THE NETWORK RAIL (ESSEX AND OTHERS LEVEL CROSSING REDUCTION) ORDER

PLANNING POLICY: SUPPLEMENTARY NOTE

Introduction

1. This supplementary Note is filed in response to (1) Submissions on behalf of The Ramblers in Response to Network Rail's Planning Note and (2) Planning Note on behalf of Colchester Borough Council.

2. Network Rail has set out its appraisal of how the Order proposals accord with what it considers to be the relevant national and local policies in its Note on Planning Policy (NR-138). There is clearly a difference of opinion between Network Rail ("NR") the Ramblers Association ("RA") and Colchester Borough Council ("CBC") as to whether, or to what extent, the Order proposals accord with those policies (and, in some case, which the relevant policies are) but those matters will be addressed in closing submissions as necessary, rather than this Note. Nor does this Note address crossing specific matters (for example, matters relating to hedgerows at E51 and E52): again, this will be addressed in closing submissions if necessary.

3. This Supplementary Note is filed:

    a. To set out NR's position that the request for deemed planning permission does not fall to be considered by reference to s.38(6) of the Planning and Compulsory Purchase Act 2004, as set out in CBC's Note; and

    b. To clarify NR's position (in the event that such clarification is required) on the two matters identified at paragraphs 33 – 40 of the Ramblers' Submission, which refer to paragraph 47 of NR's Planning Note.

4. It also briefly responds to the suggestion, by CBC, that NR has failed to have regard to policies that CBC considers to be relevant, and sets out NR's position on relevant policies in the now-adopted new East Herts District Plan (referred to on page 5 of the RA submissions).

The request for deemed planning permission: s.38(6) TCPA 1990

5. In paragraphs 2.1 – 2.6 of CBC's Note, CBC sets out its view that:

    a. Section 55 TCPA 1990 confirms that planning permission is required for development;
    b. Section 55 TCPA 1990 prescribes the meaning of development
    c. It is "undoubtedly the case" that NR seeks to take development within the meaning of section 55. Therefore planning permission is required under s.55 TCPA 1990;
    d. Section 38(6) PCPA 2004 confirms that in deciding whether to grant planning permission, any determination must be made in accordance with the development plan unless material considerations indicate otherwise;
    e. In this case, the development plan is the "Local Plan" (i.e. CBC's local plan for those crossings within Colchester);
    f. Therefore, permission should be first determined having regard to the Local Plan before then considering the other material considerations.

6. With respect to CBC, NR submits that the analysis set out in paragraphs 2.1 – 2.6 of its Note proceed on an incorrect understanding of how a request for deemed planning permission under s.90(2A) falls to be determined.

7. The request for deemed planning permission does not fall to be determined in accordance with section 38(6) of the PCPA 2004: namely, that the determination must be made in accordance with the development plan documents for the area unless material considerations indicate otherwise.

8. Section 90 TCPA 1990 provides, so far as is material, as follows:

    "(1) Where the authorisation of a government department is required by virtue of an enactment in respect of development to be carried out by a local authority or National Park authority , or by statutory undertakers who are not a local authority or National Park authority, that department may, on granting that authorisation, direct that planning permission for that development shall be deemed to be granted, subject to such conditions (if any) as may be specified in the direction.

    …

    (2A) On making an order under section 1 or 3 of the Transport and Works Act 1992 which includes provision for development, the Secretary of State may direct that

planning permission for that development shall be deemed to be granted, subject to such conditions (if any) as may be specified in the direction.

…

(4) For the purposes of this section development is authorised by a government department if—

(a) any consent, authority or approval to or for the development is granted by the department in pursuance of an enactment;

(b) a compulsory purchase order is confirmed by the department authorising the purchase of land for the purpose of the development;

(c) consent is granted by the department to the appropriation of land for the purpose of the development or the acquisition of land by agreement for that purpose;

(d) authority is given by the department—

(i) for the borrowing of money for the purpose of the development, or

(ii) for the application for that purpose of any money not otherwise so applicable; or

(e) any undertaking is given by the department to pay a grant in respect of the development in accordance with an enactment authorising the payment of such grants;

and references in this section to the authorisation of a government department shall be construed accordingly.

…"

9. In *R (on the application of Samuel Smith Old Brewery (Tadcaster)) v Secretary of State for Energy & Climate Change* [2012] EWHC 46 (Admin), the Court (Edwards-Stuart) rejected the Claimant's contention that in deciding whether to give a direction under s.90(2) TCPA 1990 that planning permission be deemed to have been granted, the Secretary of State was under a duty to determine the request in accordance with s.38(6) PCPA 2004. The material passages of the judgment are set out below for ease of reference[1]:

"[*75] Mr Village[2] submitted that the giving of a direction under section 90(2) of the 1990 Act is a determination under the planning acts. I do not agree. On the contrary, as a matter of construction I consider that it is a direction that such a determination is not required. It is worth noting that the SoS does not have to give such a direction: it would be possible to make no such direction and let the planning application process take its own separate course, although it has to be said that no-one in court appeared to know of a case in which this had been done.*

[76] NG[3] and the SoS point out that the Electricity Act 1989 contains its own statutory code as to the matters that the SoS is required to consider when deciding whether or not to grant a consent under section 37 of the Electricity Act 1989 . That code includes the "planning"

[1] A full copy of the judgment is appended to this Note and will be added to the Legal Bundle

[2] Peter Village QC appeared for the Claimant, referred to in the judgment as 'SSOTB'

[3] National Grid, the Interested Party

and "environmental" considerations listed in paragraph 1 of Schedule 9 to the Electricity Act 1989 . Miss Natalie Lieven QC, who appeared for the SoS, also pointed out that the justification for excluding section 90(2) deemed consents from section 38(6) of the 2004 Act is that applications for overhead lines are generally part of regional or national networks, so that one would not expect the SoS to have the same statutory duty as when determining an application for another form of development under section 77 of the 1990 Act.

[77] Mr Village relied on the wording of section 90(3) of the 1990 Act, namely that: "The provisions of this Act … shall apply in relation to any planning permission deemed to be granted by virtue of a direction under this section as if it had been granted by the Secretary of State on an application referred to him under *section 77 ". This brought the response from Miss Lieven that the provisions of the Act only apply to the deemed planning permission itself: they do not relate to the process by which that planning permission comes about. She submitted that the effect of section 90(3) is to ensure that where there is a deemed consent under section 90 other relevant provisions of the 1990 Act will then apply, for example, section 257 of the 1990 Act (which relates to the stopping up or diverting of footpaths and bridleways).*

[78] Mr Mark Lowe QC, who appeared for NG, made a similar submission. He submitted that, in so far as there was any determination, it was a determination under the Electricity Act 1989 and not under the planning Acts. Further, he submitted that section 90(3) of the 1990 Act applied once a direction has been made and to the resulting deemed planning permission. It did not apply to the SoS's power to make the direction.

[79] In my view the first difficulty with SSOBT's submission is the one that I have already mentioned, namely that the effect of the deeming provision is to dispense with the need for any determination of the planning permission, so that limb (3) of SSOBT's process never happens. In addition, I agree with the submissions of NG and the SoS — namely that section 90(3) applies to the deemed planning permission, not to the process that gave rise to it — which, to my mind, are unanswerable.

[80] The result of this conclusion is that it is unnecessary to consider the extent to which the SoS may or may not have complied with section 38(6) of the 2004 Act because there was no duty on him to do so. Further, it follows also that the SoS was under no duty to resolve the issue between the parties as to whether or not such a duty existed."

10. Paragraph 90.03 of the Encyclopaedia of Planning Law and Practice states that:

> *"It would appear that this reasoning would also apply such that s.38(6) of the 2004 Act does not apply to determinations to make a Transport and Works Act Order which would also involve the making of a direction granting planning permission as a result of s.90."*

11. It is Network Rail's submission that there would be no proper basis for adopting a different approach where the request for deemed planning permission is made under s.90(2A) TCPA 1990.

12. Network Rail acknowledges that para 1.28 of the DfT 'Guide to TWA Procedures', the guidance provides that "*In determining an application for a TWA order to authorise works, and any related application for deemed planning permission, the Secretary of State will have regard to, amongst other things, relevant national, regional and local planning policies….In line with the plan led system for determining planning applications, projects that conflict with relevant policies in the development plan are unlikely to be authorised, unless material considerations indicate otherwise".*

13. Network Rail would stress, however, that this Guidance pre-dates the decision in *Samuel Smith Old Brewery (Tadcaster)* (the guidance was published in June 2006) and has not been updated following that decision, and that to the extent it remains valid as guidance as to how the Secretary of State will approach decision making, it cannot be equated to the statutory test contained in s.38(6) PCPA 2004 which the Court has confirmed does not apply to requests for deemed planning permission under s.90 TCPA 1990.

14. NR would also emphasise that the request under s.90(2A) TCPA 1990 has been made for deemed planning permission "so far as it is required" for development which, in respect of works or matters, is carried out within Order limits or at any of the places authorised by the Order (see NR10).

15. That is not a request for planning permission for closure of level crossings and provision of diversion routes per se. The principle of the proposed closures with (or as may be the case) without provision of new rights of way falls to be considered under the Transport and Works Act 1992 – not the Town and Country Planning Act 1990. It is unclear whether this has been recognised in CBC in preparing its Planning Note.

16. NR submits, therefore, that its request for deemed planning permission does not fall to be considered by reference to s.38(6) TCPA, as would an application for planning permission under s.70 TCPA 1990.

Clarification of points raised in the RA submissions

17. In paragraphs 33-40 of their submissions, the RA set out their response to 2 matters raised in paragraph 47 of NR's Planning Note, namely:

    a. *"A number of the policies are concerned with the provision of new PROWS associated with new developments, or seeking enhancements/improvements to the PROW network (see also the ECC ROWIP). That is not the purpose of this Order, nor what is required under s.5(6) TWA 1992;*
    b. *"To the extent that local plan policies (for example, Harlow Local Plan Policy L13) stipulate requirements that new PROW should meet, if and to the extent that those policies depart from (and/or go beyond) the 'policy' tests set out in the TWA Guidance, NR would respectfully submit that it clearly cannot 'trump' the same. Nor can it require a different, or more onerous test, to be applied in considering the replacement PROW to be provided within that area to that which applies to the other crossings within the Order."*

18. In respect of point (a) above, the RA suggests that the "purpose" of the Order is irrelevant to considering whether the Order proposals are in compliance with local policies seeking enhancements or improvements to the right of way network, and that the focus should instead be on the effects of the Order.

19. To clarify: the statement in paragraph 47(a) was, in effect, a statement that is was necessary to read a number of the local plan polices touching on rights of way and/or the ROWIP in the context in which they appeared. For example, a policy concerned with enhancing PROW links which is clearly directed towards new built development is not, in NR's submission, a relevant policy for the purposes of considering the Order proposals – save, at most, to the extent that it illustrates the authority's general approach to PROW. Similarly, the ROWIPs should not be taken out of context. They are documents expressly directed at securing improvements to the PROW network in the highway authority's area. The Order before this inquiry is not a PROW improvement/enhancement scheme. It is an Order relating to the operation of a transport network (in this case, the railway network) under s1 TWA 1992. NR was not suggesting that the policies within the ROWIP did not fall to be considered,

merely that such consideration must take place within the legal framework against which the Order application falls to be determined.

