Department for Transport

National Highways

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Your Ref: 551514/SRO/DFT
Our Ref: NATTRAN/HE/HAO/249
Date: 8 June 2023

Dear Ms. Mitu,

THE HIGHWAYS ENGLAND (M27 SOUTHAMPTON JUNCTION 8 IMPROVEMENT SCHEME – M27 JUNCTION 8 AND WINDHOVER ROUNDABOUT) (SPECIAL ROAD) (SIDE ROADS) ORDER 2021 ("THE SRO")

THE HIGHWAYS ENGLAND (M27 SOUTHAMPTON JUNCTION 8 IMPROVEMENT – M27 JUNCTION 8 & WINDHOVER ROUNDABOUT) (SPECIAL ROAD) COMPULSORY PURCHASE ORDER 2021 ("THE CPO")

SECRETARY OF STATE'S DECISION - SRO AND CPO NOT TO BE CONFIRMED

1. I refer to National Highways (formerly Highways England) application for confirmation of the above-named Orders, which was submitted in July 2021. The Secretary of State for Transport ("the Secretary of State") has decided that the Orders will not be confirmed at present. This letter constitutes his decision to that effect.

2. The Orders had been made by National Highways to improve congestion, journey time reliability, resilience, and safety at the M27 J8 Windhover Roundabout.

CONSIDERATIONS FOR DECISION

3. 7 objections were received to the Orders, therefore the Secretary of State arranged for a joint Public Inquiry to be held at Highpoint Centre, Bursledon Road, Thornhill, Southampton between 10th May 2022 and 17th June 2022, before I Jenkins BSc CEng MICE MCIWEM, an Inspector appointed by the Secretary of State to hear those objections and representations. The main grounds of objection to the proposals were that other junctions nearby also needed improvements, the delivery

of the link road, flood risk and that there wasn't a compelling case in the public interest.

4. 3 objections were outstanding at the opening of the Inquiry and a further 2 representations supporting the scheme had been received. The Inspector has considered all the outstanding objections to and representations about the Orders both as made in writing and presented orally at the Inquiry and has since submitted his report to the Secretary of State. A copy of that report is enclosed with this letter. References in this letter to the Inspector's report are indicated by the abbreviation "IR" followed by the paragraph number in the report.

5. The Inspector summarises the case for National Highways at IR 4.1 to 4.14. The case for supporters of the scheme is summarised at IR 5.1 to 5.2. The case for the objectors is summarised at IR 6.1 to 7.2, including National Highways' response to individual objections. The Inspector's conclusions are detailed at IR 8.1 to 8.4 whilst his recommendations are given at IR 9.0. In light of his conclusions the Inspector has recommended that the Orders not be confirmed.

6. Following the close of the Inquiry, correspondence has been received from both National Highways and Mr Keeling's (one of the objectors) representatives. It is the Secretary of State's view that this correspondence reflects matters already dealt with in the course of the Inquiry and would not materially alter this decision. It will therefore not be commented on further.

7. The Secretary of State has considered carefully all the objections to, and representations about, the Orders, including alternative proposals put forward. He has considered the Inspector's report and has also considered the Orders in line with relevant guidance set out in *Guidance on Compulsory Purchase Process and The Crichel Down Rules* and *The Highways Act 1980* in reaching this decision.

CONCLUSION

8. The Secretary of State has considered whether the purposes for which the CPO is required, sufficiently justify interfering with the human rights of those with an interest in the CPO and isn't satisfied that they do. In particular, the Secretary of State has considered the provisions of Article 1 of The First Protocol to the European Convention on Human Rights and the Human Rights Act 1998. In this respect, the Secretary of State isn't satisfied that confirming the CPO in its current form shows that a fair balance has been struck between the public interest and interests of the objectors, owners and lessees. Namely, it hasn't been clearly demonstrated that all of the land is required for the Orders to be properly implemented, including the land owned by one of the objectors, Mr Keeling, where an intended flood basin was to be situated.

9. The Secretary of State considers that the evidence provided by Mr Keeling in relation to flood data modelling, shows that the long-term risks of flooding may not be sufficiently addressed and that National Highways have not sufficiently proved that

the flood basin on Mr Keeling's land is necessary. This is highlighted at IR 8.2.4.46 to IR 8.2.4.50. The Secretary of State believes this is a convincing reason not to confirm the Orders at this time.

10. Having reflected on all aspects of the matter, the Secretary of State is satisfied there is a compelling case which would justify not confirming the CPO. Consequently, it would not be correct to confirm the SRO, as both Orders are intrinsically linked. As such, the Secretary of State agrees with the Inspector's conclusions and recommendations and has decided NOT to confirm 'The Highways England (M27 Southampton Junction 8 Improvement Scheme – M27 Junction 8 And Windhover Roundabout) (Special Road) (Side Roads) Order 2021' and 'The Highways England (M27 Southampton Junction 8 Improvement – M27 Junction 8 & Windhover Roundabout) (Special Road) Compulsory Purchase Order 2021'.

11. In making this decision, the Secretary of State has relied on the information that all parties have provided, that contained in the Orders, plans, diagrams and any statements or correspondence, as being factually correct.

AVAILABILITY OF DOCUMENTS

12. A copy of this letter, together with a copy of the Inspector's report, has been sent to those parties who appeared at the Inquiry, other interested parties and relevant Members of Parliament. Copies will be made available on request to any other persons directly concerned.

13. Please arrange for a copy of the Inspector's report and of this letter to be made available for inspection at all places used to deposit the Orders for public inspection at making stage. These are; The offices of National Highways Company Limited, Bridge House, 1 Walnut Tree Close, Guildford, GU1 4LZ; Hedge End Library, 11 Upper Northam Road, Hedge End, Southampton SO30 4DY; and Thornhill Community Library, 328 Hinkler Road, Thornhill, Southampton, SO19 6DF. It should also be available to view on the National Highways website at https://nationalhighways.co.uk/our-roads/south-east/m27-southampton-junction-8/ .

14. Any person entitled to a copy of the Inspector's report may apply to the Secretary of State for Transport, at this address within 6 weeks of the receipt of this letter, to inspect any document, photograph or plan submitted by the Inspector with the Inspector's report.

RIGHT OF CHALLENGE

15. Notice is to be published of non-confirmation of the Orders. Any person who wishes to question the validity of the Secretary of State's decision on the grounds that the Secretary of State has exceeded his powers or has not complied with the relevant statutory requirements when reaching their decision may, under the provisions of Rule 54 of the Civil Procedure Rules, do so by application to the High Court. Such application must be made within six weeks of publication of the notice that the Orders

have not been confirmed. The High Court cannot entertain such an application before publication of the notice that the Secretary of State has not confirmed the Orders.

Yours sincerely,

Dave Candlish
Authorised by the Secretary of State
to sign in that behalf

The Planning Inspectorate

Report to the Secretary of State for Transport

by I Jenkins BSc CEng MICE MCIWEM

an Inspector appointed by the Secretary of State for Transport

Date: 16 January 2023

HIGHWAYS ACT 1980

ACQUISITION OF LAND ACT 1981

THE HIGHWAYS ENGLAND (M27 SOUTHAMPTON JUNCTION 8 IMPROVEMENT SCHEME – M27 JUNCTION 8 AND WINDHOVER ROUNDABOUT)(SPECIAL ROAD) COMPULSORY PURCHASE ORDER 2021

THE HIGHWAYS ENGLAND (M27 SOUTHAMPTON JUNCTION 8 IMPROVEMENT SCHEME - M27 JUNCTION 8 AND WINDHOVER ROUNDABOUT)(SPECIAL ROAD)(SIDE ROADS) ORDER 2021

Date the Inquiries opened: 10 May 2022

Ref: DPI/J1725/21/21

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CASE DETAILS

- **The Highways England (M27 Southampton Junction 8 Improvement Scheme - M27 Junction 8 and Windhover Roundabout)(Special Road) Compulsory Purchase Order 2021**

  The Order was made under sections 239, 240, 246 and 260 of the *Highways Act 1980* and section 2 of the *Acquisition of Land Act 1981*.

  Summary of Recommendation: I recommend that the Order not be confirmed.

- **The Highways England (M27 Southampton Junction 8 Improvement Scheme - M27 Junction 8 and Windhover Roundabout)(Special Road)(Side Roads) Order 2021**

  The Order was made under sections 18 and 125 of the *Highways Act 1980*.

  Summary of Recommendation: I recommend that the Order not be confirmed.

PREAMBLE

1.1 *The Inquiries and site visits*

1.1.1 I have been appointed by the Secretary of State for Transport (the Secretary of State) to conduct concurrent Inquiries for the purpose of hearing representations and objections concerning the Orders, all as described in the case details above.

1.1.2 The Inquiries were initially scheduled to open on 30 November 2021 and to sit for 7 days. However, following a pre-Inquiries meeting, held on 17 September 2021, the provision of proofs of evidence and time estimates for the giving of evidence, it was determined that a longer period would be required, necessitating the postponement of the Inquiries to a later date. The Inquiries were rescheduled to open on 10 May 2022. A second pre-Inquiries meeting was held on 26 January 2022, the minutes of which were issued to the parties and were made generally available through the Inquiries website.

1.1.3 The Inquiries opened on 10 May 2022 at the Highpoint Centre, Bursledon Road, Thornhill, Southampton, SO19 8BR and sat, under the terms of the *Highways (Inquiries Procedure) Rules 1994* and the

Compulsory Purchase (Inquiries Procedure) Rules 2007 (to the extent applicable) (Inquiry Rules), on the following days: 10-13, 17-19, 24-27 and 30-31 May, and 9-10 June.

1.1.4 I adjourned the Inquiries on 10 June 2022, having dealt with all other matters, to allow Mr Keeling an opportunity to prepare and to provide legal submissions concerning the case law referred to by National Highways for the first time in closing submissions. At the Inquiries, it was agreed that upon receipt of those submissions, National Highways would be afforded an opportunity to reply (in accordance with the Inquiry Rules - the right of final reply). I indicated that upon receipt of the submissions identified above, from both parties, it would be my intention to close the Inquiries in writing. There were no objections to that approach. Following receipt of the submissions identified above, the Inquiries were closed in writing on 17 June 2022.

1.1.5 Before and during the Inquiries, I undertook unaccompanied visits to various locations which were the subject of representations. I carried out accompanied site visits on 9 May, 9 June and 10 June 2022.

1.2 ***Purpose of the Orders***

1.2.1 The Highways England (M27 Southampton Junction 8 Improvement Scheme - M27 Junction 8 and Windhover Roundabout)(Special Road) Compulsory Purchase Order 2021 (the CPO)[1] indicates that it would authorise National Highways (formerly Highways England) to purchase land compulsorily for the following purposes:

1) The improvement of the four M27 Motorway slip roads, (northbound exit slip road, northbound entry slip road, southbound exit slip road and southbound entry slip road) of junction 8 of the M27 Motorway, on their approach and departure lengths to and from the A3024 M27 junction 8 Roundabout, at its junction with the C56 Dodwell Lane and the A3024 Bert Betts Way;

2) The improvement of the following highways: A3024 Bert Betts Way, A3024 M27 junction 8 Roundabout, A3024 Windhover Roundabout, A27 West End Road, A3024 Bursledon Road; A3025 Hamble Lane, A27 Providence Hill, Peewit Hill Close and C56 Dodwell Lane (also in pursuance of an agreement made between Highways England Company Limited and Hampshire County Council under section 4 of the Highways Act 1980) and the provision of new means of access to premises, in pursuance of the Highways England (M27 Southampton Junction 8 Improvement Scheme - M27 Junction 8 and Windhover Roundabout)(Special Road)(Side Roads) Order 2021;

3) Use by the acquiring authority in connection with the

[1] CD A.1 and A.2

improvement of highways and the provision of private means of access to premises as aforesaid; and,

4) Mitigating the adverse effect which the existence or use of the highways proposed to be improved will have on the surroundings thereof.

