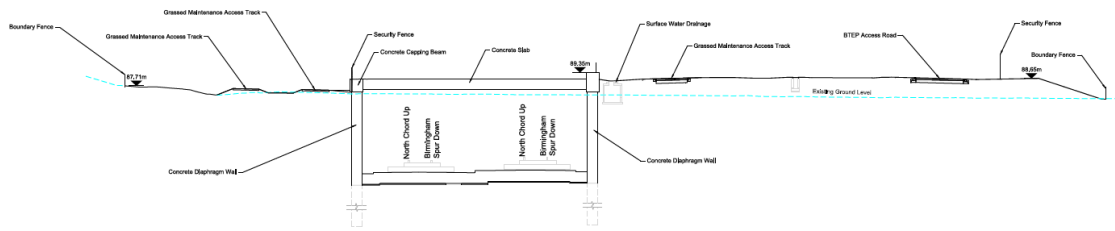


Figure 1 Cross section K

10. The portal's concrete roof slab and capping beams would project around 1.0 metre above the proposed finished surrounding ground level and those above ground elements of the BTEP would be enclosed by 1.8 metre high security fencing. It is intended that some access tracks and parking would be provided on the portal's roof and would be needed for maintenance purposes.
11. The BTEP would largely be a subterranean structure. Consequently, I consider of the above ground elements of the BTEP, for which approval has been sought at this time, of themselves would not be unduly prominent and their appearance would be capable of being softened through the undertaking of soft landscaping. Landscaping does not form part of the works for which the appellant has sought approval under the appealed Sch17 application. Landscaping being a form of mitigation that can be considered in detail when bringing into use applications are submitted under paragraph 9 of Sch17.
12. However, it is clear from details submitted for information purposes only with the appealed application that above ground structures would be required to facilitate the proposed tunnel's operation. In that regard the appellant intends that immediately to the north of the proposed BTEP a portal building would be constructed, housing mechanical, electrical and public health equipment.
13. It is further intended that the proposed portal building would be linked via two gantries to a central portal shaft extending above the BTEP's roof. The appellant has also identified the need to locate an autotransformer within the vicinity of the BTEP and that would be located to the south east of the portal building. The extent of the land reserved for those above ground structures is shown on the submitted General Arrangements Plan (Appendix 1 to this report) and an illustrative image² for them can be seen in Figure 2.

² Extract from drawing 1MC09-BBV_MSD-PL-DSE-NS04_NL11-160401 Revision C02 Sections A and B (Appeal document HS2-18b)

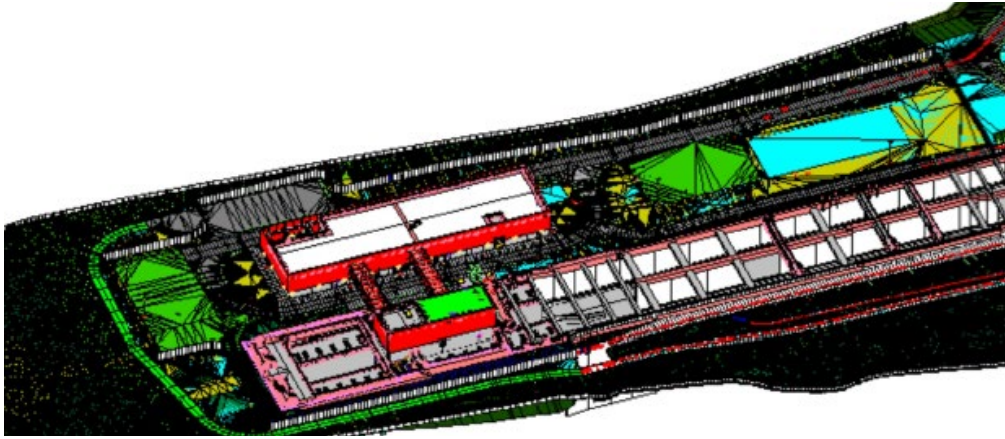


Figure 2 Illustrative image of the tunnel portal and associated above ground structures