20. In respect of point (b) above, NR was not suggesting that s.5(6) is relevant to the question of whether the Order proposals comply with local plan policies. It was, again, merely seeking to reiterate that such consideration must take place within the legal framework against which the Order application falls to be determined. It would not, in NR's submission, be appropriate to suggest that in a case where the Secretary of State was satisfied that a proposed diversion would provide a suitable and convenient replacement for existing users, a crossing should nevertheless be removed from the Order because a local plan policy which applied to the LPA area within which that crossing was situated imposed different, or more onerous, requirements for the creation of new, or replacement, PROW.

21. The reference to the "'policy' test set out in the TWA Guidance" is a reference to the guidance on page 105 of the TWA Guidance, which, it was understood to be common ground, was the guidance against which the s.5(6) requirement fell to be considered: see NR/124.

22. NR trusts that that clarifies the position, to the extent it was not clear from its earlier Note.

Other policies

23. CBC suggests, in paragraph 4.3, that NR has not referred to any of the policies contained within the Essex Transport Strategy in its planning note.

24. The ETS is addressed at paragraph 41 of NR's Note: it is referred to as the Local Transport Plan. It is also addressed in Dr Algaard's Proof of Evidence at paragraphs 2.6.15 and 2.6.16.

25. CBC also states (at paragraph 2.10) that no consideration has been given to emerging policy in NR's planning note. This comment is made in the context of CBC's analysis of the 'legal background' which is addressed above. NR would note that CBC has not identified any emerging policies which it says should have been considered, but has not been, or which would materially alter the appraisal set out in NR's Planning Note.

26. In respect of the new East Herts District Plan, policy CFLR3 is in materially the same terms as former Local Plan policy LRC9 and NR's assessment, as set out in its Planning Note, remains unchanged.

Conclusion

27. It is clear from the RA's Submissions and CBC's Note that there are a number of points of difference as to how the Order proposals fall to be considered against Local Plan policy and the extent to which they do, or do not, comply with the same. These matters will, no doubt, be revisited in Closing Submissions, but NR trusts that this Note clarifies NR's position as to the legal framework within which those matters fall to be considered in advance of all parties' closings.

JACQUELINE LEAN

4th February 2019

Case No: CO/5789/2010

Neutral Citation Number: [2012] EWHC 46 (Admin)
IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 31/01/2012

Before:

MR JUSTICE EDWARDS-STUART

Between:

THE QUEEN on the application of SAMUEL SMITH OLD BREWERY (TADCASTER) (an unlimited company)	**Claimant**
- and -	
SECRETARY OF STATE FOR ENERGY & CLIMATE CHANGE	**Defendant**
- and -	
NATIONAL GRID ELECTRICITY TRANSMISSION PLC	**Interested Party**

(Transcript of the Handed Down Judgment of
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Official Shorthand Writers to the Court)

Mr Peter Village QC and Mr James Strachan (instructed by **Ward Hadaway**) for the **Claimant**
Miss Nathalie Lieven QC (instructed by **The Treasury Solicitors**) for the **Defendant**
Mr Mark Lowe QC (instructed by **Berwin Leighton Paisner Solicitors**) for the **Interested Party**

Hearing dates: 15 & 16 November 2011

Judgment
As Approved by the Court

Mr Justice Edwards-Stuart:

1. This is a claim for judicial review of a decision dated 8 April 2010 of the Secretary of State for Energy and Climate Change ("the SoS") made under section 37 of the Electricity Act 1989. The application is made by a concerned landowner, Samuel Smith Old Brewery (Tadcaster) ("SSOBT"). The decision related to a proposal made by National Grid plc ("NG") to install and keep installed a new section of overhead electricity line about 2.2 km long and involving some 7 pylons over land lying to the south-west of Tadcaster in North and West Yorkshire. Some of this land belongs to SSOBT. There was also an application for 5 wayleaves associated with the development. In practical terms these were for the foundations of the individual pylons, but they also included the oversailing of the land.

2. Two experienced inspectors appointed by the SoS recommended that the application should be refused. Their view was that the benefits of NG's proposal did not clearly outweigh the harm to the openness of the Green Belt land on which the new line was proposed (and other harm). They expressed their conclusions in a report dated 7 August 2009. It ran to over 500 paragraphs.

3. The purpose of the proposed development was to reinforce a section of the national grid known as the Ferrybridge Ring. No-one disputed that this needed to be done: the real issue was whether the new section of line that was necessary to achieve this should be done by way of underground cables rather than by overhead power lines. The former solution was significantly more expensive - by about up to 50%, depending on which alternative solution was chosen.

4. Stripping away the procedural and legal niceties the decision by the SoS involved balancing

   (1) the additional cost of an underground cable solution and any delay that adopting this solution might cause, against

   (2) the adverse visual impact to the landscape that would result from the proposed overhead power lines and associated pylons.

   There were other considerations, such as the ecological impact and the effect on the local farmers on whose land the pylons would be constructed, but these paled into relative insignificance when compared with the visual impact on the landscape.

The facts

5. The Ferrybridge Ring is a 132kV supply that runs in a roughly trapezium shaped loop from Ferrybridge to Husthwaite via Harrogate and then back to Ferrybridge via Osbaldwick. The Ferrybridge-Harrogate-Husthwaite section is a double circuit line, and the Husthwaite-Osbaldwick-Ferrybridge section is a single circuit line.

6. In the middle of this loop there is a double circuit 275kV line that runs from Monk Fryston (which is just north of Ferrybridge) to Poppleton, near York. This line

runs roughly north-south and parallel to part of the Ferrybridge-Harrogate leg of the Ferrybridge Ring.

7. NG wishes to join the 275kV line to the 132kV line in order to reinforce the supply to the Ferrybridge Ring. This involves running a new 275kV line approximately east-west to join the existing 132kV line about halfway along the section between Ferrybridge and Harrogate, at a point near Bramham. At this point the existing 132kV line would be cut and a 15 mile section between Bramham and a substation just north east of Harrogate, at Knaresborough, would be upgraded to 275kV.

8. So far as the upgrade to the existing 132kV line is concerned, this presents no difficulty in planning terms because by and large the existing pylons (or towers) would remain. The issue at the heart of the applications with which this case is concerned is the means by which the link between the existing 275kV line and Bramham would be created.

9. As I have already indicated, NG's proposal is to do this by means of a new overhead line involving the erection of 7 new pylons. However, it is also possible to do this by means of an underground cable, albeit at significantly greater cost.

10. Along part of the proposed line of the new east-west link there is a short existing spur of overhead line running from the existing Ferrybridge-Harrogate 132kV section to Bramham, where it terminates at a bulk supply point. This spur is carried on 5 pylons. Under NG's proposals this spur would be replaced by underground cables and so the 5 pylons would be removed. However, one of them would be replaced with a new pylon at the point where the new overhead line would terminate and go underground.

11. Thus in broad terms the overall effect of NG's proposals would be to remove four pylons and add seven. As far as I can tell from the plans, SSOBT, which is the well known brewery, owns about half the land over which the proposed 2.2 km section of new overhead line would run. However, it is SSOBT's case that both it and the other landowners whose land lies along the proposed route are willing to have the line under their land rather than overhead.

12. In April 2009, very shortly before the inquiry opened, NG proposed certain amendments to its scheme which included a change to the proposed route of the underground spur to Bramham. This has the effect that a further two pylons on the existing 132kV line would be removed. These works would have constituted permitted development and so did not need to form part of the section 37 application that was before the Inspectors.

13. Whilst the overall effect of this amended scheme would involve the addition of only one new pylon, it is obvious that a conclusion on an application of this sort cannot be arrived at by drawing up a balance sheet of the pylons to be added or subtracted and simply looking at the bottom line: what NG's proposal involves is a line of seven new pylons marching across a particular tract of countryside where there are no pylons at present.

14. An important feature of NG's proposals is that the section of the existing Ferrybridge-Harrogate 132kV line that was to be upgraded to 275kV was to terminate in an existing, but hitherto unused, substation near Knaresborough. This substation had been a speculative development by NG in the 1990s in anticipation of a different scheme for which the necessary consents were never obtained. In one of the sets of alternative proposals put forward by SSOBT, the connection to the Knaresborough substation was not required and so an issue arose as to whether or not the historic development costs of the substation should be taken into account when costing those proposals. NG's argument is that the adoption of those proposals, unlike the various other options, would mean that the costs of building the Knaresborough substation would effectively be thrown away. I return to this question below.

15. In spite of fairly extensive consultation during the formulation and development of NG's proposals, they have attracted no opposition from the relevant local planning authorities, any national or local amenity or ecology interests or, indeed, anyone who lives in the area save for SSOBT and two other landowners: Mr A S Elliott and Mr R D Elliott - they are owners or occupiers of the remaining land over which the proposed overhead lines would run. A late objection was received also from an organisation called the Boston Spa Allotment Association, but at the time of the inquiry the basis of that organisation's objection was not known. Understandably, NG relied strongly on what it described as the limited and parochial nature of these objections.

16. It was NG's case that the very high additional costs of putting cables underground, together with the difficulty and expense of any maintenance of those cables, outweighed the adverse effect on the environment, both visually and in practical terms. NG's general approach was that burying cables underground was only justified in nationally important landscapes, of which this was not one.

17. It was not disputed by anyone that, if an overhead line solution was to be adopted, NG's proposal was the best choice. There is therefore no issue about other possible routes: the dispute is whether the overall adverse effect on the environment and the local landscape presented by the overhead line outweighed the additional cost and, possibly, delay that was attendant on the underground cable alternative.

18. SSOBT put forward several sets of proposals, all variants of the underground alternative, of which only two proved to be really relevant. These are the C options and the E options. There are significant differences between the parties' rival costings for the C options, which are the set of options that do not involve the use of the Knaresborough substation. As I have said, it was NG's case that the C options had to be costed by incorporating the "sunk" costs of building Knaresborough. SSOBT's submission is and was that, since the costs of building the Knaresborough substation had already been incurred and effectively written off, they should be ignored when costing any alternative proposals. When the costs of building the Knaresborough substation were factored in to the cost of the various C options, they added between about £7 and £9 million to the cost of each option. The result of this was, on NG's approach, that there was relatively little to choose between the C options and the E options in terms of total cost.

The findings of the Inspectors in relation to the costs of the various schemes

19. The Inspectors determined the Knaresborough cost issue in favour of NG. The consequence of this was that whichever of SSOBT's options was considered, on NG's figures it would be very roughly 40%-50% more expensive than NG's proposals. In round terms, SSOBT's options (including Knaresborough) would cost about £30 million as against NG's proposal at a little over £20 million (again, on NG's figures).

20. It was SSOBT's case that the necessary wayleaves for its alternative options could be obtained without difficulty because the landowners affected were prepared to consent to them. This did not, so far as I understood the position, have any significant cost implications, but the possibility that the procedures involved in obtaining these consents might delay the project is one that the Inspectors did not really address. It is part of SSOBT's case that the reason for this is that the question of the urgency of the need was not one that was the subject of any debate at the inquiry.

21. However, the Inspectors did find that SSOBT's alternative proposals would take longer to construct than NG's proposed scheme.

The environmental considerations

22. The Inspectors concluded that SSOBT's proposals would have a significantly increased effect on agricultural operations and some increased environmental damage in terms of removal of hedgerows, but acknowledged that the former was a price that the objectors - being the only people affected - were prepared to pay.