1.2.2 The Highways England (M27 Southampton Junction 8 Improvement Scheme - M27 Junction 8 and Windhover Roundabout)(Special Road)(Side Roads) Order 2021 (the SRO)[2] indicates that it would authorise National Highways (formerly Highways England) in relation to the special road[3] at junction 8, north of Bursledon, southeast of Hightown, and south of Hedge End, in the Parishes of Bursledon and Hedge End, in the District of Eastleigh, in the County of Hampshire to:

a) Improve the lengths of highway named in the Schedule and shown on the Site Plan by cross hatching;
b) Stop up the private means of access to premises described in the said Schedule and shown on the Site Plan by a solid black band; and,
c) Provide new means of access to premises along each route or at each location shown on the Site Plan by thin diagonal hatching.

1.3 *Objections to the Orders*

1.3.1 Of the 7 duly made objections (OBJ/1-7), 4 were withdrawn before the start of the Inquiries, leaving the following:

a) OBJ/3 Mr Carnell[4];
b) OBJ/6 Foreman Homes Limited[5]; and,
c) OBJ/7 Mr Keeling[6] (MK).

1.4 *Supporters of the Orders and others*

1.4.1 A letter of support was received from Hampshire County Council before the start of the Inquiries and another on behalf of the Bursledon Rights of Way and Amenities Preservation Group.

[2] CD A.3
[3] 'Special road' means the M27 Motorway slip roads, northbound exit slip road, northbound entry slip road, southbound exit slip road and southbound entry slip road of junction 8 of the M27 Motorway, which Highways England propose to improve, on their approach and departure lengths to and from the A3024 M27 Junction 8 Roundabout, at its junction with the C56 Dodwell Lane and the A3024 Bert Betts Way.
[4] CD H.6
[5] CD H.3
[6] CD H.1

1.5 *Suggested alternatives*

1.5.1 In evidence, MK has suggested changes to the M27 southbound exit slip road improvements[7] proposed by National Highways (NH) as well as the proposed flood attenuation facilities to the northeast of junction 8. Whilst in his case MK prefers to refer to those changes as refinements, NH refers to them as alternatives in its case. I reference the changes proposed by Mr Keeling as alternatives in my conclusions.

1.6 *Scope of this Report*

1.6.1 This report contains a brief description of the site and its surroundings, the gist of the evidence presented and my conclusions and recommendations. Lists of Inquiries appearances, documents and abbreviations used are attached as appendices. Proofs of evidence were added to at the Inquiries through written and oral evidence.

2 DESCRIPTION OF THE SITE AND ITS SURROUNDINGS

2.1 The M27 is part of the Strategic Road Network (SRN) connecting key urban centres in the South East including Southampton, Eastleigh, Fareham and Portsmouth. The Order scheme, which is located on the M27 junction 8 and Windhover Roundabout, is set in a mixed rural and urban fringe landscape southeast of the city of Southampton and north of the village of Bursledon. The local road network connecting with the M27 consists of the A3024 (via Windhover Roundabout), at junction 8, which provides access towards Southampton city centre and the C56 Dodwell Lane. The A27 also connects to Windhover Roundabout and provides a route around the city of Southampton, eventually connecting to the M3 near Eastleigh.

M27 junction 8[8]

2.2 The current 2-lane arrangement of the M27 A3024 Roundabout at junction 8 would become 3-lane and the junction would be signalised. The M27 northbound entry slip road and southbound entry slip road would retain their 2-lane arrangement as now, but would be provided with an additional direct filter lane, off the A3024 Bert Betts Way to the northbound entry slip road, and off the Dodwell Lane to the southbound entry slip road. The M27 northbound exit slip road would become a 3-lane approach to the M27 A3024 Roundabout, including a filter lane onto the A3024 Bert Betts Way. The M27 southbound exit slip road to the M27 A3024 Roundabout would have two lanes leading onto the roundabout and a filter lane leading onto Dodwell Lane.

[7] CD A.9 General Arrangement sheet 3 of 5.
[8] CD A.9 General Arrangement sheet 3 of 5.

2.3 Integral drainage tanks and an attenuation basin would be situated within the M27 junction 8 roundabout and there would be two further off-highway attenuation basins: 1) located immediately to the north of Dodwell Lane and east of the M27 southbound exit slip road, in existing pasture land owned by Mr Keeling (CPO Plot 11b); and, 2) located immediately to the north of the A3024 Bert Betts Way and west of the M27 northbound entry slip road, in what is currently an area of extended residential garden abutting the Bert Betts Way (CPO Plot 9d).

Windhover Roundabout[9]

2.4 The current 3-lane arrangement of the Windhover Roundabout would become 4-lane. Each arm approach of the roundabout (the A3025 Hamble Lane, the A3024 Bursledon Road, the A27 West End Road, the A3024 Bert Betts Way, and the A27 Providence Hill) would have a 3-lane approach to the roundabout, and a filter lane throughout the roundabout to each exiting arm, with a 2-lane filter exiting the roundabout onto the A3024 Bert Betts Way.

Non-motorised user (NMU) provision[10]

2.5 The integral cycleway/footways of the Windhover Roundabout would be improved on their approaches along all arms of the roundabout, to cater for pedestrians, cyclists and equestrians being taken to the roundabout crossing points and the integral paths which run through the roundabout central island. The southern cycleway/footway of Bert Betts Way would be improved between Windhover Roundabout and M27 junction 8 northbound exit slip road, where it would then cross the slip road and roundabout to enter the inner part of the carriageway of the roundabout, where a new length of integral cycleway/footway would be provided to run to the crossing of the roundabout on its eastern arm to connect with the Dodwell Lane cycleway/footway running eastwards, on the south side of its carriageway. Signalised crossing points at both junctions would enable pedestrians, cyclists and equestrians to cross to continue their movements through the junctions.

3 LEGAL AND PROCEDURAL SUBMISSIONS

3.1 Statutory formalities

3.1.1 At the Inquiries, NH confirmed that all of the statutory formalities had been complied with and this was not disputed by any of the other

[9] CD A.9 General Arrangement sheet 1 of 5.
[10] CD A.9 General Arrangement sheets 1 to 3 of 5.

parties present.[11]

3.2 Legal submissions

3.2.1 The legal tests to which the CPO is subject are a matter of disagreement between NH and MK, in relation to which both parties have made submissions that are recorded below as part of the parties' cases. There is also a dispute as to whether the SRO has been made under the appropriate sections of the *Highways Act 1980*. Whilst I give my view in my conclusions, these are legal matters upon which the Secretary of State may wish to take advice.

3.3 Cost applications

3.3.1 Cost applications have been made by National Highways and Mr Keeling against one another. These applications are the subject of a separate Costs Report to the Secretary of State.

4 THE CASE FOR NATIONAL HIGHWAYS (NH)

The gist of the material points made by NH in its written and oral submissions were:

4.1 INTRODUCTION

4.1.1 NH considers that the Orders would deliver the M27 Southampton junction 8 Improvement Scheme (the Order scheme) which comprises a series of interventions in the existing junction 8, the Windhover Roundabout and local roads connecting into each with the following objectives:

a) Reduce congestion and journey times along the M27, through junction 8 and the Windhover Roundabout.

b) Improve journey time reliability and connectivity between east and west of junction 8 and the Windhover Roundabout.

c) Improve the 'whole life' safety record at junction 8 and Windhover Roundabout.

d) Maintain air quality by reducing congestion.

e) Meet the needs of all users by delivering capacity enhancements

[11] Inspector's note: There is a dispute between NH and MK with respect to the statutory framework applicable to the SRO, which is dealt with by both parties in their cases below, with particular reference to the application of section 16 of the Highways Act 1980.

to the SRN, junction 8 slip roads and Windhover Roundabout, whilst supporting the safe, accessible use of active travel modes for pedestrians and cyclists.

4.1.2 The Scheme would be delivered across two Highway Authorities, namely: NH and Hampshire County Council (HCC).

4.1.3 Works on NH infrastructure can be delivered under its own powers.

4.1.4 Works on the HCC infrastructure would be delivered by NH under an agreement made under section 4 of the *Highways Act 1980* which allows NH to undertake works on roads outside of the SRN through an agreement with the relevant highways authority. A section 4 agreement has been drafted and reviewed by both parties' legal teams. It is currently with HCC for signature. It is anticipated that this agreement will be signed prior to Stage 6 of the Scheme (i.e. construction) (which reflects ordinary practice).

4.1.5 NH indicates that whilst most of the Order scheme can be delivered within existing highways land, some land acquisition is required, hence the need for the CPO.

4.2 Letters of objection and support

4.2.1 The Orders were subject to the usual publicity and notices under Part II of the *Acquisition of Land Act 1981*,[12] as a result of which, the Secretary of State received 7 letters of objection and, in accordance with section 14 of the *Acquisition of Land Act 1981*, caused these Inquiries to be held.

4.2.2 NH indicates that the current position in relation to each objection, aside from MK whose objection is addressed in more detail below, is as follows:

a) OBJ/1-Eastleigh Ramblers: withdrawn on 3 June 2021, following the improvements to the proposed NMU provision and, in particular, the inclusion of a link between FP1 Hound and the Windhover Roundabout.[13]

b) OBJ/2-Southern Gas Networks: withdrawn on 14 October 2021, following the settling of an asset protection agreement.[14]

[12] CD D.2.
[13] CD H.9.
[14] CD H.8.

c) OBJ/3-Mr Paul Carnell: NH considers that Mr Carnell does not appear to object to the Scheme *per se*. Rather his objection is that he sees the principal causes of congestion at junction 8 and the Windhover Roundabout to lie at the Hamble Lane/Portsmouth Road junction and the junction at Bursledon Road/Botley Road. These junctions do not form part of the Order scheme. Mr Carnell thinks that either they should form part of the Order scheme or be addressed first. These junctions are the subject of complementary proposals by HCC.[15] Mr Carnell does not suggest that the Scheme should be refused on the basis that there is no compelling case in the public interest. His real concern appears to be to ensure that there are improvements to the two above mentioned junctions as well. That is not properly speaking an objection to the Order scheme in NH's view.

d) OBJ/4-SSE: withdrawn on 30 June 2021.[16]

e) OBJ/5-Wates Development and Cranbury Estates: this objection related to Plot 2 which has now been removed from the CPO, a licence to use the land as a works compound having been agreed. Wates Developments withdrew the objection on 18 November 2021.[17] The position is also recorded in a Statement of Common Ground;[18] and,

f) OBJ/6-Foreman Homes Limited (FHL): FHL has an option over part of MK's land (as tinted brown on the title plan)[19]. It submitted an objection but has not otherwise participated or engaged in the process. FHL's interest and concerns relate to the delivery of the Link Road which is addressed below.

4.2.3 HCC has written in support of the Order scheme stating the importance of the scheme to HCC. HCC states:

`*The improvements that will be delivered as part of the NH improvement scheme are essential to help improve the operation of the local highway network, ensure that it is resilient to future demands, and that it is able to support sustainable economic growth in the area. The scheme will also provide very important new infrastructure for pedestrians and cyclists at both Windhover Roundabout and M27 Junction 8, which will connect to and add value to committed investment in new cycle infrastructure by the County Council along the A27 Providence Hill and A3024 Bursledon Road, as*

[15] CD H.4 and CD K.1, p.4.
[16] CD A.8, para 19.3.
[17] CD H.7.
[18] CD K.2.
[19] CD H.1, Schedule 1.

part of the Southampton Transforming Cities Fund. Without the NH improvements at Windhover Roundabout in particular, there will be a key missing link in the local cycle network…It would severely weaken the benefits of the County Council's scheme for improving Hamble Lane, and therefore the prospects of securing funding, if the improvements to Windhover and M27 junction 8 do not go ahead as planned. It would also significantly undermine the Hamble Lane Improvement scheme, which is addressing a long-term issue of constrained access and egress to the Hamble peninsula if traffic seeking to exit Hamble Lane to the north was impeded by a congested and unimproved Windhover Roundabout and M27 junction 8.'[20]

4.3 Main issues

4.3.1 NH considers that the main issue with regards the CPO is in essence compliance with the *Guidance on Compulsory purchase process and The Crichel Down Rules*[21] (CPO Guidance) and, in particular:

a) Paragraph 2: whether there is a compelling case in the public interest (including reasonable alternatives).

b) Paragraphs 2 and 12: whether any interference with rights under the European Convention on Human Rights (ECHR or the Convention) is justified.

c) Paragraph 13: whether NH has a clear idea of how it intends to use the land it is proposing to acquire.

d) Paragraph 14: whether all the necessary resources are likely to be available within a reasonable timescale.

e) Paragraph 15: whether there is a reasonable prospect of the Scheme going ahead and whether there are any impediments to implementation.

f) Paragraph 2: whether compulsory purchase powers have been sought as a 'last resort'.