14. A consequence of needing to provide a portal building and other above ground structures in the vicinity of the proposed BTEP would be the absence of much land, particularly to the north of the railway line, for the softening of the appearance of potentially unsightly functional structures. The relationship between the above ground structures, the proposed BTEP and land available to accommodate soft landscaping is shown in the illustrative landscaping and environmental master plan (LEMP) included in Appendix 2 to this report. The reference design assessed in the Environmental Statement (ES) for this stretch of HS2 was simply for a railway line in a cutting flanked by planting areas. A comparison between that reference design and what is now being proposed can be seen in Appendix 4 of my RR. The reference design included the undertaking of, amongst other things, a mixture of landscaped earthworks and landscape mitigation planting (scrub and woodland). By contrast the LEMP shows to the north of the BTEP generally low level planting (grassland and shrubs) and a narrow strip of what is described as "*high woodland edge*".
15. Full details of the above ground structures associated with the operation of the proposed BTEP have not been submitted by the appellant. Consequently, I consider such details could not reasonably be requested in connection with the determination of this appeal. That is because the appellant has expressly excluded a request for the approval of the plans and specifications for the above ground structures from the appealed Sch17 application. That led me in paragraphs 46 and 48 of my RR to express the view that the appellant's proposals were of a '*piecemeal*' nature because, in effect, a substantially different set of works are now being brought forward in '*... the absence of definitive details relating to the tunnel portal building, the autotransformer and any soft landscaping works*'.
16. On the information available to me I have major reservations as to whether the soft landscaping works shown on the illustrative LEMP (Appendix 2 to this report) would provide effective mitigation for the above ground BTEP structures. Potentially the only way of addressing what might be the unsightly appearance of a standalone group of structures would be reliance a higher quality of design not usually reserved for this type of functional structure. However, that is not a matter that could reasonably be secured through the imposition of any conditions under paragraph 2 of Sch17 because the portal building and other above ground structures associated with the proposed BTEP are not within the appealed application's scope.

Changes to operational noise levels or air quality

17. A Noise Demonstration Report (NDR) [AaA3] was submitted with appealed application. The NDR is excluded from the submitted documents for which approval has been sought [AaA1]. In section 1 of the NDR it is explained this report is "... *not material to approvals under paragraph 2 and 3, this information will provide reassurance in advance for the request of approval under paragraph 9, that the mitigation is appropriate ...*"³. While the NDR has only been submitted for information purposes only, it is the only noise report that has been provided by the appellant.
18. The NDR's Executive Summary explains it is a report relating to the "... *Proposed Scheme along the Birmingham Spur ...*" and therefore relates to the cutting as well as the:
- Water Orton numbers 1 and 3 Viaducts;
 - Marsh Lane Embankment;
 - Attleboro Flyover; and
 - Attleboro Farm Embankment and Retaining Wall.
19. The NDR is therefore not Water Orton cutting specific and the way it has been written suggests it was intended to accompany a single Sch17 application seeking approval for a comprehensive package of works, including the cutting, within the vicinity of Water Orton. In that regard a lot of the NDR's content focuses on noise mitigation measures concerning the operational railway to the east of Attleboro Lane, ie an area beyond the geographical extent of the appealed application.
20. It is stated in the third paragraph of the NDR's Executive Summary that:
- "This report provides that all reasonable steps are taken into the Proposed Design so that the combined airborne noise from the railway and altered roads, predicted in all reasonably foreseeable circumstances (AFRC), does not exceed the lowest observed adverse effect level (LOAEL) at residential receptors. Where it is not reasonably practicable to achieve this objective, this report demonstrates that the Proposed Design reduces airborne noise as far as is reasonably practicable (AFARP). It is shown in the report that the Proposed Design leads to noise impacts that are similar to those reported in the HS2 Phase 1 ES."*
21. The NDR predicts for the whole of the area to which it relates that seven properties in Attleboro Lane would be subject to night time (23:00 to 07:00) noise levels exceeding the LOAEL (40 L_{pAeq,8hr}). That compares with no such exceedances of LOAEL in Attleboro Lane under the ES reference design. Those exceedances of LOAEL having been attributed to a reduction in the length of landscape bunding. The Council is concerned that the predicted increases in noise received at dwellings in Attleboro Lane could have adverse health or living conditions effects for the affected residents, with there potentially being a need for windows to be kept closed to avoid sleep disturbance.