23. The Inspectors concluded that, from an ecological point of view, NG's scheme did not give rise to any conflict with the relevant local policies. So far as SSOBT's alternatives were concerned, the Inspectors concluded that these would not cause any significant harm or conflict with local policies, although some of the options - including NG's proposals - would have an adverse effect on one hedgerow. The Inspectors concluded that any solution that did not require cables to be put under this hedgerow was marginally to be preferred on environmental grounds.

24. In broad terms, therefore, there were relatively limited adverse ecological effects from any of the proposals under consideration.

25. In relation to construction and agricultural impact, the Inspectors concluded that there was no significant impact in planning terms whichever scheme was adopted.

The site and surroundings and local planning policies

26. The Inspectors' summary of the site and its surroundings was in the following terms:

    (1) The route of the proposed overhead line lies within the administrative areas of Leeds City Council (West Yorkshire) on the west side and Selby District Council (North Yorkshire) on the east side. It crosses open countryside which is designated as Green Belt within both areas.

The location is to the south west of the town of Tadcaster and to the north of the A 64 dual carriageway.

(2) NG's baseline description of the existing landscape and visual resources of the locality within the ES is agreed by the parties as an appropriate basis for consideration of the landscape and visual effects of the proposals. The area is characterised by smoothly rolling landform and fertile intensively farmed arable land in large fields rounded by often low cut hedgerows, creating a generally large scale, open landscape. In places, woodland, overgrown hedgerows, game coverts, plantations and parkland landscape combine to give a sense of enclosure. Woodland around Tadcaster Grammar School and to the east of this at Lord's Plantation on the north side of the route are examples of this type of vegetation feature.

(3) The route would cross the A659 at its east end and the local road of Warren Lane at its west end near to Bramham Substation. The Substation is well screened by vegetation, although an adjacent telecommunications mast is visible above this. To the south on Warren Lane is a group of buildings at Headley Hall, including a Grade II listed barn and further to the east a former World War I aircraft hangar (also listed Grade II). There are small groups of residential properties on Warren Lane and also on Garnet Lane to the east of the XC line. Elsewhere within the area there are some isolated residential properties and complexes of farm buildings. To the north of the route near the junction of Warren Lane with Toulston Lane is a stone quarry.

(4) To the west of the PHG line is Bramham Village, the main part of which is designated as a conservation area and contains a number of listed buildings. Views from here towards the route of the line are partly limited by the lower elevation relative to the route itself. To the north east of Bramham is a disused 18th century windmill, on Toulston Lane/York Road are a late mediaeval cross base and a 19th century milestone, and on the A659 is another 19th century milestone; all of these are Grade II listed buildings.

(5) There are a number of public rights of way within the area. **Generally, from positions where there are open views in the locality around the proposed route, the towers and conductors of the existing XC, PHG and PBM overhead lines together with the lower voltage overhead lines result in electrical infrastructure having a widespread visual presence within these views**.

(My emphasis)

27. Within the Selby District the relevant policies were contained in the Yorkshire and Humber Plan "Regional Spatial Strategy to 2026" ("RSS") and the Selby District Local Plan. The former required plans, strategies, investment decisions and programmes to, among other things, provide for new efficient energy generation and transmission infrastructure in keeping with local amenity and areas of demand.

28. In the latter, the Selby District Local Plan, policies relating to development within the Green Belt largely followed the national policy in Planning Policy Guidance 2 ("PPG2") with a view to preventing development that would detract from the open character or visual amenity of the Green Belt. One section of the policy related to landscape areas that were defined to be locally important, through one of which the proposed overhead line would pass. Within these, priority was to be given to the conservation and enhancement of the character and quality of the landscape, and particular attention was to be paid to the design, layout, landscaping of development and the use of materials in order to minimise impact and enhance the traditional character of buildings and landscape. It was also the policy that any harm to the nature conservation interests was to be kept to a minimum.

29. Within the Leeds District, the RSS was incorporated in the relevant local policies, together with certain extant policies of the Leeds Unitary Development Plan. The latter contained provisions relating to the Green Belt that largely followed national policy. There was also a requirement for all new development within the countryside to have regard to the character of the landscape and to maintain features which contribute to this, where appropriate contributing to restoration or enhancement. In addition, there were provisions seeking to protect wildlife or habitat resources and requiring new development wherever possible to enhance existing wildlife habitats and to provide new wildlife habitats where the opportunities arose.

Planning Policy Guidance 2: Green belts ("PPG2")

30. Since this document assumed a prominent role in the submissions of the parties, I have set out the provisions that were referred to (taken from the version amended in March 2001) in Annex A to this judgment.

The need for the reinforcement of the Ferrybridge Ring

31. As I understand the position, it was not disputed that there was a current group capability deficit of 38 MW in the event of a loss of the Ferrybridge-Bramham-Harrogate 132kV circuit. This level of capability deficit was forecast to increase to 61MW by 2013/14.

32. In the light of this and other similar considerations, NG's submission to the inquiry (as recorded at paragraph 69 of the report) was as follows:

> "The need expert instructed by SSOBT accepts the need for reinforcement and that reinforcement should be undertaken as soon as practicable in order to make sure that this customer group enjoys similar security of supply to other parts of the country. Although querying the optimism of the forecast growth in demand, he advances no better alternative to NG's assessment."

33. At paragraph 421 of the report, the inspectors noted that NG's evidence on this point was not challenged by SSOBT. They said:

> "We accept that the Ferrybridge Ring does not comply with security of supply requirements (class E of ER P2/6) and that there is an urgent need to reinforce the network to meet these requirements."

34. In these circumstances I do not consider that it is open to SSOBT to submit or assert at this hearing that NG never ran any case on urgency (in the sense described in the extracts quoted above) at the inquiry: since the facts relating to need were or appeared to be common ground, there was no need to. In my judgment, it is plain that there was and is an existing need to reinforce the Ferrybridge Ring as soon as practicable. In this sense the need is urgent.

The statutory and regulatory framework

35. I now turn to the statutory framework, much of which I take gratefully from SSOBT's skeleton argument. Section 3A of the Electricity Act 1989 sets out a principal objective and general duty of the SoS in carrying out his functions, namely (amongst other things) the protection of the interests of existing and future consumers in relation to electricity conveyed by distribution or transmissions systems.

36. Section 9 of the Electricity Act 1989 concerns the general duty of a licence holder and provides, so far as material:

> "**9 General duties of licence holders**
>
> ...
>
> (2) It shall be the duty of the holder of a licence authorising him to participate in the transmission of electricity—
>
> (a) to develop and maintain an efficient, co-ordinated and economical system of electricity transmission; and
>
> (b) . . ., to facilitate competition in the supply and generation of electricity."

Overhead lines

37. Section 37 of the Electricity Act 1989 prevents an electricity licence holder installing electricity lines except in accordance with a consent issued by the SoS. The SoS is entitled to impose conditions on any such consent. Section 37 provides, so far as material:

> "**37 Consent required for overhead lines**
>
> (1) Subject to subsection (2) below, an electric line shall not be installed or kept installed above ground except in accordance with a consent granted by the Secretary of State.
>
> (2) . . .
>
> (3) A consent under this section—
>
> (a) may include such conditions (including conditions as to the ownership and operation of the line) as appear to the Secretary of State to be appropriate;
>
> (b) may be varied or revoked by the Secretary of State at any time after the

end of such period as may be specified in the consent; and

(c) subject to paragraph (b) above, shall continue in force for such period as may be specified in or determined by or under the consent."

38. Section 36 of the Electricity Act 1989 gives effect to Schedule 8 of the Electricity Act 1989 as follows:

> "**36 Consent required for construction etc. of generating stations**
> …
>
> (8) The provisions of Schedule 8 to this Act (which relate to consents under this section and section 37) shall have effect."

39. Paragraphs 1-3 of Schedule 8 of the Electricity Act 1989 set out the requirements for an application for consent pursuant to section 37 of the Electricity Act 1989 and provide for when a public inquiry must be held. Where a local planning authority objects, a public inquiry must be held. Where any other person objects, the Secretary of State must consider those objections together with all other material considerations with a view to determining whether a public inquiry should be held. If he thinks it appropriate to do so, he shall cause a public inquiry either in addition to, or instead of any other hearing or opportunity for stating objections to the application.

40. Paragraphs 4 and 5 of Schedule 8 set out the procedures to be followed where a public inquiry is to be held, including publication of the inquiry in the relevant locality.

41. The consent procedure under section 37 of the Electricity Act 1989 does not itself affect the definitions of development and statutory procedures of planning control under the Town and Country Planning Act 1990 ("the 1990 Act"). Accordingly where the proposals involve development within the meaning of the 1990 Act, planning permission is also required.

42. However, section 90 of the 1990 Act makes provision for the grant of deemed planning consent in the following situations:

> "**90 Development with government authorisation**
>
> (1) Where the authorisation of a government department is required by virtue of an enactment in respect of development to be carried out … by statutory undertakers who are not a local authority or National Park authority, that department may, on granting that authorisation, direct that planning permission for that development shall be deemed to be granted, subject to such conditions (if any) as may be specified in the direction.
>
> (2) On granting a consent under section … 37 of the Electricity Act 1989 in respect of any operation or change of use that constitutes development, the Secretary of State may direct that planning permission for that development and any ancillary development shall be deemed to be granted, subject to such conditions (if any) as may be specified in the direction.

(3) The provisions of this Act (except [Part] XII) shall apply in relation to any planning permission deemed to be granted by virtue of a direction under this section as if it had been granted by the Secretary of State on an application referred to him under section 77.

(4) For the purposes of this section development is authorised by a government department if—

(a) any consent, authority or approval to or for the development is granted by the department in pursuance of an enactment;

(b) a compulsory purchase order is confirmed by the department authorising the purchase of land for the purpose of the development;

(c) consent is granted by the department to the appropriation of land for the purpose of the development or the acquisition of land by agreement for that purpose;

…

and references in this section to the authorisation of a government department shall be construed accordingly.

…"

43. I agree with SSOBT that it can be seen from section 90(3) of the 1990 Act that the provisions of the 1990 Act apply to any planning permission deemed to be granted under this provision as if the planning permission had been granted by the Secretary of State under section 77 of the 1990 Act (the power of the Secretary of State to call-in planning applications for his own determination). The only exception to that is in respect of Part XII of the 1990 Act, which deals with the validity of determinations made under the 1990 Act and sets out the statutory process for challenge of such decisions: see section 288 of the 1990 Act. Section 90(3) excludes the operation of these provisions. SSOBT submits that the need to do this makes it clear that but for such exclusion, the relevant decisions would constitute determinations that would otherwise fall within the ambit of Part XII of the 1990 Act. However, I do not consider that this necessarily follows. Section 288 in Part XII of the 1990 Act deals with proceedings for questioning the validity of other orders, decisions and directions made under the Act and this expressly includes any decision on an application referred to the Secretary of State under section 77 of the 1990 Act. Accordingly, the effect of excluding the application of Part XII of the 1990 Act is that the procedures provided by section 288 for questioning the validity of decisions do not apply to a direction under section 90(2) of the Act.

44. The provisions of the 1990 Act that apply include sections 70 and 77 of the 1990 Act. Section 77(4) of the 1990 Act provides:

"(4) Subject to subsection (5)[1], where an application for planning permission is referred to the Secretary of State under this section, sections 70, 72(1)

1 Which makes provision for the right of a person to be heard at an inquiry prior to the Secretary of State's determination.

and (5), 73 and 73A shall apply, with any necessary modifications, as they apply to such an application which falls to be determined by the local planning authority and a development order may apply, with or without modifications, to an application so referred any requirements imposed by such an order by virtue of section 65 or 71."