4.4 Legal framework

The need for detail design

4.4.1 In NH's view, the question before the Secretary of State is whether or not there is sufficient justification for the CPO/ SRO.[22] The CPO seeks

[20] CD H.4
[21] CD F.13
[22] CD J.2: R v Secretary of State for Transport, ex parte De Rothschild (1989) 57 P.&C.R. 330 at p.337 where Slade LJ said: "*First, I do not accept that any special rules beyond the ordinary Wednesbury/ Ashbridge rules fall to be applied when the court is considering a challenge to the Secretary of State's*

authorisation for compulsory purchase of land for the purposes of the Order scheme. The CPO/SRO do not seek authorisation for the Order scheme itself. The CPO/SRO therefore require to be supported by sufficient justification to show there is a compelling case in the public interest to interfere with human rights, but do not require to be based on a completed version of the Scheme and do not require the Secretary of State to approve the detailed design of the Scheme. MK's team, however, have sought to test a different question: is the detailed design acceptable. NH does not have to demonstrate the same to justify the Orders. These questions are distinct.

4.4.2 This can be seen in the Court of Appeal decision in *Grafton Group (UK) plc v Secretary of State for Transport* [2016] EWCA Civ 561 (*Grafton*).[23] In that case the Port of London Authority made a compulsory purchase order in relation to a disused wharf with the purpose of bringing it back into use as a wharf handling river born aggregates and cement for batching into concrete. A planning application for the necessary operational development for the purposes of the CPO was refused. An inquiry was held into the CPO and the refusal of the related planning permission. It was common ground that if the planning appeal were dismissed, the CPO ought not be confirmed.

4.4.3 The Inspector recommended and the Secretary of State dismissed the planning appeal on the impact to the character and appearance of the area. However, the Inspector recommended that the CPO nonetheless be confirmed on the basis that there was a sufficient probability of an alternative scheme that would be acceptable. The Secretary of State accepted the recommendation and confirmed the CPO.

4.4.4 The Court of Appeal confirmed that there was nothing wrong in principle in confirming a CPO despite the dismissal of the planning appeal. It endorsed the following paragraph from the High Court judgment in the same case at [29]:

> '*Confirmation of a CPO is not in law or policy necessarily tied to any particular scheme for which planning permission is simultaneously sought. So the refusal of planning permission for a particular scheme on grounds which the inspector thought remediable, rather than fatal in principle to the very purpose of the CPO, does not necessarily require non-confirmation of the CPO, and the starting of the whole*

confirmation of a compulsory purchase order. Secondly, however, the Secretary of State, as Mr. Laws on his behalf accepted and submitted, must be satisfied that the compulsory purchase order is justified on its merits before he can properly confirm it. He must not exercise his powers capriciously. Given the obvious importance and value to landowners of their property rights, the abrogation of those rights in the exercise of his discretionary power to confirm a compulsory purchase order would, in the absence of what he perceived to be a sufficient justification on the merits, be a course which surely no reasonable Secretary of State would take." (my emphasis).

[23] INQ-91.2.

process all over again with a different planning application. So there was no error in principle of itself in confirming the CPO while dismissing the planning appeal.'

4.4.5 The Court of Appeal held that the Inspector had been entitled to conclude that there was sufficient prospect of a better scheme although though no detailed evidence had been presented as to that alternative. Laws LJ said at [36]:

'*It seems to me that the judge's reasoning at para 144 rests on the premise that the inspector could only lawfully arrive at the overall conclusion that a better design might come forward if chapter and verse of such a design had been presented to him in the evidence, or elaborated by him on the basis of evidence. I think the premise is false. Given his comprehensive appreciation of the details of the scheme on offer, his criticisms of its scale and design, his legitimate emphasis on the benefits of the wharf's reactivation, taken with his view (para 12.61) that on balance, the proposals would be contrary to the development plan and the appeal should fail, the inspector was in my view wholly entitled to decide that there was a sufficient probability of an alternative, adjusted scheme coming forward and that in those circumstances the CPO should be confirmed*.'

4.4.6 NH considers that MK's team have approached these Inquiries not asking whether the justification is sufficient but asking whether the particular (draft) design is acceptable in all material ways. That approach does not properly reflect the CPO tests laid down in the CPO Guidance nor the law.

Legal approach to compelling case

4.4.7 Paragraph 2 of the CPO Guidance provides that '*a compulsory purchase order should only be made where there is a compelling case in the public interest*.' [24]

4.4.8 NH considers that this is the codification in Government guidance of what the Court of Appeal said in *Prest v Secretary of State for Wales* [1983] 1 EGLR 17 *(Prest)*[25] on which MK places great reliance.[26] *Prest* is an expression of the compelling case test and not a further and additional test. So that when in *Prest* it is said that where the scales are evenly balanced, the decision '*should come down against compulsory acquisition*'[27] that merely reflects the need for there to be a compelling

24 CD F.13, p.6.
25 CD J.1.
26 CD H.2, para 19, para 264, para 276 and para 286.
27 CD J.1, p.3.

case.

4.4.9 The compelling case test means that compulsory purchase powers should be exercised only if '*necessary*'. However, it is clear from the cases that this means '*reasonably*' necessary, rather than '*strictly*' or '*absolutely*' necessary (see further below in the context of least intrusive means).

4.4.10 As was made clear in *De Rothschild v Secretary of State for Transport* [1989] 1 All ER 933 *(De Rothschild)*[28], the test is whether the decision-maker has acted with *Wednesbury* unreasonableness, and there are no '*special rules'* requiring an acquiring authority to minimise compulsory land take; they must simply be satisfied that there is '*sufficient justification on the merits'* for confirmation to be a reasonable decision.

4.4.11 This was a case where alternatives existed but were rejected on the grounds of costs and delay. The decision maker considered and rejected alternatives. The Secretary of State confirmed that he did not believe any of the suggested alternatives had sufficient advantages/benefits which would justify their adoption in place of the Council's proposed scheme.

4.4.12 The Court of Appeal found no error of law. This immediately puts to bed MK's suggestion that the presence of an alternative that 'could' work means that compulsory acquisition cannot be necessary.

4.4.13 The Court of Appeal held at [943d]:

> '*Some reliance was placed on the phrase used by Lord Denning in Prest that no citizen is to be deprived of his land by any public authority against his will unless the public interest "decisively so demands." As I read the inspector's report and the Secretary of State's decision, both of them considered that the public interest did decisively so demand. The by-pass was needed. Some land of the appellants had to be acquired for the purpose. They both took the view that the council had shown unequivocally that the order route was <u>better</u> in the public interest than any of the alternative routes over other land of the appellants which the appellants had proposed*.' (NH's emphasis)

4.4.14 NH considers, as such, the mere existence of an alternative proposal does not of itself prevent there being a compelling case in the public interest as a matter of either UK law or under the ECHR. It is necessary

[28] CD J.2.

for an alternative to be considered and evaluated when judging whether there is a compelling case in the public interest for the CPO, but this does not mean that an alternative must or should be preferred.

4.4.15 The Secretary of State is able to consider and reject alternative proposals as a basis for defeating the CPO on the grounds that: (i) the alternatives are uncertain in their delivery of the objectives which underpin the public interest basis for confirming the CPO e.g. because they do not secure certain delivery of the objectives of the Order scheme in the public interest, or lack the relevant permissions or consents, or generally lack certainty in the delivery of relevant proposals in the public interest; (ii) the alternatives will delay the implementation of the Order scheme where a timely delivery of the proposals is in the public interest and; (iii) the alternatives will not deliver the public interest benefits of the Order scheme as well or as effectively as the Scheme, or in the timely manner of the Order scheme, where that difference in delivery of benefits and timing are material having regard to the public interest.

4.4.16 The *London Borough of Bexley v (1) SoS for the Environments Transport and Regions (2) Sainsburys' Supermarkets Limited and Sainsburys' Supermarkets Limited v (1) SoS for the Environments Transport and Regions and (2) London Borough of Bexley* [2001] EWHC Admin 323 *(Bexley)* case[29] also makes it clear that the Secretary of State and the Courts consider that the creation of delay and uncertainty in considering alternative proposals put forward in support of CPO objections is itself a highly material consideration in rejecting the objections and confirming the CPO. In that case, the judge considered and approved the Secretary of State's approach to an alternative and rival supermarket proposal advanced by Sainsbury's which did not require compulsory acquisition whereas the Safeway scheme did. It is notable that even though the alternative proposals were granted planning permission by the Secretary of State, it was still considered appropriate to reject Sainsbury's objection and confirm the Safeway CPO. The judge held that the Secretary of State was entitled to take the view that the delay and uncertainty which the implementation of the Sainsbury's proposals would generate were sufficient to lead to the rejection of the alternative.

4.4.17 NH indicates that, for reasons set out later, there are no 'better' alternatives to the NH Order scheme and changing the design now would cause delay and material costs as described by Mr Clark (NH's overview witness).

4.4.18 The CPO Guidance test of a compelling case in the public interest fairly reflects the necessary element of balance as between private rights and

[29] INQ-7.2

the public interest required to be considered in the context of ECHR rights.[30] There is nothing materially different between the principles governing human rights considerations and the compelling case test.[31]

4.4.19 NH indicates that MK's expert witnesses have been given legal advice to the effect that the correct approach to compulsory purchase is that the Order scheme should reflect the least intrusive approach to its delivery. This was a theme in MK's closings.

4.4.20 Furthermore, this advice has been a fundamental driver of MK's experts' approach – Mr Moore (MK's flood risk and highways design witness), in particular. Mr Moore states, for example, that NH should have approached the assessment of flood risk in such a way as to have made choices which minimise the size of the proposed flood compensation area and, therefore, the land take required from MK.[32] However, the advice given to Mr Moore and the approach underlying it does not properly reflect the law. There is no special rule that the '*least intrusive*' approach must be adopted where compulsory purchase powers are sought.[33]

4.4.21 NH considers that what is required is for the decision maker to be satisfied that the CPO is justified on the merits. This means a balancing exercise to discern if there is a compelling case in the public interest (challengeable only on *Wednesbury* grounds).

4.4.22 In *R (oao Clays Land Housing Cooperative Limited v Housing Corp* [2005] 1 WLR 2229 (*Clays Lane*) at [25][34] it was put like this (in the context of a compulsory transfer between social landlords under powers of the housing corporation as opposed to straight CPO but it raised human rights issues and the courts have been very clear that there is no difference between the consideration of private rights and the public interest in the human rights and compulsory purchase spheres and as set out below this case has been applied in the CPO context):

> '*I conclude that the appropriate test of proportionality requires a balancing exercise and a decision which is justified on the basis of a compelling case in the public interest and as being reasonably necessary but not obligatorily the least intrusive of Convention rights. That accords with Strasbourg and domestic authority. It is*

[30] *Tesco Stores Limited v Secretary of State for Environment, Transport and the Regions and Wycombe District Council* (2000) P.&C.R. 427, at p.429.
[31] INQ-7.2: *Bexley London Borough Council v Secretary of State for Environment, Transport and the Regions* [2001] EWHC 323 Admin at [46].
[32] See, for example, KEE/1/6, para 2.3.
[33] A detailed analysis of the law on least intrusive means is set out in *Pascoe v First Secretary of State* [2006] EWHC 2356 (Admin) at [66]-[75].
[34] INQ-7.1.

also consistent with sensible and practical decision-making in the public interest in this context. If "strict necessity" were to compel the "least intrusive" alternative, decisions which were distinctly second best or worse when tested against the performance of a regulator's statutory functions would become mandatory. A decision which was fraught with adverse consequences, would have to prevail because it was, perhaps quite marginally, the least intrusive. Whilst one can readily see why that should be so in some Convention contexts, it would be a recipe for poor public administration in the context of cases such as Lough and the present case.'