³ The references to paragraphs 2 (building works), 3 (other construction works) and 9 (bringing into use) being to paragraphs in Sch17

22. The NDR advises that across the whole of the area it covers there would be a reduction from 617 to 503 properties where exceedances of the maximum night time LOAEL ($60 L_{pAF, max}$) would arise. However, the NDR does not explain what contribution, if any, the design for the Water Orton cutting and the proposed BTEP might have in reducing those exceedances. If the design of the cutting and the proposed BTEP were contributing to that reduction I would have expected the appellant to have clearly stated that as part of its appeal case. As I am unaware of the full nature of the proposals contained in any other requests for the approval of plans and specifications for works to the east of Attleboro Lane I cannot comment further on the weight to be attributed to the predicted wider improvement in Water Orton's noise climate. That being something that might have been possible had I been reporting on an appeal that concerned all of the works within the vicinity of Water Orton, as opposed to what I have characterised as being a piecemeal application for some elements of the works affecting this area.
23. It appears that there would be some worsening in the noise climate in Attleboro Lane compared with the ES reference design. Should that be due to the current design for the Water Orton cutting and the proposed BTEP I consider the appellant would not have been able to demonstrate adherence to its commitment to reduce noise as far as reasonably practicable. That I consider creates a difficulty when the cutting and proposed BTEP are being assessed against the tests in paragraphs 2 and 3 of Sch17, namely whether the plans and specifications should be refused or approved with conditions on the ground that the works ought to be modified to preserve local amenity and the works would reasonably be capable of being so modified and in the case of the proposed portal whether it could reasonably be carried out elsewhere within the permitted limits for HS2. In this instance there would appear to be a modification that could be made, the reversion to the ES reference design for the cutting and the Bromford Tunnel, given that those works have previously been demonstrated to have a lesser effect for the residential occupiers of Attleboro Lane.
24. The worsening in the noise climate for Attleboro Lane might be capable of being resolved through the undertaking of mitigation works not identified in the NDR. However, I consider that would be a matter for consideration when a bringing into use application was made under paragraph 9 of Sch17. In connection with the submission of that application I consider it would be necessary for the appellant to submit a comprehensive noise assessment for the Council's consideration, with any necessary noise mitigation measures being incorporated into the works for which approval was to be sought under paragraph 9.
25. With respect to air quality, this is a concern that has been raised by multiple residents in connection with constructing the works subject to the appealed application. I am given to understand firstly that the handling and storage of spoil, reusable spoil and topsoil and dust suppression are matters which come with the scope of paragraph 4 (matters ancillary to development) of Sch17 and secondly the Secretary State for Transport has made a "class approval" under paragraph 5 relating to them. That means that the previously mentioned matters ancillary to the construction of HS2 are subject to the controls incorporated into the class approval and are not for further consideration as part of the determination of the appealed application.

Benefits attributed by the appellant to an extension to the Bromford Tunnel

26. The appellant in section 3.7 of its response to the third parties' appeal submissions has identified the following matters as being benefits of extending the Bromford Tunnel:
- Removing the need to realign approximately 600 metres of the River Tame.
 - Reducing carbon emissions due a reduction in the overall extent of built infrastructure.
 - Relocating the tunnel portal from a floodplain reducing climate change effects due to flood risk.
 - Reducing effects on the Park Hall nature reserve.
 - Reducing effects on farmland.
 - Reducing landscape and visual impacts for heritage impacts.
 - Reducing operational airborne noise effects for a number of residents.
27. The appealed application does not seek approval to the 2.9km extension of the Bromford Tunnel, with only the BTEP forming any part of the intended tunnel extension. Accordingly, I remain of the view that it would be inappropriate for me to comment on the benefits claimed by the appellant, because they relate more to the proposed tunnel extension than a relocated portal and very little information has been submitted about the claimed benefits.