45. Section 70 of the 1990 Act sets out general considerations for the determination of applications. It includes the following requirement to have regard to the provisions of the development plan:

> "(2) In dealing with such an application the authority shall have regard to the provisions of the development plan, so far as material to the application, and to any other material considerations."

46. In addition, SSOBT points out that the duty to have regard to the development plan in the determination of applications is the subject of a further more specific requirement contained in section 38(6) of the Planning and Compulsory Purchase Act 2004 ("the 2004 Act"). This provides that:

> "(6) If regard is to be had to the development plan for the purpose of any determination to be made under the planning Acts the determination must be made in accordance with the plan unless material considerations indicate otherwise."

47. Schedule 9 of the Electricity Act 1989 concerns the preservation of amenity and is given effect by section 38 of the Act. It provides, so far as material:

> ***"Preservation of amenity: England and Wales***
>
> **1**
>
> (1) In formulating any relevant proposals, a licence holder or a person authorised by exemption to [generate, [distribute, supply or participate in the transmission of] electricity]—
>
> (a) shall have regard to the desirability of preserving natural beauty, of conserving flora, fauna and geological or physiographical features of special interest and of protecting sites, buildings and objects of architectural, historic or archaeological interest; and
>
> (b) shall do what he reasonably can to mitigate any effect which the proposals would have on the natural beauty of the countryside or on any such flora, fauna, features, sites, buildings or objects.
>
> (2) In considering any relevant proposals for which his consent is required under section 36 or 37 of this Act, the Secretary of State shall have regard to—
>
> (a) the desirability of the matters mentioned in paragraph (a) of sub-paragraph (1) above; and
>
> (b) the extent to which the person by whom the proposals were formulated has complied with his duty under paragraph (b) of that sub-paragraph.

(3) In this paragraph—

"building" includes structure;

"relevant proposals" means any proposals—

...

(b) for the installation (whether above or below ground) of an electric line; ..."

From this it can be seen that section 38 requires both the licence holder and the SoS to have regard to the effect which the proposals would have on the natural beauty of the countryside and the other matters mentioned in the section.

Wayleaves

48. In relation to compulsory wayleaves, paragraph 6 of Schedule 4 to the Electricity Act 1989 identifies a power for the compulsory grant of wayleaves in connection with the installation of electric lines.

49. It provides:

"(1) This paragraph applies where –

(a) for any purpose connected with the carrying on of the activities which he is authorised by his licence to carry on, it is necessary or expedient for a licence holder to install and keep installed an electric line on, under, or over any land; and

(b) the owner or occupier of the land, having been given a notice requiring him to give the necessary wayleave within a period (not being less than 21 days) specified in the notice –

(i) has failed to give the wayleave before the end of that period; or

(ii) has given the wayleave subject to terms and conditions to which the licence holder objects;

and in this paragraph as it so applies "the necessary wayleave" means consent for the licence holder to install and keep installed the electric line on, under or over the land and to have access to the land for the purpose of inspecting, maintaining, adjusting, repairing, altering, replacing or removing the electric line."

. . .

(3) Subject to sub-paragraphs (4) and (5) below, the Secretary of State may, on the application of the licence holder, himself grant the necessary wayleave subject to such terms and conditions as he thinks fit; and a necessary wayleave so granted shall, unless previously terminated in accordance with a term contained in the wayleave, continue in force for such period as may be specified in the wayleave.

(4) The Secretary of State shall not entertain an application under sub-paragraph (3) above in any case where-

(a) the land is covered by a dwelling, or will be so covered on the assumption that any planning permission which is in force is acted on; and

(b) the line is to be installed on or over the land.

50. It is a requirement under paragraph 6 of Schedule 4 of the Electricity Act 1989 that the occupier/owner of the land affected by a wayleave is given an opportunity to be heard. Paragraph 6(5) provides, so far as material:

> "(5) Before granting the necessary wayleave, the Secretary of State shall afford -
>
> (a) the occupier of the land; and
>
> (b) where the occupier is not also the owner of the land, the owner,
>
> an opportunity of being heard by a person appointed by the Secretary of State."

51. Paragraph 7 of Schedule 4 sets out a statutory right of compensation where a wayleave is compulsorily granted. It provides:

> "(1) Where a wayleave is granted to a licence holder under paragraph 6 above –
>
> (a) the occupier of the land; and
>
> (b) where the occupier is not also the owner of the land, the owner,
>
> may recover from the licence holder compensation in respect of the grant.
>
> (2) Where in the exercise of any right conferred by such a wayleave any damage is caused to land or to moveables, any person interested in the land or moveables may recover from the licence holder compensation in respect of that damage; and where in consequence of the exercise of such a right a person is disturbed in his enjoyment of any land or moveables he may recover from the licence holder compensation in respect of that disturbance.
>
> (3) Compensation under this paragraph may be recovered as a lump sum or by periodical payments or partly in one way and partly in the other.
>
> (4) Any question of disputed compensation under this paragraph shall be determined by the Tribunal; and sections 2 and 4 of the Land Compensation Act 1961 … shall apply to any such determination."

52. The prescribed procedures for considering the grant of wayleaves under the Electricity Act 1989 are the subject of the The Electricity (Compulsory Wayleaves) (Hearings Procedure) Rules 1967 ("the 1967 Rules") which were originally made in respect of hearings held under section 22(1) of the Electricity (Supply) Act 1919.

53. Rule 3 of the 1967 Rules provides definitions of certain terms including the following:

> "(1) In these Rules, unless the context otherwise requires:-
> …
> "appointed person" means the person appointed by the Minister to hold a hearing to which these Rules apply;
> …
> "the land" means the land across which consent to place an electric line is sought;
>
> "objector" means an owner or occupier of the land or any part thereof who has failed to give his consent to the placing of the electric line or who has attached to his consent any terms, conditions or stipulations to which the electricity authority objects."

54. Rule 4 of the 1967 Rules sets out the procedure to be followed before the hearing, including the provision of at least 21 days notice of the hearing, the service by the electricity authority of its written statement of reasons not later than 14 days before the hearing, and the giving of a reasonable opportunity for objectors to inspect and take copies of evidence upon which the electricity authority is intending to rely.

55. Rule 5 of the 1967 Rules deals with appearances at a hearing. It includes:

> "(1) The electricity authority may appear at the hearing by any of its officers appointed by it for the purpose or by counsel or solicitor, and an objector may appear on his own behalf or be represented by counsel, solicitor or any other person."

56. Rule 6 of the 1967 Rules makes special provision for representation of Government Departments at a hearing if they wish to express support for an electricity line proposal.

57. Rule 7 of the 1967 Rules sets out the procedure to be followed at a hearing and Rule 8 of the 1967 Rules makes provision for site inspections of the land.

58. Rule 9 of the 1967 Rules deals with the procedure after the hearing. It includes the obligation on the Inspector to report to the Secretary of State as follows:

> "(1) The appointed person shall after the close of the hearing make a report in writing to the Minister which shall include the appointed person's findings of fact and his recommendations, if any, or his reasons for not making any recommendations.
>
> (2) Where the Minister-
>
> (a) differs from the appointed person on a finding of fact, or
>
> (b) after the close of the hearing receives any new evidence (including expert opinion on a matter of fact) or takes into consideration any new issue of fact (not being a matter of

government policy) which was not raised at the hearing,

and by reason thereof is disposed to disagree with a recommendation made by the appointed person, he shall not come to a decision which is at variance with any such recommendation without first notifying the electricity authority and any objector who appeared at the hearing of his disagreement and the reasons for it and affording them an opportunity of making representations in writing within 21 days or (if the Minister has receive new evidence or taken into consideration any new issue of fact not being a matter of government policy) of asking within 21 days for the re-opening of the hearing."

59. Rule 10 deals with notification of the decision as follows:

> "(1) The Minister shall notify his decision, and his reasons therefore, in writing to the electricity authority and the objectors; and, where a copy of the appointed person's report, he shall be supplied with a copy thereof on written application made to the Minister within one month from the date on which he is notified of the Minister's decision."

DTI guidance in relation to wayleaves

60. In September 2002 the SoS issued a document which is described as 'Application to the Secretary of State for Trade and Industry for the Grant of a Necessary Electricity Wayleave in England and Wales: Guidance for Applicants and Landowners and/or Occupiers' ("the Guidance").

61. The document states that it is intended to provide 'general guidance' to electricity companies who are proposing to apply to the SoS for the grant of a necessary wayleave, and owners and occupiers whose land is or may be the subject of such applications. It refers to the governing legislation as being the Electricity Act 1989 and the 1967 Rules. The document is subject to the following notice on its title page:

> "IMPORTANT NOTICE
> It should be noted that the Secretary of State has to take a view on whether she has jurisdiction in order to proceed with a necessary wayleave application. This guidance therefore sets out the Secretary of State's interpretation of the legislation and includes case law where applicable. Ultimately though, only the Courts can decide on the correct interpretation of the relevant legislation."

62. The grant of a necessary wayleave is identified as a compulsory procedure in the Guidance. Paragraph 1.4 of the Guidance states:

> "1.4 Most rights to install an electric line and to keep it installed, together with access to the land, are secured voluntarily. However, if a voluntary agreement cannot be reached, because the electricity companies have a public service role, they do have access to compulsory procedures. The electricity companies may seek a Compulsory Purchase Order under Schedule 3 to the Electricity Act 1989 or a "necessary" wayleave under Schedule 4 to the Electricity Act 1989 ."

The Human Rights Act 1998

63. Since this was also relied on by Mr Peter Village QC who, together with Mr James Strachan, appeared for SSOBT, I must set out the relevant provisions. Section 3 of the Human Rights Act 1998 ("HRA 1998") requires that so far as it possible to do so, primary and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights.

64. Section 6 of the HRA 1998 provides that it is unlawful for a public authority to act in a way which is incompatible with a Convention right.

65. Article 6 is identified as a Convention right in Part II of the Schedule to the HRA 1998. It provides that (so far as material):

> "1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. …"

66. SSOBT submits that the determination of its civil rights, including any deprivation or interference with his property rights, was therefore required to be resolved within a reasonable time. Mr Village submits that it is inherent in this principle that it would not be fair or appropriate for the outcome of those rights to be fundamentally affected by delay caused or materially contributed to by the decision-maker himself, particularly where this results in a hearing which has not occurred within a reasonable period of time.

67. Article 1 of the First Protocol is also identified as a Convention right (in Part II of the Schedule to the HRA 1998). It provides that:

> "Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law. The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties."

The grounds of the challenge to the SoS's decision

68. These can be summarised as follows:

(1) Failure to apply section 38(6) of the 2004 Act to the section 37 consent application.

(2) Failure to determine whether the proposal involved the construction of a "building" or an "engineering operation" for the purposes of PPG2.

(3) Erroneous application of the PPG2 policy in relation to pylons.

(4) Unreasonable departure from the Inspectors' conclusions as to the impact on the landscape character and visual appearance of the area.

(5) Unlawful or unfair reliance upon the urgency of the need to reinforce the Ferrybridge Ring.

(6) Unfair or irrational treatment of the costs of the Knaresborough substation.

(7) The treatment of the wayleave applications was wrong in law or was otherwise incompatible with SSOBT's rights under Article 1 of the First Protocol.

(8) Failure to give proper effect to the EIA Regulations.

69. I shall take them in turn, although my conclusions on some grounds may in part determine the conclusions on subsequent grounds.