4.4.23 So that in *Clays Lane*, it was made clear that '*necessary'* does not mean absolutely necessary. Kay LJ stated '*what is necessary is driven by the balancing exercise rather than by a 'least intrusive' requirement' '…the appropriate test of proportionality requires a balancing exercise and decision which is justified on the basis of a compelling case in the public interest and as being reasonably necessary but not obligatorily the least intrusive of Convention rights.'*

4.4.24 This was considered further in *Smith, Reilly and Reilly v Secretary of State for Trade and Industry* [2007] EWHC 1013 (Admin) (*Smith*), in which Williams J concluded that '*a decision to confirm a compulsory purchase order may be proportionate even though it does not amount to the least intrusive interference of the landowner's rights...'*[35]

4.4.25 This was further confirmed by the Court in *Belfields v Secretary of State*

[35] INQ-91.3. In this case, the London Development Agency proposed a CPO for the acquisition of traveller caravan sites required as part of the site for the 2012 Olympic and Paralympic Games. At inquiry, the Inspector concluded that, to protect the human rights of the occupiers of the sites, the CPO should not be confirmed unless the Secretary of State was satisfied that alternative traveller caravan sites were available. The Secretary of State confirmed the CPO before alternative sites were confirmed, given the importance and urgency of the Olympics development. Several occupiers sought a judicial review of the Secretary of State's decision to confirm the CPO. Counsel for the claimants argued that the decision could not have been proportionate unless it is the "least intrusive" option. Reference was made to *Daly* and *Samaroo*. It was acknowledged that there is a law of authority suggesting a decision could be proportionate, even if not the least intrusive option, but sought to argue that this applied only to conflicts between private interests. Reference was made to *Lough*, *Clays* and *Pascoe*, in which Forbes J also referred to *Lough* and *Clays* and rejected the claimants' approach that the least intrusive approach must be used. Williams J stated: "*In fact, I agree with Forbes J that a decision to confirm a compulsory purchase order may be proportionate even though it does not amount to the least intrusive interference of the landowner's rights under Article 8. In my judgment the analysis of the relevant lines of authority undertaken by Forbes J in Pascoe is highly persuasive. Nothing would be achieved by my attempting to reformulate his analysis in my own words. I stress, however, that the context is all important. In this case the issue of proportionality has to be judged against the background that everyone accepts that an overwhelming case has been made out for compulsory acquisition of the sites for the stated objectives and that compulsory purchase is justified. The issue of proportionality arises only in relation to whether the confirmation of the order should await the provision of alternative sites i.e. in relation to the point in time at which the compulsory purchase order should be made. In that context, in my judgment, it is unnecessary for the Defendant to demonstrate that the measure he proposes to take is the least intrusive available*" (Paragraph 42) (my emphasis).

for Communities and Local Government [2008] JPL 954 (*Belfields*)[36], which stated at [20]:

> *'I do not accept that proportionality in a case such as this is to be determined by treating as a requirement that the CPO should be the 'least intrusive' means of achieving the public benefit that is sought. Such a test was rejected by the Court of Appeal in R. (on the application of Clays Lane Housing Co-operative Ltd) v The Housing Corporation [2005] 1 W.L.R. 2229 (see para.[25] in the judgment of Maurice Kay L.J.) and by Forbes J. in Pascoe v First Secretary of State [2007] 1 W.L.R. 885 at paras [68]-[75], both of which were cases in which rights under Art.8, as well as under Art.1 of the First Protocol, were engaged. The policy requirement that a CPO will not be confirmed unless there is a compelling case in the public interest fairly reflects the necessary balance required under the Human Rights Act (see Bexley LBC v Secretary of State for the Environment, Transport and the Regions [2001] EWHC Admin 323 at [33]-[48]), and the Secretary of State must be satisfied of this: see Hall v First Secretary of State [2007] EWCA Civ 612, per Carnwath L.J. at [21].'*

4.4.26 NH considers that the MOPAC appeal decision does not assist MK.[37] In that case the Inspector found that there was an alternative that could meet the purposes of the scheme which had less of an impact on the landowner (a lease rather than the freehold). In the present case a purpose of the Scheme as explained below is to address flood risk. MK's alternatives do not achieve that aim.

4.4.27 The cases also show that any number of factors may be relevant to the balancing exercise including certainty of delivery and cost and delay if the proposed CPO was not to be confirmed.[38]

4.4.28 The cases clearly show that the existence of an alternative does not mean that compulsory purchase powers cannot be confirmed. Alternatives are a factor that go to the balancing exercise and a decision maker may confirm an order where he/she concludes that the proposed scheme is better than a proposed alternative.[39] This is

[36] INQ-91.5.
[37] INQ-8.2.
[38] For example, the judge in *Belfields* said rejecting an argument that it was not appropriate to have regard to certainty of delivery as a factor weighing in favour of the CPO: *"It is clear that the inspector and the Secretary of State, so far from demanding certainty, were weighing the degree of uncertainty of the development taking place in the absence of the CPO against the particular contribution that the Penpoll site would make to the regeneration of the area and the need for its development in accordance with the agreed timescale. This approach was, in my view, palpably proportionate; and in adopting it the inspector and the Secretary of State were justified, having concluded that there was considerable uncertainty about the site being developed in the absence of the CPO, in concluding that there was a compelling need for its inclusion in the order"* (Paragraph 25).
[39] See, for example, *Bexley London Borough Council v Secretary of* State [2001] EWHC 323 (Admin) in which alternatives were considered. Harrison J concluded that the Secretary of State was entitled to

considered further below on the facts.

4.4.29 Finally with regards alternatives, NH says it is well established that vague and inchoate schemes cannot be given any material weight. In *R (Mount Cook Land Limited) v Westminster City Council* [2017] PTSR 1166 (*Mount Cook*)[40] at [30], the Court of Appeal held that where alternatives might be relevant, vague or inchoate schemes, or those which have no real possibility of coming about, are either irrelevant, or where relevant, should be given little or no weight. Whilst that was a planning case, NH considers that it is equally relevant in the current CPO case.

Response to the 'Reply submissions of Mr Keeling on law…' (INQ-92)

4.4.30 NH considers that the *'Reply submissions of Mr Keeling'* is misleading on the law. If the approach MK advocates is followed, it would be a radical change to the approach to compulsory purchase in the field of construction and development and make the use of compulsory powers very much harder. It rests on spurious distinctions between types of CPO cases in the planning and development sphere and others whereas what unifies them is a need to demonstrate a compelling case in the public interest which needs to be judged on the particular facts in the particular context. It is clear in the context of development projects supported by CPOs (no matter what compulsory power is relied upon), the least intrusive means test is not applied.

4.4.31 NH indicates that it ought not be forgotten that compulsory purchase powers exist because they are essential in the public interest to allow for the construction of projects themselves in the public interest that would otherwise not be possible. Roads, railways, airports, power stations, urban regenerations, new towns all rely on these powers. Compulsory purchase powers are in themselves in the public interest (as the exercise of them must be in each case where they are sought to be used).

4.4.32 The allegation – made apparently without awareness of the irony – that new points were raised by NH in closing is wrong it says. It is further perpetuated by the Blake Morgan letter dated 14 June 2022.[41] The

take the approach that *"the use of compulsory purchase powers was justified in order to facilitate implementation of a scheme which he considered to be better in the public interest than the scheme proposed by Sainsburys."* He said: *"In my view, De Rothschild* [CD/J2] *is authority for the proposition that the use of compulsory purchase powers can be justified in order to achieve a better scheme of development in the public interest than an alternative scheme put forward by an objector which does not require compulsory acquisition"* at [44].

[40] INQ-91.7.

[41] INQ-93. In brief NH's response is as follows. First, it is inappropriate for these points to be raised outside of the inquiry. Secondly, it is not helpful for a person who did not attend the inquiry to

Inspector will draw his own conclusions on this issue and NH does not seek to trouble either him or the Secretary of State on these points. It is agreed by NH that new points not ventilated in the Inquiries or supported by evidence ought to be given no weight by the decision maker (whoever so makes them).

4.4.33 In NH's view, MK's reliance on Article 6 rights as a means of seeking to ensure all of his points are considered (see INQ-92 paragraphs 3, 7 and 8) is to misuse Article 6 which requires – in the broadest of terms – MK to have a fair hearing. It does not dissolve MK of responsibility in his participation in the hearing nor disapply the rules to him. This would include agreeing the scope of a reply and then ignoring it. No one could suggest with a straight face that MK's concerns have not been heard without scrupulous fairness and diligence.

4.4.34 NH says it ought to be recorded that NH itself has bent over backwards to assist MK in his objection and provided MK with an enormous amount of information at MK's request, recognising the impact on his rights the Order scheme would have.

4.4.35 Furthermore, some care is required in reading MK's submissions. Some quotations from the judgments may be perceived by the reader as law but are in fact recording Counsel submissions, not the finding of the Court.

make detailed points on what evidence was given or not given. Thirdly, as to Article 6 this is addressed in the main text above. Fourthly, as to the specific assertions: (i) this was in response to reliance placed by MK on DMRB CD 529 for the first time in closing (his paragraph 200) and the first time it was alleged that the watercourse is a public watercourse (his paragraph 201). This issue had not been put in play and was not understood to be controversial. It should not be controversial that it is not a public watercourse: there is no right of navigation over it (there is no right of navigation on non-tidal watercourses save for a few larger rivers administered by navigation authorities which does not apply here). It is private in that sense. Notably MK does not actually suggest otherwise; (ii) paragraph 144/ footnote 160 of NH's closing is perfectly fair, it expressly refers the reader to paragraph 149 of MK's closing and states that that paragraph *implicitly* recognises that Policy S11 is effectively an allocation. That is because MK goes onto deal in paragraph 150 with the sequential test as if policy S11 were an allocation, having said that MK does not accept the same; (iii) NH's case very clearly was that a FCA would be required south of Dodwell Lane if the culvert was upsized, otherwise there would be flooding downstream. This was because of the volume of water required to be attenuated; and (iv) MWS said in closing that Mr Pickering was referring to not increasing flood risk elsewhere. That much should be clear. The sentence is "*to limit discharge to existing rates…thereby maintaining existing flows*" in the context of the design event whilst "*meeting the requirements of the NPPF [CD.F1 paragraph 158]* [Note: this is a bad reference as it is to the NPPF 2019, it should read paragraph 162 which is the equivalent paragraph in NPPF 2021] *and DMRB LA 113 [CD.F9a, paragraph 3.68, page 23]*" which refers to mitigation measures *not increasing flood risk elsewhere*. NH thought that meaning was clear until it read paragraphs 180 and 181 of MK's Closing. The DMRB explicitly refers to not increasing flood risk elsewhere. It was not put to Mr Pickering that he meant anything else.

Section 110 of the Highways Act 1980

4.4.36 NH indicates that MK is correct on one point. He points out at INQ-92 paragraph 12 that section 23 of the *Land Drainage Act 1991* does not apply. NH agrees. Paragraph 163 of NH's Closing is in error. NH is content for paragraph 163 of its closing to be deleted.

4.4.37 However, this does not affect the key point that the volume of water to be attenuated is too large to be addressed on NH land and no choate suggestion as to how this might be done has been provided.

Tesco Stores Limited v Secretary of State for Environment, Transport and the Regions & Wycombe District Council [2000] QBD (Tesco)[42] *(INQ-92 paragraphs: 20-40)*

4.4.38 NH relied on *Tesco* at paragraph 32 and footnote 18 of its closings.[43] It did so only to establish that the test of compelling case in the public interest fairly reflects the necessary element of balance as between private rights and the public interest required to be considered in the context of ECHR.

4.4.39 NH indicates that MK's Reply does not deal with this point in any substantive way. All that is said is that the judgment pre-dated the day on which the *Human Rights Act 1998* came into force.

4.4.40 That is right but totally ignores: (i) the fact that the judge acknowledges this fact but nonetheless looks at the legislation and comes to the view that it fairly reflects the necessary balance (p.429); (ii) the UK was a signatory to the underlying Convention (since c.1950) in any event; and (iii) footnote 19 of NH's Closings refers to *Bexley* at [46][44] which came after the *Human Rights Act 1998* came into force and makes precisely the same point.