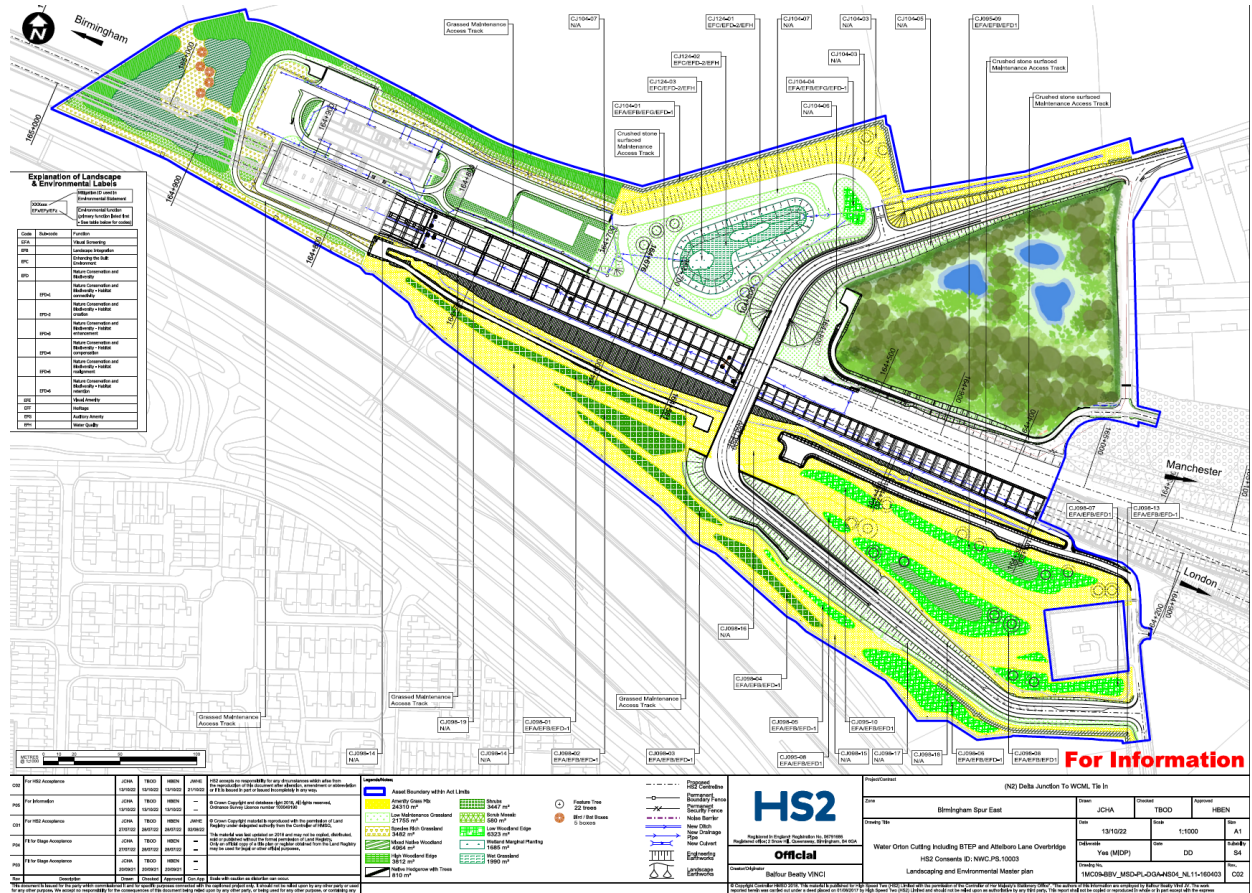
Conclusions

28. For the reasons given above I recommend that no conditions be imposed in connection with the request for the approval of plans and specifications concerning the formation of the Bromford Tunnel East Portal.

Grahame Gould

INSPECTOR

Appendix 2 Indicative Landscaping and Environmental Master Plan



Drawing 1MC09-BBV_MSD-PL-DGA-NS04_NL11-160403 Revision C02 (Appeal document HS2-18h)