Ground 1: the application of section 38(6) of the 2004 Act

70. Both NG and the SoS submit that the duty in section 38(6) of the Planning and Compulsory Purchase Act 2004 ("the 2004 Act") only applies "*for the purpose of any determination to be made under the planning Acts…*". Thus, they say, there has to be a determination made under the planning acts before any requirement to have "regard to be had to the development plan" can arise.

71. The immediate difficulty facing SSOBT is that the principal decision by the SoS which is under challenge in this case was made under section 37 of the Electricity Act 1989. That is not a planning act. To meet this point SSOBT relies on the direction given under section 90(2) and the effect of section 90(3) the 1990 Act, but both NG and the SoS submit that is misconceived.

72. Section 90(2) of the 1990 Act gives the SoS the power, once he has decided to grant a consent under section 37 of the Electricity Act 1989, to make a "direction" that planning permission for development shall be deemed to be granted. In this case such a direction was made by the SoS in the Decision Letter.

73. Once this direction has been given, therefore, the necessary planning permission is deemed to have been granted. Accordingly, it follows that it no longer requires determination: the section 37 decision has effectively decided it.

74. It is SSOBT's case that "*there can be no doubt that the deemed planning consent under section 90 of the 1990 required a determination to be made under the planning Acts, and therefore the statutory duty under section 38(6) of the 2004 Act was engaged*". Accordingly, SSOBT submitted that the effect of these provisions was that NG's proposal required:

(1) consent from the SoS under section 37; and

(2) planning permission for the purposes of the 1990 Act granted by way of deemed planning permission under section 90(2); and

(3) the application for deemed planning permission to be determined in accordance with the development plan, unless material considerations indicated otherwise.

75. Mr Village submitted that the giving of a direction under section 90(2) of the 1990 Act is a determination under the planning acts. I do not agree. On the contrary, as a matter of construction I consider that it is a direction that such a determination is

not required. It is worth noting that the SoS does not have to give such a direction: it would be possible to make no such direction and let the planning application process take its own separate course, although it has to be said that no-one in court appeared to know of a case in which this had been done.

76. NG and the SoS point out that the Electricity Act 1989 contains its own statutory code as to the matters that the SoS is required to consider when deciding whether or not to grant a consent under section 37 of the Electricity Act 1989. That code includes the "planning" and "environmental" considerations listed in paragraph 1 of Schedule 9 to the Electricity Act 1989. Miss Natalie Lieven QC, who appeared for the SoS, also pointed out that the justification for excluding section 90(2) deemed consents from section 38(6) of the 2004 Act is that applications for overhead lines are generally part of regional or national networks, so that one would not expect the SoS to have the same statutory duty as when determining an application for another form of development under section 77 of the 1990 Act.

77. Mr Village relied on the wording of section 90(3) of the 1990 Act, namely that: "*The provisions of this Act . . . shall apply in relation to any planning permission deemed to be granted by virtue of a direction under this section as if it had been granted by the Secretary of State on an application referred to him under section 77*". This brought the response from Miss Lieven that the provisions of the Act only apply to the deemed planning permission itself: they do not relate to the process by which that planning permission comes about. She submitted that the effect of section 90(3) is to ensure that where there is a deemed consent under section 90 other relevant provisions of the 1990 Act will then apply, for example, section 257 of the 1990 Act (which relates to the stopping up or diverting of footpaths and bridleways).

78. Mr Mark Lowe QC, who appeared for NG, made a similar submission. He submitted that, in so far as there was any determination, it was a determination under the Electricity Act 1989 and not under the planning Acts. Further, he submitted that section 90(3) of the 1990 Act applied once a direction has been made and to the resulting deemed planning permission. It did not apply to the SoS's power to make the direction.

79. In my view the first difficulty with SSOBT's submission is the one that I have already mentioned, namely that the effect of the deeming provision is to dispense with the need for any determination of the planning permission, so that limb (3) of SSOBT's process never happens. In addition, I agree with the submissions of NG and the SoS - namely that section 90(3) applies to the deemed planning permission, not to the process that gave rise to it - which, to my mind, are unanswerable.

80. The result of this conclusion is that it is unnecessary to consider the extent to which the SoS may or may not have complied with section 38(6) of the 2004 Act because there was no duty on him to do so. Further, it follows also that the SoS was under no duty to resolve the issue between the parties as to whether or not such a duty existed.

81. Although Mr Village referred me to authority on the relevance of development plans, such as the *City of Edinburgh Council v Secretary of State for Scotland*

[1997] UKHL 38, in the light of my conclusions on this ground it is not necessary to examine these authorities for the purposes of this judgment, although of course I have noted what they say.

Ground 2: whether the proposal involved the construction of a "building" or an "engineering operation"

82. The issue here is whether NG's proposal for an overhead line involved the construction of a "building" or was an "engineering operation" for the purposes of PPG2 (the relevant provisions of which are at Annex A). SSOBT's case was that the construction of these large pylons constituted the erection of a building, as that term is used in PPG2. The Inspectors agreed.

83. Paragraph 3.2.2.1 of the Decision Letter was as follows:

> "The Secretary of State does not consider the question of whether electric transmission lines supported on steel lattice towers constitute a "building" or an "engineering operation" to be relevant to the determination of this case. The Secretary of State's view is that, in the present case, development is proposed which would be "inappropriate" in Green Belt, and therefore by definition (PPG2 paragraph 3.2) harmful to the Green Belt."

84. SSOBT submits that in reaching this conclusion the SoS failed to take account of relevant policy in PPG2, or failed to deal with a principal important controversial issue of direct relevance to a proper assessment of the proposal's conflict with PPG2. Mr Village submitted that whilst PPG2 did afford protection from engineering operations which did not preserve openness, this inevitably imported different considerations into the overall assessment of harm as distinct from the concept of a building.

85. PPG2 provides that the construction of new buildings inside a Green Belt is inappropriate unless it is for one of the specified purposes. In relation to engineering operations, it provides that the carrying out of such operations and the making of material changes in the use of the land are inappropriate development unless they maintain openness. Section 3 of PPG2 provides that there is a general presumption against inappropriate development within a Green Belt, and that such development should not be approved except in very special circumstances. It then says: "*See paragraph 3.4, 3.8, 3.11 and 3.12 below as to development which is inappropriate*". Paragraph 3.4 deals with buildings and paragraph 3.12 deals with engineering operations.

86. Thus, if a proposed development is inappropriate, there is a presumption against it which will not be displaced in the absence of special circumstances. In my judgment, it does not matter whether the inappropriateness of the development arises from the fact that it involves the construction of a building or the carrying out of an engineering operation. If an engineering operation does not maintain openness and conflicts with the purposes of including land in a Green Belt, then it will be inappropriate and the presumption against it will arise.

87. The SoS found, at paragraph 3.2.2.2 of the Decision Letter, that large structures such as high-voltage electricity pylons and the associated lines "*do have an impact on openness*". The effect of this conclusion was that, for the purposes of PPG2, NG's proposals amounted to a development that was inappropriate.

88. Once the SoS concluded that the proposed development was inappropriate, the presumption against the development meant that it should not be approved under the guidance given in PPG2 except in very special circumstances. Paragraph 3.2 of PPG2 effectively requires the SoS to carry out a balancing exercise. It is whether the harm by reason of the inappropriateness of the development (and any other harm) is clearly outweighed by other considerations such as to justify approval.

89. The question of whether or not very special circumstances existed such as to justify the approval of a particular development is a question of planning judgement. It is not a question of law (unless matters that are clearly irrelevant are taken into account).

90. On this question of planning judgement the Inspectors came to one conclusion and the SoS to another. The Decision Letter made it quite clear that the SoS had carried out the balancing exercise required by paragraph 3.2 of PPG2 (as is evidenced, in particular, by the heading to section 3.8). In paragraphs 4.6 to 4.8 of the Decision Letter the SoS set out the factors which potentially outweighed the harm that would result from the development. These were:

    (1) The urgent need to meet compliance with ER P2/6, and the lack of certainty about the timing of the delivery of any alternative scheme.

    (2) The additional cost involved in putting lines underground. Whilst rejecting the factor of 10/15 taken by NG for the purposes of its policy, the SoS considered that a difference of some 30%-40%, representing the increase in the cost of the E alternative over NG's proposals was highly material.

    (3) The greater time and difficulty involved in maintenance of underground lines, although this was not regarded as a factor that would be determinative on its own.

91. During the course of the argument I was a little concerned about the fact that there was, so far as I could tell, no evidence as to the likely delay to the implementation of the scheme if one of the E (or any other) options was adopted in place of NG's proposals. It is in my view self-evident that the adoption of any proposal that required the obtaining of additional consents would be likely to involve some delay, or at least a serious risk of delay, in addition to which an underground alternative would almost certainly take longer to construct than overhead lines (a point which the Inspectors noted, at paragraph 485).

92. At paragraph 448 of their report the Inspectors concluded that the only “substantial” disadvantage of the objectors’ options by comparison with NG's proposal was the additional cost. I infer from this that, although the Inspectors had noted that underground cables would take longer to construct, they did not consider this additional construction period to be a substantial disadvantage of the

objectors' proposals. At paragraph 440 the Inspectors said that there was no evidence to indicate that either the E or C groups of alternative options "*could not feasibly be pursued in terms of the likely availability of land rights*".

93. It is not clear from the terms of the report whether this assessment of feasibility related solely to the likelihood of obtaining the consents themselves or related to the wider question of whether such consents could be obtained within a timeframe that did not affect the feasibility of the alternative options as a whole. It is perhaps a little curious that, given the thoroughness with which the Inspectors approached their task, no separate consideration was given to the impact of the requirement to obtain alternative consents in the context of the accepted need for urgency in reinforcing the Ferrybridge Ring. I think that Mr Village's response to this was that no one at the time raised the point that the need to obtain the consents necessary for the C or E options would or might involve any materially significant delay.

94. However, on reflection, it seems to me that no issue can be taken with the SoS's view that there was a "*lack of certainty*" about the timing of the delivery of an alternative scheme - there clearly was - or that this lack of certainty was not a proper factor to take into account. This is particularly so in the light of the SoS's statutory duty to protect consumers, as Mr Lowe pointed out.

95. In my judgment, therefore, the SoS's decision reached in this case was one reached after carrying out the balancing exercise required by PPG2. Unless there is anything in SSOBT's grounds 3 or 4, the decision is not one that is susceptible to challenge by way of judicial review.

Ground 3: erroneous application of the PPG2 policy in relation to pylons

96. SSOBT submitted that, when disagreeing with his Inspector's conclusions, the SoS identified two particular factors, both of which were misconceived in principle.

97. The first is the assertion in paragraph 3.2.2.3 of the Decision Letter that the particular nature and use of pylons means that they "*do not contribute to urban sprawl as they are as much rural as urban structures*". Second, in the same paragraph it is said that pylons do not act as a precedent for other forms of development, or divert development away from more appropriate urban locations.

98. In relation to the former assertion, SSOBT submits that it is either illogical or meaningless in the context of the purposes of the policy in PPG2. In relation to the latter, SSOBT submits that whether pylons set a precedent or do not divert development away from urban locations are incapable of diminishing their impact on the openness of the Green Belt.