4.4.41 NH says, this bad point aside, MK does not challenge NH's reliance on *Tesco*.

Pascoe[45] *(INQ-92 paragraphs: 41-132)*

4.4.42 INQ-92 paragraphs 41-68 address Ground 1 in *Pascoe* (not relied upon or referred to by NH). It is wholly irrelevant. NH indicates the question under that ground was whether the enabling powers, sections 162 and

[42] INQ-91.4
[43] INQ-91.
[44] INQ-7.2.
[45] INQ-91.6

159(2) of the *Development of Urban and Other Areas Act 1993*, were met in circumstances where section 162 provided powers of compulsory purchase to meet the acquiring authority's objectives and those included land of a particular description (vacant or unused; under-used or effectively used; contaminated, derelict, neglected or unsightly (section 159(2)) and where the acquiring authority could not speak to the condition of all the land. In those circumstances, the judge concluded that the acquiring authority had not met the conditions to use the powers of compulsory purchase in that Act. That Act does not apply here.

4.4.43 MK seeks to distinguish between *Pascoe* and the current case on the basis that *Pascoe* had planning permission in place. That is fine but does not make a planning permission a requirement for the confirmation of a CPO. It is clearly not in NH's view: see *Grafton* below and paragraphs 15 and 105 of the CPO Guidance[46].

4.4.44 In any event, NH considers that there are no 'gaps' in this Scheme. The Inspector and Secretary of State has Annex A to the Statement of Reasons (SoR)[47] which explains the need for each plot of land.

The correct legal test [INQ-92 paragraphs 69-134]

4.4.45 INQ-92 paragraph 43: NH considers that it is really quite surprising to see MK setting out what it says is the correct test by reference to *Smith* [43] which the judge in that case (see below) expressly states does not represent his view.

4.4.46 Paragraph 44: the quote from *Samaroo* expressly states that the second stage is predicated on the first and that the means are the 'least intrusive'. Less interfering in paragraph [19] has to be read in the light of paragraph [20].

4.4.47 As to *Prest* and the compelling case test, NH considers that paragraphs 88 and 91 begin to posit a substantive difference between the compelling case test and the law. That is a wholly novel proposition and flies in the face of all the case law which refers to a compelling case. The CPO Guidance reflects[48] the law. This can be seen in *Swish Estates Ltd v Secretary of State for Communities and Local Government* [2017] EWHC 3331 (*Swish Estates)*[49] where a direct line is drawn between the compelling case test and *Prest* and, what is more, this judgment –

[46] CD F.13.
[47] CD A.7.
[48] NH is happy to replace the word codify with reflect (see paragraphs 12 and 208 of MK's Reply). This better reflects what NH was trying to say.
[49] CD J.5

quoting the Court of Appeal – states in terms that the law comprises the compelling case test at paragraph [30a]. '*The applicable law…'A CPO should only be made where there is a compelling case in the public interest. An acquiring authority should be sure that the purposes for which it is making a CPO sufficiently justify interfering with the human rights of those with an interest in the land affected'…To similar effect are certain observations of Lord Denning MR in Prest…'*.'

4.4.48 MK creates Category 1 and Category 2 cases by reference to *Samaroo* paragraphs [19] and [20] (see INQ-92 paragraphs 44, 86). But this categorisation is not to be found in the cases. Moreover, *Samaroo* refers to stages of consideration (1) can the object be met by lesser means (2) if the answer is no, does the measure have a disproportionate effect on the interests of affected persons? These are two stages of applying the proportionality test when the approach in *Samaroo* is applicable. They are not categories of case.

4.4.49 *Samaroo* is not universally applicable (*Pascoe* [73]). The cases in the planning/ CPO sphere (in which broad sphere this road scheme sits) (contrary to paragraph 16 of INQ-92 which relies on a faux distinction between planning and compulsory purchase in the current caseCPO which is addressed under *Belfields* below) do not apply *Samaroo* (examples being: *Pascoe, Smith, Belfields, Grafton*).

4.4.50 NH considers that there is no good basis on which MK can suggest that the Order scheme is not within the broad planning sphere of CPO cases. The fact that the Orders are made under the *Highways Act 1980* is not a point of distinction in this regard (INQ-92 paragraph 109). Nor is the fact that planning permission is not required and was in other cases (INQ-92 paragraphs 110-117). These points look beyond the principal point that combines these type of cases: land is sought to be acquired for development. That is the important and unifying point. *Pascoe* is an example of a 'planning case' but not under the *Town and Country Planning Act 1990*.

4.4.51 Other points:

a) INQ-92 paragraph 16, 81, 151: the suggestion that the correct legal test differs depending on whether the scheme is 'unobjectionable' or that everyone agrees there is a need for the scheme is surprising. This would give objectors significant power to stand in the way of CPOs over and above their right to object and for the acquiring authority to have to discharge the compelling case test. MK has in fact made it clear he does not object to the need for the Order scheme, he simply objects to NH's formulation of the flood alleviation elements of it. MK cannot change that position to suit his argument at this final hurdle.

b) INQ-92 paragraph 90: NH addressed human rights in its SoR supporting the making of the Order.[50]

c) INQ-92 paragraph 100 and 102: it has never been part of NH's case to suggest alternatives are not relevant.

d) INQ-92 paragraph 101: the NH evidence does grapple with alternatives and this issue is addressed in its closings. In NH's submission there is no gap but it is for the decision maker to judge.

Smith[51] *(INQ-92 paragraphs: 9, 18, 43, 123a, 135-157)*

4.4.52 NH says that MK is at the least in danger of misleading on *Smith*. NH's closings at paragraph 38 and footnote 23 address *Smith*.

4.4.53 INQ-92 paragraph 9 and 138 do not represent what was decided in NH's view. It is very clear that the judge in *Smith* accepted that it was not necessary in that case to apply the least intrusive means test. *Smith* was a CPO which included naked deprivation of, not grazing land but, the Claimants' homes which were integrally linked to their identity (see paragraphs [29] and [30] of the judgment). (i.e. with greater impact on the private rights than the instant case).

4.4.54 The judge very explicitly states at paragraph [42] that '*a compulsory purchase order may be proportionate even though it does not amount to the least intrusive interference of the landowner's rights*' and then goes on to address the position as if the least intrusive means test did apply, contrary to his own views, in the alternative (see paragraph [43]).

4.4.55 The judge concludes that the confirming of the order was, in any event, the least intrusive means (paragraph [48]). He was plainly not saying the least intrusive means was the correct test (contrary to MK INQ-92 paragraphs 18, 43 (it is inexplicable how MK can submit to the Secretary of State that this is the correct test where *Smith* [43] expressly states '*contrary to my view*'), INQ-92 paragraph 123a (in which it is suggested that *Samaroo* was applied in *Smith* whereas it was only so applied in the alternative contrary to the judge's views), 157 and 160).

4.4.56 Further, NH says it should be noted contrary to what appears to be said by MK at INQ-92 paragraph 9, *Smith* is obiter on the correct legal test –

[50] CD A.7 section 10.
[51] INQ-91.3

see paragraph [32] of the judgment. This is because the judge concluded that, whatever the correct legal test, the confirmation of the CPO was the least intrusive means in any event.

4.4.57 Although obiter, NH submits that the approach taken in *Smith* was correct and supports its contention that the least intrusive means is not applicable in the extant circumstances.

4.4.58 NH accepts that context is all important (*Smith* [42]). The fact this was a case that established least intrusive means did not apply in the context of a CPO where the land to be acquired was someone's home intimately wrapped up with their identity clearly supports NH's position. If the least intrusive means did not apply in those circumstances, it is not going to apply to a relatively small parcel of grazing land.

4.4.59 Other points:

a) INQ-92 paragraph 140: this is not a quote from the judgment. It appears to be from a headnote to the judgment in a law report not provided to the Inquiries. NH submitted the transcript.

b) INQ-92 paragraph 154: this does not reflect NH's case. Whilst NH does say that the least intrusive means test is not applicable, it has shown that there are no viable alternatives.

Belfields[52] (*INQ-92 paragraphs 158-167)*

4.4.60 NH indicates that MK appears to try to distinguish *Belfields* on the basis that the compulsory purchase power used was under the *Town and Country Planning Act 1990* and the instant CPO was made under the *Highways Act 1980*.

4.4.61 NH considers that there is no basis for such a distinction and no authority is provided by MK in order to make it good. The CPO Guidance[53] demonstrably makes this wrong, the compelling case test is laid down in the overview section applying to all forms of CPOs (see paragraph 2 of the CPO Guidance). Nothing in the specific guidance on section 226 of the *Town and Country Planning Act 1990* (paragraphs 94-106 of the CPO Guidance) affects the compelling case test as applied to a section 226 CPO. There is no specific 'tier 2' guidance on CPOs made under the *Highways Act 1980* to overtake the general guidance.

4.4.62 MK's distinction is a theme running through his reply but it is not one

[52] INQ-91.5
[53] CD F.13

supported by any case law or by the CPO Guidance. This point is also made under *Pascoe* (see, for example, paragraph [72]).

4.4.63 In NH's view, *Belfields* is another straightforward CPO case where the least intrusive means test was rejected.

4.4.64 Other points:

a) INQ-92 paragraph 163: MK has hitherto made no point about timescale of delivery. This point should be given no weight. His witnesses (which it should be noted hardly feature across both sets of his closing submissions) confirmed that they accepted the need for the Order scheme arising from congestion that had been identified in transport policy documents since 2012. That is the context in which it is now for the first time inferred by MK that the Scheme need not be delivered until the end of the plan period (2036). That suggestion is plainly not sensible, especially given the compelling need for development of the national networks identified in the National Networks National Policy Statement (NN NPS)[54].

b) It is noted that paragraph 105 of the CPO Guidance provides, in the context of planning CPOs, that full details of a scheme are not required. Which is the short point NH made by reference to *Grafton* where the associated planning permission was refused.

Grafton[55] (*INQ-92 paragraphs 168-196)*

4.4.65 Grafton is relevant to NH's paragraphs 4.4.1-6. *Grafton* was used to support the contention that the design of a CPO Scheme does not have to be complete to justify making/ confirming an Order.

4.4.66 NH considers that ought not be controversial. *Grafton* is explicit on the point (see paragraphs [29] and [36] of the judgment set out in NH's paragraphs 4.4.4-5 above). See also paragraph 105 of the CPO Guidance.

4.4.67 INQ-92 paragraphs 168-182 do not deal with *Grafton* at all but address NH's evidence and imputes meanings into paragraphs 4.4.1 and 4.4.6 that simply do not exist.

4.4.68 INQ-92 paragraph 172 says that for the first time in closing NH indicated to the Inspector and Secretary of State that they cannot rely

[54] CD F.2 para 2.10.
[55] INQ-91.2

'*on any objective material to objectively sustain the Orders made by NH*.' It is not clear what is meant by this or how it is meant to be reconciled to the very substantial evidence that NH adduced to the Inquiries. Or indeed the very next paragraph of MK's Reply which recognises the obvious; that NH relies on its GA drawings as submitted to the Inquiries, listed as core document A9.

4.4.69 As to Paragraph 176, NH considers that paragraph 20 of NH's Closings is not misleading. It is NH's submission that MK has sought to test detailed design and not to ask whether there is sufficient justification of the Order as is the proper test. It is not a question of the wrong target but of the wrong test/ approach. It is for the Inspector and Secretary of State to weigh NH's submissions on this. These paragraphs are just MK having a second go at closing.

4.4.70 It is plainly not NH's case that it does not know the extent of the land required (INQ-92 paragraph 181).

4.4.71 It is only at INQ-92 paragraphs 183-196 that MK engages with *Grafton* but, significantly he does not engage at all with or dispute the point on which NH relies: that detailed design is not required.

4.4.72 Instead MK engages with: a different fairness ground in that case (INQ-92 paragraph 189) (not here relevant); remedy (INQ-92 paragraph 188) (not here relevant); and the adequacy of the evidential base for the Inspector's conclusion that a better scheme would be likely to come forward and the general need for a sufficient evidence base (which is not controversial) (INQ-92 paragraphs 187 and 191-194).

4.4.73 In essence these paragraphs culminate in the suggestion (INQ-92 paragraphs 195 and 196) that the fact Stage 5 detailed design has not been completed means there is no evidence on which the Orders can be confirmed. That is plainly nonsense.