99. I have to confess to being a little surprised by the suggestion that pylons are as much rural as urban structures: speaking for myself, I would have thought that they are predominantly rural structures. However, I am wholly unable to see how this view of the SoS can be regarded as unfavourable to the objectors. One would have thought that a purely rural structure would be likely to be less inappropriate in a Green Belt then an urban structure. But to enter on this debate is to miss the

real point that the SoS was making. The point was that erection of pylons in itself does not contribute to the development of urban sprawl. Since one of the fundamental aims of Green Belt policy is to prevent urban sprawl by keeping land permanently open (see paragraphs 1.4 and 1.5 of PPG2), the SoS was clearly entitled to consider whether the erection of pylons would contribute to urban sprawl and thus conflict with that aspect of the policy of PPG2.

100. This is a quite separate point from the question of the impact on the openness of the Green Belt of the proposed pylon line, which was identified at paragraph 3.2.2.2 of the Decision Letter. The SoS's consideration of the visual harm that would be caused by the erection of the pylons was considered in paragraph 3.3.2.1 and 3.3.2.2 of the Decision Letter. In those paragraphs the SoS set out the factors to which he had had regard and which led to the conclusion that the SoS, whilst accepting the Inspectors' views, attached less weight to those factors than the Inspectors had done. These conclusions are challenged in ground 4, and I will consider them further in the next part of this judgment.

101. But so far as ground 3 is concerned, for the reasons that I have given I can discern no error in the SoS's approach and, in so far as the conclusion about the likely effect on urban sprawl is concerned, it is, as both the SoS and NG have submitted, a matter of pure planning judgement. Accordingly, I reject the challenge based on ground 3.

Ground 4: unreasonable departure from the Inspectors' conclusions as to the impact on the landscape character and visual appearance of the area

102. Whilst SSOBT acknowledges that assessments of visual impact are matters of judgement for the SoS having regard to the Inspectors' findings, it submits that the reasons for departing from the Inspectors' judgements must be proper, adequate and intelligible. To this SSOBT adds the further point that this is all the more important when the SoS is departing from the conclusions of his Inspectors who have inspected the site and have expressed caution in their report about the photomontages that were produced in the course of the inquiry.

103. When I first considered the issues in this case I did have some disquiet about the fact that the SoS, or perhaps more accurately the senior civil servant who was considering the matter on his behalf, may not have visited the site and may therefore have been relying on photomontages about which caution had been expressed. However, I was told by counsel (without dissent) that it is often the practice in cases of this sort for the site not to be visited by the SoS or those acting on his behalf.

104. Miss Lieven reminded me that the test to be applied in a "reasons" challenge was considered by the House of Lords in *South Bucks v Porter (No 2)* [2004] 1 WLR 1953 (HL), in which Lord Brown (giving the only speech) summarised the "*more authoritative and useful dicta*" on the topic and quoted at paragraph 33 from the judgment of Sir Thomas Bingham MR in *Clarke Homes v Secretary of State for the Environment* (1993) 66 P&CR 263 (CA) at p.271-2, in which he "*felicitously observed*":

> "I hope I am not over-simplifying unduly by suggesting that the central issue in this case is whether the decision of the Secretary of State leaves room for genuine as opposed to forensic doubt as to what he has decided and why. This is an issue to be resolved as the parties agree on a straightforward down-to-earth reading of his decision letter without excessive legalism or exegetical sophistication."

105. Paragraph 3.3.1 of the Decision Letter summarised the conclusions of the Inspectors. It is not suggested that this summary was defective. In paragraph 3.3.2.1 it was said that the SoS accepted these findings, but differed from the Inspectors "*in the weight to be attached to the harm which flows from these findings*". The Decision Letter then set out five matters to which the SoS had had regard when concluding that less weight should be given to the factors affecting the harm to the landscape than had been given by the Inspectors. The fifth of these factors, at paragraph 3.3.2.1(e), was as follows:

> "Large towers and lines such as those proposed, are likely to be clearly visible in almost any landscape, and will very often (if not usually) give rise to significant landscape and visual harm and thus be "visually jarring" in almost any landscape, urban or rural."

106. SSOBT submits that this reasoning is incapable of supporting the conclusion that less weight ought to be attached to the Inspectors' judgements, or their general conclusion that significant harm would result from NG's proposals. Mr Village submitted that the error of the reasoning was exposed by the explanation given in the SoS's Summary Grounds, where it was said that unless there was to be a general moratorium on putting pylons in rural areas it had to be acknowledged that they would usually be highly visible and "jarring" and could not be hidden. Mr Village submits that this is not evident from the reasoning in the Decision Letter.

107. I do not accept this submission. The point being made, as I read it, in the Decision Letter was that even though the route had been carefully chosen and that the identified adverse impacts were confined to a relatively small number of locations and receptors (that is people who would be likely to see the pylons), one could never hide a pylon line which is by its nature intrusive. In other words, the SoS was acknowledging the fact that whilst the steps taken and the circumstances of the location meant that the damage had been kept to a minimum, there was nevertheless inevitably going to be some damage because that was an unavoidable incident of erecting a pylon line. That, taken as a whole, seems to me to be a perfectly rational approach to the problem.

108. In my judgment, SSOBT's submissions on this point, subtly and attractively though they were presented by Mr Village, amount to no more than disagreement with the SoS's assessment of the extent of the harm and the weight to be attached to it. As Miss Lieven reminded me, one thing that is firmly settled in this area of the law is that matters of planning judgement are within the exclusive province of the local planning authority or the Secretary of State (per Lord Hoffmann *in Tesco Stores v Secretary of State for the Environment* [1995] 1 WLR 759 (HL), at page 780).

109. For these reasons I reject the challenge under ground 4.

Ground 5: unlawful or unfair reliance upon the urgency of the need to reinforce the Ferrybridge Ring

110. Under this ground, SSOBT submits that the SoS's reliance upon the urgency of the need was either unlawful or unfair. Mr Village attacked the conclusion, set out at paragraph 3.7.2.1(b) of the Decision Letter, to the following effect:

> "… However, the Secretary of State gives considerable weight in this case to the urgent nature of the need, and the fact that the second derogations are due to expire in 2012 (paragraph 420). Any fresh application for a new route will inevitably involve a fairly lengthy process and has an inherent element of uncertainty within it. These are important factors weighing in favour of granting consent."

111. The criticism of this conclusion is that it reflects a failure by the SoS to deal with the evidence before him (or fail to give adequate reasons for his decision made on the basis of that evidence) or, alternatively, indicates that he acted without regard for the fact that part of the urgency rose from delay that was attributable to his own department's default. The latter point also founds a complaint under Article 6 taken in conjunction with Article 1 of the First Protocol.

112. I can deal with the Article 6 point fairly shortly. This concerns the right to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. It is clear that the determination by the SoS of the section 37 application involved the determination of "civil rights" within the meaning of Article 6(1). It is clear also that the SoS does not purport to act as an independent and impartial tribunal established by law: see *R (Alconbury Limited) v Secretary of State for the Environment* [2001] 2 WLR 1389. It is the combination of the determination by a Secretary of State and the power of the court to review that decision by way of judicial review that makes the procedure compliant with Article 6.

113. In relation to what is a reasonable time, Mr Village submits that the relevant starting date is 18 July 2006, when NG sought the wayleaves. For this proposition, which I accept, he relied on the case of *Kiurkchian v Bulgaria* (44626/98) [2005] ECHR 181. Accordingly, he submits that the failure to make a decision until nearly 4 years later is incompatible with SSOBT's right to a fair hearing within a reasonable time. Further, Mr Village submitted that since NG made no application to expedite this hearing, it cannot complain of any prejudice. The short answer given by Mr Lowe to this last point is that his instructing solicitors approached the court but were told that an expedited hearing of this case was most unlikely to be granted.

114. In my view, a period of a little under 4 years in which to determine SSOBT's civil rights arising out of NG's proposal can probably not be described as reasonable. However, this is not one of those cases where the delay has affected the ability to make a proper decision: for example, as in cases where the passage of time dims memories. The effect of the delay has simply been to prolong the period of uncertainty: on the other hand, it has kept SSOBT's land pylon free during that period.

115. The difficulty facing Mr Village's argument based on delay alone is the same as that which faced the claimant in the case of *UK Coal Mining Ltd v Secretary of State for Local Government, Transport and the Regions* [2001] EWHC (Admin) 912, a decision of Ouseley J in which he said, at paragraph 109:

> "The real issue which Mr Corner raised was whether if the only fault on the part of the Secretary of State was the time which he had taken to reach his decision, there should be any relief granted to the claimant. Mr Corner said that there would be no value in quashing the Secretary of State's decision on that basis alone. Either the claimant would get a new letter in the post a day or so later saying the same thing, or if there had been new factors requiring consideration, that would add to the delay."

In these circumstances, Ouseley J took the view that it would be pointless to order the quashing of the decision.

116. Accordingly, for the same reasons the reliance on Article 6 in the context of this ground produces no useful result in terms of remedy and is therefore misconceived. The real thrust of Mr Village's submissions, as I understood them, went to what he submitted was the unfairness of allowing the process to drag on for an unreasonable period of time and then relying on the urgency of the need to justify the grant of permission under section 37.

117. Before turning to the substance of Mr Village's submissions I should remind myself of the passage from the opinion of Lord Brown in *South Bucks District Council v Porter* [2004] UK HL 33, at paragraph 36, in which he gave guidance on the approach to be adopted when considering a decision letter. He said:

> "The reasons for a decision must be intelligible and they must be adequate. They must enable the reader to understand why the matter was decided as it was and what conclusions were reached on the "principal important controversial issues", disclosing how any issue of law or fact was resolved. Reasons can be briefly stated, the degree of particularity required depending entirely on the nature of the issues falling for decision. The reasoning must not give rise to a substantial doubt as to whether the decision maker erred in law, for example by misunderstanding some relevant policy or some other important matter or by failing to reach a rational decision on relevant grounds. But such adverse inference will not readily be drawn. The reasons need refer only to the main issues in the dispute, not to every material consideration. They should enable disappointed developers to assess their prospect of obtaining some alternative development permission, or, as the case may be, their unsuccessful opponents to understand how the policy or approach underlying the grant of permission may impact upon future such applications. Decision letters must be read in a straightforward manner, recognising that they are addressed to parties well aware of the issues involved and the arguments advanced. A reasons challenge will only succeed if the party aggrieved can satisfy the court that he has genuinely been substantially prejudiced by the failure to provide an adequately reasoned decision."

Miss Lieven also drew my attention to an extract from the judgment of Forbes J in *Seddon Properties Ltd v Secretary of State for the Environment* (1978) 42 P & CR 26 that was quoted by Lord Brown at paragraph 26 of his opinion:

> "The inspector is not writing an examination paper . . . One must look at what the inspector thought the important planning issues were then decide whether it appears from the way he dealt with that he must have misunderstood a relevant policy . . ."

118. I have already indicated that the Inspectors concluded, inevitably to my mind, that the construction process involved in laying cables underground would be longer than that involved in erecting overhead lines, but that they concluded also that the difference was not significant in the context of this scheme. However, they did not consider - or at least, if they did, they did not record any conclusion about - the extent of any additional delay that might or was likely to result from the need to obtain fresh consents for the objectors' alternative proposals (a point that I have already discussed in paragraphs 91 to 94 above).

119. In this context, Mr Lowe referred me to the evidence that was given by a Mr Cunnane, a planning expert called on behalf of SSOBT, in answer to questions that he asked him at the inquiry. In effect, Mr Cunnane told the inquiry that part of the land on which the proposed substation required by SSOBT's C options would be built was in the ownership of a third party who was willing to cooperate with SSOBT's proposals. However, it emerged that Mr Cunnane's information about this did not come from the owner of the land himself, but was based on what he had been told by his clients. He was forced to concede in answer to Mr Lowe's questions that the owner might not after all wish to enter negotiations for the construction of the substation on his land or that such negotiations, if started, might have proved unsuccessful. Finally, Mr Cunnane confirmed in answer to questions from one of the inspectors that there was no documentary evidence of the owner's willingness to have a substation built on his land. It seems to me that this evidence formed a somewhat sketchy basis for a submission that obtaining the necessary consents for the construction of this substation was effectively a foregone conclusion and would not involve any additional delay. However Mr Village submitted, by contrast, that there was no evidence before the inquiry as to the delay that might be caused by the need to obtain additional or different consents: he said that was not a case made by NG at the inquiry.

120. In my judgment, the extract from the Decision Letter quoted at paragraph 110 above does not reveal any failure to deal with the evidence before the SoS or constitute inadequate or unintelligible reasons for the conclusion reached. It is, to my mind, almost self-evident that the obtaining of consents and permission for an alternative scheme would be likely to result in some additional delay, however well disposed the relevant landowners may have been to the giving of those consents. The SoS did not attempt to quantify any such delay, but merely noted that any fresh application would inevitably involve a fairly lengthy process and had an inherent element of uncertainty within it. I accept that this extract from the Decision Letter, taken in isolation, might suggest that the uncertainty referred to was in relation to both the likelihood of obtaining the relevant consents and the time that it would take. However, as I have already mentioned, in paragraph 4.6

of the Decision Letter, which forms part of the SoS's overall conclusions, the lack of certainty that was taken into account was a lack of certainty "*about the timing of delivery of an alternative scheme*".

121. It seems to me that, reading the Decision Letter as a whole, the fact that was being taken into account by the SoS was the uncertainty as to the delay that would be likely to result from the implementation of one of the alternative proposals. Since the Inspectors had reached no conclusions as to what this delay might be, I consider that the SoS was entitled to use his own judgement and experience in deciding whether or not this potential delay was a matter that ought to be taken into account.

122. For these reasons, I do not accept that the SoS failed to deal properly with the evidence, such as it was, or failed to provide either adequate or intelligible reasons for his conclusion. This leaves the point about unfairness.

123. As I have said, the thrust of this point is that it was unfair to deploy considerations of the urgency of the need when one of the reasons for that urgency was the SoS's own delay in reaching his decision (some 8 months from receipt of the Inspectors' report, or nearly 4 years after the initial application for the wayleaves). The other matter relied on was that SSOBT had made an offer in November 2006, which was an offer to make available land for an underground route - but not an offer to pay for the additional cost of putting the supply underground. NG refused the offer in January 2007 on the ground that the alternative solution advocated by SSOBT would have "*significant disadvantages*": the letter did not explain what those disadvantages were.

124. As I have already indicated, there was no real dispute at the inquiry that there was an urgent need to reinforce the Ferrybridge Ring. Further, the evidence before the Inspectors was that the position was getting worse and consequently that the need to do something about it was increasing. This evidence was not challenged.

125. Mr Village's response to this was to submit that if the matter had been dealt with properly and within a reasonable time, the degree of urgency (at the time of making the decision) would have been less. Therefore any additional time that might have been involved in realising SSOBT's alternative proposals would have carried less weight in a situation where the degree of urgency was not as great. As with so many of Mr Village's submissions, the argument was attractively and forcibly put.

126. However, it is important to remember that the need in question was not that of the objectors or of the SoS, but of the consumers who were and are dependent for their supply on the Ferrybridge Ring. It seems to me that the SoS had to consider the position as it stood when he had to make his decision. Historic delays were largely water under the bridge and were certainly not attributable to any of the consumers. As Miss Lieven put it during her oral submissions: "*the public interest remains the same irrespective of the delay (or the reason for it)*". Whilst causes of delay may be relevant to considerations under Article 6 as to whether or not a person has received a fair hearing within a reasonable time, I have already explained why in my view Article 6 does not assist SSOBT in obtaining any useful relief in this case.

127. For these reasons I consider that the SoS was not required to take into account the historic delays in relation to the determination of NG's application for this overhead power line, even though some of these may have been the responsibility of the SoS's own department, when considering the urgency of the need to reinforce the Ferrybridge Ring (at the time of making the decision) and when balancing that need against and in the context of the other relevant factors which he had to take into account. Indeed, it might be said that to have done otherwise would have been incompatible with the overriding duty to protect the interests of consumers imposed on the SoS by section 3A of the Electricity Act 1989.

Ground 6: unfair or irrational treatment of the costs of the Knaresborough substation

128. This issue relates to the historic costs of building the Knaresborough substation. As I have already mentioned, that substation was built in the 1990s in anticipation of proposals that never materialised. It was, in effect, a speculative development by NG. SSOBT's option C proposals did not involve using this substation, with the result that the historic costs of its development would be thrown away if any of those proposals were implemented. Further, it would not simply disappear if it did not form part of any new proposal - it would just remain in its existing state as a useless and intrusive structure, unless even more money was spent on demolishing it (for which an allowance was included in NG's calculations).

129. The option E proposals were more costly but did involve the use of Knaresborough and therefore did not require the additional substation that formed part of the C options. The E options required the construction of a sealing end compound but the Inspectors concluded that this would be a less intrusive structure than the new substation required by the C options.

130. In very broad terms, one of the E options was about £1 million more expensive than the corresponding C option if the costs of the Knaresborough substation were taken into account when assessing the latter, and the others were much the same. If the Knaresborough costs were excluded, then the C options were, on SSOBT's assessments, between about £3.5 million cheaper and £1.8 million more expensive than NG's proposal. The E options ranged from being about £7.8 million to £10 million more expensive than NG's proposals. These figures are illustrative - the outcome of this claim does not turn on the detail.

131. Whilst the Inspectors preferred NG's approach in relation to the costs of the Knaresborough substation viewed simply in terms of costings, they also considered the matter on broader grounds. They concluded that the abandonment of a developed resource in favour of a similar new development on a greenfield site would be wasteful and contrary to the principles of sustainable development. They concluded also that it would be difficult to justify a new substation in Green Belt terms when there was an existing substation that could be used. It is clear, therefore, that the question of the Knaresborough substation raises issues that are rather wider than just those of an accounting exercise.

132. It is clear from paragraphs 3.8.1.2 and 4.7 of the Decision Letter that the SoS appears to have accepted NG's approach to the costing of the Knaresborough substation (because SSOBT's alternative calculations as to the cost of the C

options were not referred to). The SoS noted also the Inspectors' view that the increase in cost associated with the E options was not disproportionate, given the importance carried by the Green Belt in planning policy terms and the impact of NG's proposal, and that this led to the Inspectors' overall conclusion that very special circumstances did not exist to justify NG's proposal under PPG2.

133. It seems to me that the SoS, like the Inspectors, considered that the real choice was between NG's proposal and one or other of the E options. In these circumstances, I have some reservations as to whether the Knaresborough costs issue is really relevant to SSOBT's case on this application. However, insofar as the challenge is based on perversity grounds, it seems to me that it was doomed to failure[2]. At the end of the day, the Knaresborough costs issue or, perhaps more accurately, the need for an additional substation under the C options and the consequent waste of the costs of developing Knaresborough, was simply one of many factors that went into the balancing exercise that had to be carried out by the Inspectors and, subsequently, by the SoS.

134. In its skeleton argument SSOBT really confined its submissions to the unfairness that was inherent in adopting a method of cost comparison which, SSOBT contended, encouraged pre-emptive decisions to be taken by a statutory undertaker. It submitted that the Decision Letter did not properly explain the reason for treating the costs in the way that they had been or, alternatively, that the SoS's conclusion on this issue was simply irrational.

135. For the reasons that I have given, I consider that the SoS effectively adopted the broad approach to the question of the Knaresborough costs, namely that the adoption of the C options would result in wasting an existing resource and introducing a new substation that would constitute an inappropriate development in a Green Belt. I can see no error of law in this approach and, so far as the conclusion that resulted from it is concerned, that was a matter of planning judgement pure and simple.

Ground 7: the treatment of the wayleave applications was wrong in law or was otherwise incompatible with SSOBT's rights under Article 1 of the First Protocol

136. The thrust of SSOBT's argument on this ground is that the wayleaves are tantamount to the compulsory acquisition of a person's land against his will in circumstances where this was not found to be necessary, but only expedient. SSOBT submitted that the SoS failed to consider whether such an interference with its property rights was decisively required in the public interest or whether it could be justified as being compatible with its rights under Article 1 of the First Protocol (since the deprivation was not necessary, but merely expedient).

137. In spite of the submissions of Miss Lieven, I am prepared to accept in the context of the present application that the wayleaves in this case come close to amounting in practice to compulsory acquisition of a person's land for what, in practical terms, may be regarded as perpetuity (although the term is in fact 15 years).

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2 It is pointed out by NG that this challenge on the ground of perversity is not included in the Statement of Facts and Grounds. I have not overlooked this, but prefer to deal with the issue on its merits.

However, against that it has to be noted that the amount of the land that was to be acquired is small and the interference with the occupier's agricultural activities minimal. It must be remembered also that SSOBT's real complaint is that the proposed overhead power line is a gross visual intrusion on the landscape in this Green Belt area: that complaint has nothing to do with the actual footprint of the pylons themselves. Indeed, if the route of the proposed overhead cables had been such that, coincidentally, no pylon actually had to be constructed on SSOBT's land, I do not imagine for one moment that SSOBT would have been any less antagonistic towards NG's proposal: in that situation the question of wayleaves would not have affected SSOBT.

138. Thus the wayleaves argument must be considered in its proper context. Suppose, hypothetically, that the objective of reinforcing the Ferrybridge Ring could have been achieved by the simple expedient of acquiring the same pieces of land but without needing to construct any visible structure upon them: in such a situation I have no doubt that SSOBT would not have made any serious complaint. In short, I am left with the strong impression that the complaint about the wayleaves is really no more than an ingenious makeweight.

139. Nevertheless, SSOBT's arguments must be addressed on their merits. It seems to me that there is considerable force in Miss Lieven's submission that if a wayleave was not justifiable under the First Protocol because it was only expedient - but not necessary - to have it, it would mean that in all but a very few cases a wayleave could not be granted for an overhead power line because an underground alternative would nearly always be available.

140. Building on this Miss Lieven submits that SSOBT's argument does not make sense because it seems to be arguing that because there was a potential alternative of putting the line underground there can be no justification under the First Protocol for granting a wayleave for an overhead line. She points out, correctly, that even if the line was to be put underground there would still have to be an easement or wayleave granted to the electricity company. That, she submits, could prove to be as much of an interference with the landowner as an overhead cable. However, in my view this last submission misses the point. Mr Village's argument hinges on the difference between a wayleave compulsorily acquired and an easement voluntarily given. In the case of the latter, the First Protocol is not engaged: I see considerable force in that point.

141. However, Miss Lieven makes the further point that the test for a compulsory purchase order is whether there is a compelling case in the public interest. She submits that if the circumstances are such that this test would be satisfied, then it is hard to see how there could be any objection to the grant of a wayleave on the ground that it is "expedient" to do so.

142. It is perhaps not surprising that the Inspectors concluded that if the section 37 application was to be granted, and a direction given under section 90(2) of the 1990 Act, the wayleave applications should also be granted. The balancing exercise that the SoS had to carry out when considering the application under section 37 involved balancing the harm to the Green Belt land resulting from the erection of an overhead power line against the additional cost and uncertain delay (having regard to the urgent need) that would be involved in laying the cables

underground. PPG2 requires "very special circumstances" to justify development in a Green Belt that is inappropriate, which this overhead line is.