4.4.74 All the more so when it is a point sought to be made by reference to *Grafton* in which the scheme underlying that CPO was rejected and, as such, there was no scheme at all, just the judgment of the Inspector, on the basis of the materials before him in relation to the rejected scheme, that an acceptable scheme could come forward.

Mount Cook[56] (INQ-92 p*aragraphs 197-204)*

4.4.75 MK says *Mount Cook* is not applicable as it was a planning case (not a planning CPO case). NH has always accepted that alternatives may be

[56] INQ-91.7

relevant to the consideration of the compelling case test. However, that does not make all cases on alternatives (which are mainly in the planning sphere) redundant. Ultimately, it is for the decision maker to decide what weight is to be given to an alternative. In *Mount Cook* the Court of Appeal said that vague or inchoate schemes are either irrelevant or where relevant should be given little or no weight. The same will self-evidently apply in the context of a CPO.

4.4.76 MK has sought to suggest NH can deal with flood risk in its own land but has singularly failed to explain how. Mr Pickering (NH's flooding witness) has explained even on MK's own case (or at least its flood risk assumptions) there is 3,200m^3 of water [INQ-32 paragraph 1.15 (which Mr Pickering confirmed orally was on the basis of Mr Moore's assumptions (i.e. ReFH2, 0.015 and 16% flow removed))] to deal with. Mr Pickering has said it needs an area equivalent to the flood compensation area (FCA) on Plot 11b. There is no such area in NH land (which is a narrow strip along the highway).

4.4.77 What is the alternative (or 'refinement')? NH says there has been no answer to that simple question. All MK does is duck that question by saying the onus of proof is on NH. Of course it is to justify the making/ confirmation of the Orders *but* it is for MK to present his case and in this regard he has manifestly not done so. The Court of Appeal's observation in *Mount Cook* is apt and no weight can be applied to MK's unarticulated alternative. This deals with MK's section 110 point. All that is, is a potential mechanism to deliver an alternative but it is useless if it is not capable of delivering a viable alternative and that is the case here due to the volumes of water required to be attenuated.

4.4.78 The suggestion that *Mount Cook* somehow cuts against NH in that MK persists in describing NH's scheme as vague and inchoate is a complete misapplication (as well as misdescription of the Scheme). NH's Scheme is the Scheme. It is not an alternative. Moreover, as made clear in paragraph 105 of the CPO Guidance and *Grafton* the details of the scheme do not need to be finalised.

4.4.79 Other points:

a) INQ-92 paragraph 211: in relation to *de Rothschild*, clearly if the proposed 'special rules' do not apply when considering a challenge to confirmation of a CPO, they cannot apply to the Secretary of State's consideration of whether a CPO should be confirmed. The Inspector is writing a report to assist the Secretary of State in deciding whether to confirm the CPO. In making that decision, the Secretary of State should act reasonably in accordance with the law, and that means *Wednesbury* reasonableness.

b) INQ-92 paragraph 217: 'better' in paragraph 4.4.17 is a reference back to the Court of Appeal in *de Rothschild* set out at paragraph 4.4.13.

c) INQ-92 paragraph 220: MK is potentially misleading in his explanation of *Pascoe* here. Paragraph [73] of *Pascoe* does not apply in such a cut and dried manner. Paragraph 73 states that *Samaroo* is not of universal application, and that it is not applicable in the context of decision making in the planning field. Even if it were considered that this decision is not '*in the planning field*' (contrary to NH's position set out above), that does not mean *Samaroo* applies. It is not applicable to planning decisions. Equally it can be not applicable to other types of decisions. There is no reason why *Samaroo* would be applicable to decisions under the Highways Act 1980. It would seem sensible to apply the same approach to CPOs under the *Highways Act 1980* as are applied to CPOs under the *Town and Country Planning Act 1990* which both deal with construction projects which, by definition, are in the public interest. *Clays Lane* is not a *Town and Country Planning Act 1990* decision, nor is *Pascoe* and yet *Samaroo* did not apply in those cases.

d) INQ-92 paragraph 225: There is no suggestion in the *Compulsory Purchase Order Decision Ref. APP/PCU/CPOP/G6100/326737* (Mopac)[57] that the *Samaroo* approach was applied. The fact that an alternative was found to be better was a factor that meant a compelling case was not made out. It does not mean that the least intrusive test was applied (indeed those words do not feature in the decision). In that case, there was an alternative which had a lesser impact which could met the purposes of the scheme. That is not the case here.

e) INQ-92 paragraph 227: paragraph 4.4.81 does not refer to '*the Denbigh case'*.

f) INQ-92 paragraph 229: the Orders are made under the *Highways Act 1980*. It states so on their face. NH has never suggested otherwise.

g) INQ-92 paragraph 231: NH have always been clear that the SRO is made under section 18 of the *Highways Act 1980*. NH's submissions on section 18 respond to those made by MK, which argue that section 18(1)(c)(i) and section 18(1)(f) cannot be relied upon. NH's submissions explain why they can be.

[57] INQ-8.2.

h) INQ-92 paragraph 232: There is no requirement for NH to become the highway authority in order to carry out works to the gyratory. That is the entire point of section 18 Orders.

i) INQ-92 paragraph 264: regarding sections 16 and 18, the basis of the Orders is clear, NH's submissions in response to these points are set out at paragraphs 4.4.81-88 and remain sound. The basis of Mr Bedwell's evidence (MK's planning witness) and his approach is clear to see from his own hand.

4.4.80 For the reasons set out above, NH considers that MK's reply does not provide a sound analysis of the law nor any reason not to confirm the Orders.

Response to MK's Closings paragraphs 23 – 31: statutory framework

4.4.81 NH identifies that at paragraph 6.2.2.3 it is stated by MK that the CPO Schedule evidences that the County Council maintains the slip roads. This statement ignores the evidence of NH[58] that the slip roads are maintained by NH and the fact that it was accepted by Mr Bedwell in cross-examination that the slip roads were maintained by NH. He also confirmed that he had no evidence to suggest the position was different from that set out in CD A.12 other than the CPO Schedule and accepted that just because HCC are noted as an occupier in the CPO Schedule, that does not mean they are maintaining the slip roads.[59] NH has confirmed that it maintains the slip roads. There is no evidence to the contrary.

4.4.82 At paragraph 6.2.2.5, it is stated that Section 18(1)(c)(i) of the *Highways Act 1980* applies only to highways that cross or enter the route of a special road *'or is or will be otherwise affected by the construction of the special road.'* It is suggested that as the M27 has been constructed, this final provision cannot apply. However, this is a partial reading of Section 18(1)(c)(i) which allows an SRO to be made in relation to a highway which *'is or will be otherwise affected by the construction or improvement of the special road'* (emphasis added).

4.4.83 It is also stated that Section 18(1)(f) does not include '*improvements*'. Section 18(1)(f) allows an SRO to be made *'for any purpose incidental*

[58] CD A.12.

[59] It was explained to Mr Bedwell in cross-examination and he accepted that HCC were listed as an occupier (a) on a precautionary basis and (b) that, in any event, did not mean they had an interest in the land or maintained the highway. The reference to an occupier in the CPO does not create an interest in land it reflects the requirements of section 12 of the Acquisition of Lane Act 1981 [CD D.2, p.13]. Occupiers are notified because they are clearly affected by CPOs albeit they are not landowners.

to the purposes aforesaid or otherwise incidental to the construction or maintenance of, or other dealing with, the special road.' There is no justification for MK's assertion '*other dealing'* does not include 'improvements', other than that it does not suit his purpose.

4.4.84 At paragraph 6.2.2.6, it is recognised that section 18(1)(c)(i) provides that an SRO may be made where a highway '*is or will be otherwise affected by the construction or improvement of a special road.'* MK goes on to state that the '*scope of what may be done to other highways is limited to where the highway crosses or enters the route'*. This is not what section 18(1)(c)(i) states. Section 18(1)(c)(i) clearly applies to allow an SRO to authorise a special road authority to stop up, divert, improve, raise, lower or otherwise alter a highway in two situations: (1) where the highway crosses or enters the route of the special road, and (2) where the highway is or will be otherwise affected by the construction or improvement of the special road.

4.4.85 NH considers that MK's interpretation of section 18(1)(c)(i) is not supported by any reasonable reading of it. NH's evidence has demonstrated that the strategic and local roads to be improved as part of the Order scheme are functionally linked, and that improvements to the slip roads necessitate improvements to the local roads in order to achieve the Order scheme objectives of reducing congestion and increasing safety.

4.4.86 NH says it is clear that the SRO can competently be made pursuant to section 18(1)(c)(i) and section 18(1)(f). There is therefore no basis for the suggestion at paragraph 6.2.2.8 that a prior section 16 order would be required. This has never before been suggested and appears to be a late attempt to rescue Mr Bedwell. Paragraph 6.2.2.8 again raises the suggestion that jurisdiction over the improved highway is to be transferred back and forth between HCC and NH. As has been made clear by Counsel for NH at several points during the Inquiries, there is no suggestion of 'jurisdiction' being transferred. This is recorded in CD A.12.

4.4.87 As to the final sentence of paragraph 6.2.2.8, section 4 of the *Highways Act 1980* allows NH to enter into agreements with local highway authorities to provide that certain functions of the local highway authority in relation to improvement of a highway may be exercised by NH. Mr Tremeer (NH's land acquisition witness) explains[60] that a Section 4 agreement between NH and HCC has been agreed and is anticipated to be signed prior to Stage 6, but that if for any reason that was not the case, the Order scheme could be delivered under the SRO. MK's reference to sections 4(4)–(5) is based on a misinterpretation of the indemnity referred to in INQ-62. Section 4(4) allows a Section 4

[60] GT p/e, paras 3.25-3.26 [NH/7/2].

agreement to include for payments by NH to the local highway authority in respect of additional liabilities imposed on the local highways authority in consequence of the provisions of the agreement, or vice versa. Section 4(5) allows for a local highway authority to contribute towards any expenses incurred by NH in executing works to which the Section 4 agreement relates. Plainly neither scenario addresses the potential for claims against NH arising out of injuries or death caused by flooding on the highway following improvements without flood mitigation following a decision by the Secretary of State that such mitigation was not required. It was that to which the indemnity was directed.

4.4.88 NH says it is convenient here to address a further point that was raised by MK a number of times during the Inquiries. It was put to NH's witnesses that the CPO is 'reliant' on the SRO and that 'the SRO comes first'. That is an untenable submission in light of the provisions of the Highways Act 1980. As Mr Bedwell accepted in cross-examination when taken to the *Highways Act 1980*[61], that Act makes express provision for the simultaneous consideration of CPOs and SROs.