143. Mr Lowe submitted that in the case of compulsory acquisition of land, which must satisfy the test of a compelling case in the public interest, there is no requirement that compulsory acquisition is only lawful and/or proportionate where it is "necessary". Whilst I did not understand Mr Village to challenge this in so many words, he submitted that, in the absence of a definition of expediency, the court should adopt the principle set out in *Prest v Secretary of State for Wales and another* (1982) 81 LGR 193. It is not necessary to consider the facts of that case, in which each member of the Court gave a separate judgment giving his reasons for allowing the appeal. Lord Denning said, at page 198:

> "I regard it as a principle of our constitutional law that no citizen is to be deprived of his land by any public authority against his will, unless it is expressly authorised by Parliament and the public interest decisively so demands . . ."

Watkins and Fox LJJ did not address this question or indicate agreement with Lord Denning's judgment. However, the passage was cited with approval by Lord Collins in *R (Sainsbury's Supermarkets) v Wolverhampton CC* [2010] UKSC 20, at paragraph 10.

144. Whether or not the test of "a compelling case in the public interest" is the same as Lord Denning's test that the public interest should "decisively so demand" is perhaps moot. PPG2 provides that the potential harm caused by inappropriate development will not be justified unless there are very special circumstances so that the harm is "*clearly outweighed*" by other considerations. In this case the relevant consideration is the urgent need to reinforce the Ferrybridge Ring. That need is in the public interest and, in deciding the section 37 application as he did, the SoS must be taken to have decided that the potential harm to the landscape presented by the proposed overhead power line was clearly outweighed by the public interest in urgently reinforcing the Ferrybridge Ring. That seems to me to amount to a conclusion that there was a compelling case in the public interest for NG's proposal. In my view it also equates to, or at least comes close to, a conclusion that the public interest decisively demands the reinforcement of the Ferrybridge Ring by means of NG's proposed overhead power line.

145. Since NG's proposal requires wayleaves for the pylon foundations (as well as for the oversailing of the land), the case for the wayleaves for NG's proposal also meets the test of being a compelling case in the public interest. In these circumstances, I can see no error in the Decision Letter and so SSOBT's challenge to the wayleaves must fail.

Ground 8: failure to give proper effect to the EIA Regulations

146. SSOBT submitted at the inquiry, and the Inspectors agreed, that the Environmental Statement that NG was required to produce did not deal with the effects of the construction of the Knaresborough substation. The Inspectors rejected this as a basis for objection, on the basis that NG's overall reinforcement scheme was not part of the current proposal for which section 37 consent was

sought (see paragraph 455 of the report), and the fact that the sub-station was built a number of years ago in accordance with a previously granted permission.

147. As I have already indicated, there was no suggestion that, if NG's proposal was not approved or did not proceed, the Knaresborough substation would be removed. It was in existence before NG made the current application under section 37 and it was going to remain in existence irrespective of the outcome of that application. Thus the effects of the construction of the Knaresborough substation on the surrounding environment had already happened and would remain unchanged irrespective of whether or not NG's proposal went ahead.

148. In these circumstances both Miss Lieven and Mr Lowe submitted that the Knaresborough substation was part of the baseline position and was only relevant to the extent that the present proposal could have a potentially cumulative effect in terms of environmental impact. NG's proposal involved the erection of seven new pylons across a tract of land that was some 15 miles from the site of the Knaresborough substation, so the cumulative impact - at least in terms of visual impact on that particular area of Green Belt - was self-evidently not significant.

149. In my view the short and complete answer to this ground, as Miss Lieven and Mr Lowe submitted, is the fact that the Knaresborough substation already exists and is not part the proposed development for which consent was being sought under section 37. I agree with Miss Lieven that the cases relied on by Mr Village in his skeleton argument, *R (Barker) v London Borough of Bromley* [2006] UKHL 52 and *Wells v Secretary of State for Transport, Local Government and the Regions* [2004] EUECJ C-201/02 (Case C-201/02) [2004] ECR I-723, do not support the proposition that where a development has been constructed with lawful consent, it should be taken into account as part of a separate proposal which is being assessed for the purposes of the Environmental Impact Assessment Regulations. The first case raised the issue of whether a national regulation which precluded any consideration for the need for an EIA at the time when consideration was being given to an application for approval of reserved matters following the grant of outline planning consent for a proposed development complied with the relevant European Directive. It was held by the House of Lords that the relevant regulations did not comply, because in the case of what was referred to as a multi-stage consent process they did not provide for fresh consideration of the need for an EIA if that appeared to be necessary at the approval of reserved matters stage.

150. The second authority (although the first in time), *Wells*, raised a similar point in relation to a multi-stage consent for mining operations at a quarry. In that case no consideration had been given to the need for an EIA, although some matters had been left to be decided by the mineral planning authority. The court held that the approval of a new set of conditions on an existing permission granted by an Interim Development Order (old mining permission) was a "development consent" for the purposes of the EIA directive, with the result that an assessment of the environmental effects of the operations had to be carried out.

151. I do not see how either of these authorities provides any assistance to the issue raised by ground 8. In this case there was no question of any modification or alteration of the original planning permission for the Knaresborough substation. That had been granted and was a matter of history. NG's proposal in this case, for

which it sought consent under section 37 of the Electricity Act 1989, was "*to install and keep installed a new section of overhead electricity line located to the south-west of Tadcaster and east of Bramham in the counties of North and West Yorkshire respectively*". There was no application for permission to do anything in relation to the Knaresborough substation.

152. In addition to these two authorities, Mr Village relied also on a more recent decision of the Court of Appeal in *R (Brown) v Carlisle City Council and Stobart Air Ltd* [2010] EWCA Civ 523. In that case there were two separate planning applications to develop an airport site. The first involved the replacement and realignment of the main runway, the construction of a new passenger terminal, offices and hangers ("the airport development"), and for the construction of a Freight Storage and Distribution Facility ("the Freight Distribution Centre"). The second, submitted a year later, involved a "scaled down" proposal in relation to the airport development and a smaller Freight Distribution Centre. The second application was accompanied by an Environmental Statement, but this dealt only with the likely significant effects on the environment of the revised proposal for the Freight Distribution Centre. It did not address the cumulative effects of that proposal and the revised airport development which was being proposed at the same time. The Court of Appeal held that this was a fatal defect.

153. The facts of that case were contrasted with the facts of *R (Davies) v Secretary of State for Communities and Local Government* [2008] EWHC 2223 (Admin), which concerned the Heysham to M6 Link Road and a proposed Park and Ride Scheme. The court held that *Davies* was clearly distinguishable because the evidence before the Inspector had established that the Heysham to M6 Link Road (for which there had been an Environmental Statement) was justified in its own right and would be constructed at whether or not a proposed Park and Ride Scheme, which was the subject of a separate application, was permitted. There was no section 106 Agreement preventing the construction and use of the link road until the Park and Ride Scheme had been commenced.

154. It seems to me that the facts of this case are much closer to those of *Davies* because the construction of the Knaresborough substation cannot be regarded as "an integral part" of the current proposal since it has already taken place. The position is even stronger than that in *Davies*, where the link road was still to be constructed even though it would go ahead irrespective of the Park and Ride Scheme.

155. For these reasons I reject SSOBT's submissions in relation to ground 8.

Conclusion

156. SSOBT's claim for judicial review of the SoS's decision in his letter of 8 April 2010 therefore fails and must be dismissed. If costs cannot be agreed, I will hear submissions from the parties.

Afternote

157. I hope that it will be explained to members of the public who are told of the outcome of this claim, and who are not familiar with the process of judicial

review, that this decision is not an endorsement by the court of the SoS's decision giving consent to NG's proposal under section 37.

158. The role of the court is confined solely to determining whether or not the decision by the SoS has been made in accordance with the law and does not constitute an improper use of executive power. It is not the business of the court to express a view as to whether or not the decision was the right one. That is a question on which individual opinions will inevitably differ.

159. SSOBT mounted a strong case against NG's proposal, a fact evidenced by the fact that two experienced inspectors agreed that the merits of the proposal did not outweigh the harm to the environment. The fact that I have upheld the SoS's decision does not mean that the views of SSOBT or the conclusions of the Inspectors were wrong or unjustified. This judgment amounts to no more than a determination by the court that the decision of the SoS was not contrary to law.

ANNEX A - Extracts from PPG2

Intentions of policy

1.4 The fundamental aim of Green Belt policy is to prevent urban sprawl by keeping land permanently open; the most important attribute of Green Belts is their openness. Green Belts can shape patterns of urban development at sub-regional and regional scale, and help to ensure that development occurs in locations allocated in development plans. They help to protect the countryside, be it in agricultural, forestry or other use. They can assist in moving towards more sustainable patterns of urban development (see paragraph 2.10).

Purpose of including land in Green Belts

1.5 There are five purposes of including land in Green Belts:

- to check the unrestricted sprawl of large built-up areas;
- to prevent neighbouring towns from merging into one another;
- to assist in safeguarding the countryside from encroachment;
- to preserve the setting and special character of historic towns; and
- to assist in urban regeneration, by encouraging the recycling of derelict and other urban land.

The use of land in Green Belts

1.6 Once Green Belts have been defined, the use of land in them has a positive role to play in fulfilling the following objectives:

- to provide opportunities for access to the open countryside for the urban population;

- to provide opportunities for outdoor sport and outdoor recreation near urban areas;

- to retain attractive landscapes, and enhance landscapes, near to where people live;

- to improve damaged and derelict land around towns;

- to secure nature conservation interest; and

- to retain land in agricultural, forestry and related uses.

1.7 The extent to which the use of land fulfils these objectives is however not itself a material factor in the inclusion of land within a Green Belt, or in its continued protection. For example, although Green Belts often contain areas of attractive landscape, the quality of the landscape is not relevant to the inclusion of land within a Green Belt or to its continued protection. The purposes of including land in Green Belts are of paramount importance to their continued protection, and should take precedence over the land use objectives.

Presumption against inappropriate development

3.1 The general policies controlling development in the countryside apply with equal force in Green Belts but there is, in addition, a general presumption against inappropriate development within them. Such development should not be approved, except in very special circumstances.
See paragraphs 3.4, 3.8, 3.11 and 3.12 below as to development which is inappropriate.

3.2 Inappropriate development is, by definition, harmful to the Green Belt. It is for the applicant to show why permission should be granted. Very special circumstances to justify inappropriate development will not exist unless the harm by reason of inappropriateness, and any other harm, is clearly outweighed by other considerations. In view of the presumption against inappropriate development, the Secretary of State will attach substantial weight to the harm to the Green Belt when considering any planning application or appeal concerning such development.

3.3 . . .

New buildings

3.4 The construction of new buildings inside a Green Belt is inappropriate unless it is for the following purposes:

. . .

3.12 The statutory definition of development includes engineering and other operations, and the making of any material change in the use of land. The carrying out of such operations and the making of material changes in the use of land are inappropriate development unless they maintain openness and do not conflict with the purposes of including land in the Green Belt.
(Advice on material changes in the use of buildings is given in paragraph 3.8 above).

. . .

Visual amenity

3.15 The visual amenities of the Green Belt should not be injured by proposals for development within or conspicuous from the Green Belt which, although they would not prejudice the purposes of including land in Green Belts, might be visually detrimental by reason of their siting, materials or design.