4.5 COMPELLING CASE

4.5.1 The need for the Order scheme

Congestion

4.5.1.1 NH indicates that the need for the Order scheme has long been recognised in a number of transport policy documents addressed by both Mr Sim (NH's traffic and economics witness) and Mrs Williams (NH's planning witness) (this is not disputed by MK's team):

a) It is first identified in the *Hampshire County Council & Eastleigh Borough Transport Statement 2012* (Sept 2012) which identifies congestion and capacity issues at junction 8 and the Windhover Roundabout.[62]

b) *The Solent Transport Delivery Plan 2012-2016* (Feb 2013) sought to identify the interventions most likely to be effective in delivering strengthened gateways and planned housing and employment sites, without which there would be a constraint on sustainable economic development. Improvements to the M27

[61] See CD D.1, sections 18(4), 257 and schedule 20.
[62] CD G.19 (Hampshire County Council & Eastleigh Borough Transport Statement), para 3.39.

junction 8 were identified as a required intervention. [63]

c) *The Solent to Midlands Route Strategy Evidence Report* (April 2014) sought to identify solutions for a prioritised set of challenges and opportunities and identified the M27 between junction 7 and junction 8 as one of the ten busiest sections on the route as well as one of the ten least reliable.[64] In addition junction 8 is identified as one of the top 250 sites for casualties on the SRN.[65]

d) Improvements to M27 junction 8 and the Windhover Roundabout were identified in *Road Investment Strategy* (RIS) 1 (December 2014).[66] Section 3 of the *Infrastructure Act 2015* requires NH to comply with the RIS.

e) Again, improvements to the M27 junction 8 and the Windhover Roundabout April 2015 is identified in the *Solent to Midlands Route Strategy Study*[67] as well as in *Connected Southampton Transport Strategy 2019*;[68]

f) The evidence base for the Local Plan assumed improvements would be made to the junctions[69] and this underpinned the recently adopted policy S11(l) which identifies the improvements to the junctions as a key proposal in the main local transport policy.

g) Finally, RIS2 was published in March 2020 and, again, the improvements to the junctions are identified as a committed project in Road Period 2 (which means the Scheme is funded).[70]

4.5.1.2 Accordingly, there is a long and consistent line in transport policy documents which identify congestion and safety problems at junction 8 and the Windhover Roundabout which culminates in RIS2 which has a statutory footing (section 5 of the *Infrastructure Act 2015* and with which NH must comply (section 6)[71]) and the Local Plan which has just found to be sound.[72] As further discussed in the planning section below

[63] CD G.18 (Solent Transport Delivery Plan), p.20, p.40, p.53 and p.81.
[64] CD B.18 (Solent to Midlands Route Strategy Evidence Report), para 1.1.8, p.6 Table 2.1, p.7 Table 2.2.
[65] CD B.18 (Solent to Midlands Route Strategy Evidence Report), para 2.2.10.
[66] CD F.3 (RIS1), p.45 of Part 2.
[67] CD F.23 (Solent to Midlands Route Strategy Study), Annex A, Row 8.
[68] CD G.5 (Connected Southampton Transport Strategy), pp.55-56 and p,124.
[69] CD G.20 (Transport Assessment of the Pre-submission Local Plan), p.10, para 1.4.4 and p.50, paras 6.3.8-6.310,
[70] CD F.4 (RIS2), p.91 and p.104.
[71] INQ-33, App.1.
[72] Meaning, *inter alia*, justified on the basis of evidence (see CD F.1 (NPPF), para 35).

there is also a recognised compelling need to improve the SRN in national policy.

Safety

4.5.1.3 The need also arises from NH's obligations to provide a safe network. NH is obligated to have regard to safety. Safety is at the heart of NH statutory duties and is captured in section 5(2) of the *Infrastructure Act 2015*[73], the licence[74] and RIS2.[75] NH is in the business of providing safe and reliable road networks.

4.5.1.4 NH indicates that the Economic Appraisal Package provides a detailed explanation of what has been done to assess the safety impacts of the Scheme.[76] COBA-LT software is used to set out the accident savings anticipated over the 60-year appraisal period. The only difference between the Do Minimum and the Do Something tests, is the improvement to the M27 junction 8 scheme. The results (accident savings) are network wide, and not specific to a junction. As reported by Mr Sim, the NH Stage 5 design is forecast to reduce the number of casualties compared to the Do Minimum by 3 fatal, 51 serious, and 373 slight.[77] This represents an improved level of accident savings as compared to the Stage 3 scheme and therefore lends further support to the Stage 5 design.

4.5.1.5 Mr Singh (MK's transport planning witness) confirmed in cross-examination that he did not challenge the suitability of COBA-LT to model accident savings nor the accident savings it reports. He tried to paint these savings as merely theoretical but this analysis is based upon the requirements of the TAG guidance and accepted best practice. The safety issues are, however, far from theoretical. Road Safety Audit 2 (RSA2) shows the accidents that have occurred at the junctions.[78]

4.5.1.6 In the end, Mr Singh agreed in cross-examination that the Scheme provides safety benefits and that benefit which he did not question; NH is required to deliver a safe network; and the Order scheme needs actually to be built out to get the safety benefits.

4.5.1.7 Safety benefits are just that. They are benefits that weigh positively in favour of the scheme. The suggestion during the course of the Inquiries – notably not repeated in closing – that as NH are required to deliver safety benefits, the issue weighed only neutrally in the balance is not sustainable

[73] INQ-33, App.1.
[74] INQ-33, App.2, para 2.1, para 3.1, para 4.2 a, b, c, e, para 5.15 and para 5.16.
[75] CD F.4 (RIS2), p.1, p.3, p.20, p.21, p.31, p.32 and p.49.
[76] CD B.24 (Economic Appraisal Package) p.37, s.7.6.
[77] NH/1/2, para 5.16.
[78] INQ-28, pp.7-10.

and appears to have been recognised as such. Safety is integral to NH because of its importance. It only happens if improvements are actually made and that is what NH is trying to do here. Given the importance of the issue, the improvements in safety are an important and significant benefit.

Non-motorised users (NMU)

4.5.1.8 There is a third element to the need case: facilities for NMU. Currently, there is poor connectivity and lack of safe shared facilities for pedestrians and cyclists around Windhover Roundabout and junction 8 from Hamble Lane to Hedge End which would be addressed by the Order scheme. Again, that is a benefit.

Conclusion

4.5.1.9 NH considers that there is a clear need for the Order scheme based on congestion, safety and provision of facilities for NMU. The primary aim of the scheme is, therefore, to reduce congestion and improve safety between M27 junction 8 and 5 (westbound). It seeks to do this through removing bottlenecks and increasing capacity on the local network along the A3024 corridor (which connects junction 8 to the Southampton City Centre) in order to encourage traffic to use the shorter, sign-posted routes to the city centre via M27 junction 8/A3024 rather than via M27 junction 5 and A335. This in turn will improve traffic flow and reliability on the SRN between junction 8 and junction 5 of the M27 and accommodate the planned economic growth in the area.

4.5.1.10 The Scheme will deliver the above transport benefits without materially adverse environmental consequences and will also deliver considerable economic benefits.

4.5.1.11 The transport economic benefits are set out in *Transport Economic Appraisal Package*[79]. Over the 60-year assessment period, the Scheme has a benefit cost ratio (BCR) of 1.6. This represents 'medium' value for money for governance and funding purposes and is indicative that the Order scheme warrants public funding. Moreover, as set out below, it actually has funding.

4.5.2 Transport modelling

4.5.2.1 NH notes that there has been some criticism of NH's approach to traffic modelling. As set out in Mr Sim's evidence[80] the case for the Order

[79] CD B.24.
[80] NH/1/2, para 4.11.

scheme in terms of transport modelling is based on evidence taken from the SATURN model – his proof of evidence sought to establish the metrics supporting the business case for the Order scheme using outputs from the SATURN modelling. Modelling during Project Control Framework (PCF) Design Stage 3 establishes the difference between the Do Minimum and the Do Something scenarios in the strategic model. The LinSig models were not being used to justify the Scheme. LinSig modelling was referred to in Mr Sim's proof of evidence only in response to MK's objection. LinSig modelling is relevant to detailed design, rather than the preliminary design on which the CPO/SRO is based. The Inspector and Secretary of State are not being asked to approve a detailed design. Hence Mr Sim's focus on the SATURN model.

4.5.2.2 NH indicates that LinSig modelling has featured in these Inquiries because the LinSig models were provided to MK's team by NH at their request. When responding to the evidence set out in Mr Prince's proof of evidence (MK's original transport planning witness, replaced by Mr Singh) which was based on work carried out using the LinSig models, Mr Sim identified that the flows used by AECOM and MODE were average peak flows[81] and explained the volume of traffic that requires to be considered is the peak flow, and therefore a peak hour factor (PHF) needs to be applied when carrying out LinSig modelling.[82] The requirement for a peak hour factor was not identified in Mr Sim's first proof of evidence because the focus of his evidence was on the strategic case for the Order scheme, establishing BCR and demonstrating safety benefits. Mr Sim's rebuttal responded to Mr Prince's focus on LinSig, notwithstanding that it is not what is relied upon by NH in its case.

Intervention and signalisation is required

4.5.2.3 Mr Singh agreed in cross-examination that: (a) there is a need for improvements at junction 8 and Windhover Roundabout that have identified in transport policy documents over a prolonged period; and, (b) intervention is required, at the very least being signalisation. In short, it is agreed between the parties that do nothing is not an option. Thereafter, the key point between the parties in terms of highways modelling is whether or not the 2 lane option is a viable alternative, but three other points also need to be addressed: (i) the calculation of the PHF; (ii) the approach to degree of saturation (DoS); and, (iii) optimisation.

[81] NH/1/4, para 2.4 and para 2.5.
[82] NH/1/4, para 2.9 and para 2.11. This is agreed (see INQ-13, points agreed, 4). The only difference between Mr Sim and Mr Singh is in how to calculate the PHF.

Calculation of peak hour factor (PHF)

4.5.2.4 Mr Singh rather pejoratively suggested Mr Sim 'side stepped'[83] appropriate data in the calculation of the PHF, but this is an issue where there is a divergence of professional views on what is the appropriate dataset to use, and Mr Sim has made choices informed by his professional views and set out what those choices are and explained them very clearly in his evidence.[84]

4.5.2.5 In deciding to utilise the March 2014 data to calculate the PHF, Mr Sim had regard to the following factors[85]:

a) The SATURN model used in the evaluation of the M27 junction 8 has a Base Year of March 2015, [86] a 'neutral month' and the nearest available data was WebTRIS[87] March 2014.

b) The use of data between March 2015 and later years is not considered appropriate to the Base Year model, from which the forecasting work is derived.

c) Since March 2018, the M27 between junctions 4 and 11 has been subject to temporary traffic management restrictions along various sections of the M27 to accommodate the Smart Motorway works. This may not reflect normal operational conditions, and therefore was not included in the original PHF calculation.

d) Since March 2020, the UK has been subject to various COVID 19 related restrictions, again, this has influenced both traffic volumes and driver behaviours. For this reason, this more recent data was considered not reflective of the 'normal operational conditions', and therefore not used in the original PHF calculation.

4.5.2.6 NH considers that these are plainly sensible considerations carefully applied and are to be preferred to Mr Singh's approach which looks beyond the base year and which traffic data already includes the M27 smart motorway scheme which is part of the Do Minimum in the model. As such, Mr Sim's approach is to be preferred.

83 Mr Singh p/e, para 1.6 [KEE/2/6].
84 Mr Sim Supp R, s.3 [NH/1/5].
85 Mr Sim Supp R, para 3.15 [NH/1/5].
86 Mr Singh confirmed he agreed with the use of the March 2015 baseline traffic data to inform the model in cross-examination and see Mr Singh p/e, p.3, para 1.11 [KEE/2/6].
87 In INQ-48, para 3.3, Mr Singh queried why Mr Sim had not used TRADS data but, as Mr Singh acknowledged in cross-examination, WebTRIS and TRADS are the same. WebTRIS is the rebrand that occurred in 2015/2016.

4.5.2.7 In any event, the reality is that the March 2022 data preferred by Mr Singh, despite acknowledging that it was an outlier in the AM peak, if applied, would have the effect of making the 2-lane option worse in the PM peak (see below).[88] Further, the flows in the AM peak would be lower such that the do something results in the AM peak would be reduced[89] (which is where there are incidences of exceedance of the theoretical maximum capacity prior to optimisation).

4.5.2.8 Accordingly, NH considers that its choices have been conservative and Mr Singh's own preferences would make the 3-lane scheme work better, but the 2-lane scheme worse in the PM where it is already over capacity on Mr Singh's own evidence.[90]

Degree of saturation (DoS)

4.5.2.9 An arm of a junction is generally considered to be over capacity once a DoS threshold of 90% is reached.[91] NH design to this threshold on all roads within its schemes, but it is not treated as an absolute cut off.[92] Rather it is the point at which random delays begin to increase very rapidly.[93] Mr Singh essentially agreed with this approach as he confirmed in cross-examination.

Optimisation

4.5.2.10 NH indicate that some care is required in comparing the modelling results as between the NH scheme and Mr Moore's alternative options as shown in Tables 5.1a and 5.2b of Mr Singh's evidence.[94] As Mr Singh explains, he has applied a process of optimisation to Mr Moore's alternatives but not to the NH schemes.[95] Both Mr Sim and Mr Singh agreed that optimisation is a perfectly normal step to be taken.[96] Mr Singh agreed in cross-examination that the NH Stage 5 design could equally be optimised and it would be appropriate to do so. Mr Sim explained that it would improve performance and that there is no basis to think it would not improve the NH Stage 5 scheme to operate as the Mr Moore options. That is plainly right as the differences in design are small (essentially the radius of the corner from the M27 southbound off-slip to Dodwell Lane).

[88] The relevant data being 1.07 [NH/1/5, Table 3.1] vs 1.12 [NH/1/5, Table 3.9].
[89] The relevant data being 1.21 [NH/1/5, Table 3.1] vs 1.11 [NH/1/5, Table 3.9].
[90] INQ-48, Table 5.1a, Mr Moore Option 2 overall PRC.
[91] INQ-15, para 7.3.
[92] INQ-54, p.1.
[93] INQ-54, Figure 1.
[94] INQ-48.
[95] Mr Singh p/e, pp.14-15, para 5.13 and para 5.15 [KEE/2/6].
[96] INQ-13, points agreed, 2).

4.5.2.11 The upshot is that when looking at Mr Singh's tables like is not being compared with like. For example, MK's team point to the red figures in Table 5.2b and say the NH scheme does not work, but fail to recognise that those figures are prior to optimisation and the clear evidence from Mr Sim – not contradicted by Mr Singh – was if optimised the numbers in red would turn black (i.e. be under 100%). And in any event, Mr Sim explained in his evidence in chief that, once constructed, the Order scheme traffic signal settings would be further refined on site directly from adjustments based on actual traffic conditions.

4.5.2.12 Mr Singh states: '*Tables 5.1 and 5.2 demonstrate that based on minor adjustments to the LinSig model to optimise the performance of the junction, Mr Moore's alternative junction designs would ensure that the M27* junction *8 Southbound Off-Slip, Dodwell Lane and Dowdell Circulatory Lanes would all operate within theoretical 100% capacity across all scenarios considered, whereas NH's designs would not.*'[97] This is misleading. The Tables demonstrate no such thing. They do not compare optimised schemes with optimised schemes.

4.5.2.13 Mr Singh's Table 5.2b[98] demonstrates that Mr Moore's Option 2 (2-lane) scheme is over capacity in both the morning and evening peak (see overall Practical Reserve Capacity (PRC). Whilst capacity is similar for both the 2-lane and 3-lane during the morning peak, queuing on the M27 southbound off-slip is materially higher in the 2-lane approach.[99] On the approach to the gyratory from Dodwell Lane the queue in the 2-lane scheme in the AM runs right up to the junction with Dodwell Lane.[100] As Mr Singh agreed in cross-examination, the network operates better if avoiding queuing up to junction mouths.

4.5.2.14 Stepping back from queuing, the junction is over capacity in the 2 lane option for the evening peak and within capacity in the 3-lane option. Mr Singh agrees that a 3-lane scheme would be an appropriate solution.[101] Any objective transport advice must be that the 3-lane scheme performs better than the 2-lane scheme. Moreover, NH is charged with creating a network that is safe, reliable and resilient and the 3-lane scheme better reflects these requirements (which are laid down by the Government).

4.5.2.15 MK submitted that, in advocating a 3-lane approach, Mr Sim endorses a '*build it bigger/predict and provide*' approach. This is not the case in NH's view. Mr Sim explained that at the start of the Stage 5 design

[97] KEE/2/6, para 5.20.
[98] INQ-47, p.6.
[99] Mr Singh p/e, p.19, Table 5.4 [KEE/2/6] (approximately 20 cars in the morning across 3 lanes versus 31 across 2 lanes).
[100] KEE/2/7, App.D.
[101] Mr Singh p/e, para 1.9 and para 2.3 [KEE/2/6].

process the decision was taken to remove the fourth lane from the junction design, demonstrating that the design has not been expanded beyond what was deemed necessary. In addition, along with the reasons set out above, Mr Sim has made clear that the provision of a 2-lane approach to the M27 junction 8 roundabout would be sub-optimal and create congestion at this location despite the introduction of traffic signals.[102]

4.5.2.16 Although a transport planner, Mr Singh's instructions were explicitly linked to the proposed compulsory acquisition of MK's land. However, landownership is not properly speaking a consideration for transport planners. It appeared that Mr Singh's reluctance to let go of the 2-lane scheme related to considerations of land take and land ownership as opposed to issues relevant to transport planning

4.5.3 **Highways design**

4.5.3.1 The Orders were made by NH following completion of PCF Stage 3 (preliminary design). As set out in paragraph 4.15 - 4.22 of NH's Statement of Case,[103] the final preliminary design is set out in the Stage 3 General Arrangements drawings,[104] but the design continues to be developed as the Order scheme progresses into PCF Stages 4 and 5 (detailed design).[105]

4.5.3.2 NH confirms that the PCF Stage 5 detailed design has been designed in accordance with the relevant standards of the *Design Manual for Roads and Bridges* (DMRB). Where standards cannot be met, an application for approval for a departure from standard has been, or will be, made to the relevant Overseeing Organisation (NH or Hampshire County Council – as appropriate).

4.5.3.3 Departures from standard are a normal part of the DMRB system[106], including provision for bulk departure applications. NH considers that the suggestion that the need to obtain a departure makes a road scheme unsafe, or that obtaining approval makes the departure safe is untenable. If an element of design were inherently unsafe, it would not be provided as part of the Order scheme and would be designed out.

4.5.3.4 As already indicated, detailed approval of the design is neither sought

[102] Mr Sim R, para 3.54-3.555 [NH/1/4].
[103] CD A.8.
[104] CD A.6.
[105] Design changes following the making of the Order, during the Stage 5 work, are detailed in NH's 'Details of Design Changes between PCF Stage 3 and Stage 5' [CD A.10] and 'Details of Highway Design Changes' [CD B.21], shown on the draft General Arrangement Engineering Drawings [CD A.9], and are set out in Mr Warburton's Proof of Evidence [NH/2/2].
[106] See INQ-29 (DMRB GG 101), paras 2.3 – 2.8.

nor required. The reality is that there is little of significance to the justification of the Orders that is between the parties in relation to highways design.[107] Both 3-lane schemes require departures in relation to entry path radius. The existing situation is also non-compliant. MK suggested in closing it is compliant, but NH's understanding is that is not the case. There is little difference with regards either the current situation or the two 3-lane schemes that have been considered in the Inquiries, except that the proposed schemes will be safer as they introduce signalisation.

4.5.3.5 Mr Warburton (NH's highways witness) accepts Mr Moore's alternative 3-lane solution is a viable design,[108] but he provides justification for NH's own design and explains the drawbacks associated with Mr Moore's alternative layout. While NH accept Mr Moore's alternative 3-lane layout would work, it is not a demonstrably better design that NH's Scheme. As explained by Mr Black (NH's landscape witness),[109] the change in channel line would not enable the flood attenuation basin on Plot 11b, or the required landscaping, to be moved. There would therefore be no benefits to NH in adopting Mr Moore's 3-lane alternative layout.

4.5.3.6 The differences between Mr Moore and Mr Warburton are set out in their respective notes[110] and relate primarily to the length and width of the additional lane on the southbound diverge. Mr Warburton explains the reasoning for his position.[111] Mr Moore's reasoning is not clearly set

[107] Mr Warburton's p/e at section 4 addresses specific points raised by MK in his Objection [CD H.1] and his Response to the Statement of Case [CD H.2]. Paragraphs 4.7–4.13 explain the geotechnical reasoning behind the proposed embankment. Paragraphs 4.15–4.16 explains the reason why a retaining wall solution has been discounted during both Stage 3 and Stage 5 design. It is relevant that Stage 3 and Stage 5 have been carried out by different professional teams, who have both reached the conclusion that inclusion of a retaining wall should be discounted. Paragraphs 4.18–4.23 accepts Mr Moore's suggestion that there is an over-provision in terms of the verge in highways design terms but explains that reducing the verge would not change the position of the proposed planting as that is dictated by the channel line, and will therefore not reduce the land take from MK. Paragraphs 4.25–4.26 accepts Mr Moore's comments in relation to the eastern splitter island, and explains how this has changed at Stage 5. Paragraphs 4.28–4.29 explains that the existing width of Dodwell Lane is insufficient, and also that further changes have been made to road markings and the splitter island during Stage 5. Paragraphs 4.31–4.34 explains that widening the westbound entry arm further to the south would provide a poorly designed and unsafe approach to the roundabout.
[108] See Mr Warburton R, para 2.5 [NH/2/3]. Mr Warburton notes that Mr Moore's reduction in verge width, combined with the reduction in radius, does result in a localised reduction in forward visibility, below the desirable minimum. At para 2.7, Mr Warburton also advises that the realignment of the channel line would result in a reduction to the width of the Dodwell Lane splitter island, which will impact on the proposed maintenance hardstanding. Paras 2.8–2.13 further explain that the maintenance hardstanding within the splitter island on Dodwell Lane has been provided to allow maintenance of traffic signalling which will be contained on the splitter island. This is necessary to ensure workers, plant and equipment are not required to cross the carriageway. Mr Moore's alternative layout would result in a reduced length being available for the maintenance hardstanding.
[109] Mr Black R, para 4.20 [NH/4/3].
[110] INQ-59 and INQ-61.
[111] INQ-61, paras 1.4–1.8.

out in his note.

4.5.3.7 As identified above, Mr Moore has provided a design which is not compliant with regard to entry path radius on the southbound off-slip or westbound approach from Dodwell Lane, but which he considers is an acceptable design. NH agree and consider that their design is too. Both proposals require departures from DMRB standards[112].

4.5.3.8 In evidence in chief, Mr Warburton's evidence was that he considered it likely a departure would be granted. In evidence in chief, Mr Moore merely pointed to two examples in his experiences where changes had to be made before a departure being granted but significantly, Mr Moore did not suggest that NH's design would not be granted a departure. His only suggestion was that it might be considered that too many departures had already been granted (with no regard given by Mr Moore to the size of the Order scheme or Mr Warburton's explanation that the number of departures is due, in part, to the fact that the current situation at the site is non-compliant) and that the status quo may be preferable (with no regard to the fact that Mr Singh had accepted that do nothing is not an option or that, contrary to the position stated in MK's Closing, the existing 2-lane off slip at the M27 junction 8 is non-standard – the assertion that there is a change from compliant to non-compliant through the proposed scheme is wrong).

4.5.3.9 NH says that MK's narrow view fails to take account of the bigger picture. The Order scheme introduces traffic lights, which generally improve safety, and includes the reduction in speed limit on the circulatory from 50mph to 40mph. MK has focused on one element of the geometric design, which is very common to be non-compliant when introducing an additional lane and changing the layout from uncontrolled to traffic signal controlled.

4.5.3.10 PCF Stage 5 design is still live, and departures form part of this. Had Stage 5 work not commenced until after completion of PCF Stage 4, MK would not have had sight of any departures. The Secretary of State is not required to come to a view on the acceptability of these departures, as they are not being asked to approve a detailed design for the Order scheme. If the identified departure is not approved, NH will simply have to do what it can inside the bounds of the land that it owns and acquires pursuant to the CPO. Nonetheless, the clear evidence from Mr Warburton is that he expects the departures to be approved. Tellingly, Mr Moore did not really try to say otherwise.

4.5.3.11 NH acknowledge that the Road Safety Audit 1 (RSA1)[113] has not

[112] See Highways Note of Dan Warburton [INQ-61]
[113] CD B.10 (RSA1).

formally been signed off by NH. However, NH have provided evidence that the RSA1 was approved by email[114] and Mr Warburton has confirmed that the recommendations in the RSA1 have been incorporated into the Stage 5 detailed design or been superseded by the RSA2, and that the RSA1 Brief, Report and Designers Response were issued as part of the RSA2 brief.[115] NH has also provided a copy of the RSA2[116] and an email from HCC confirming that it has no further queries on the RSA2.[117] It is clear from the nature of the issues raised in RSA2 that Mr Warburton was correct to say that there have been no serious concerns raised.

4.5.3.12 Reference in paragraph 6.4.4.6 below to the creation of a '*dangerous state of affairs*' goes beyond the scope of MK's evidence. This is an assertion of opinion which has never been stated by MK's witnesses in written or oral evidence. The suggestion that the need to obtain a departure makes a road scheme unsafe is obviously wrong. As noted above, departure applications (including bulk departure applications) are a built-in part of the DMRB system.[118] A departure from standard does not mean the design is unsafe, and the suggestion that the process of independent evaluation makes the departure become safe is clearly nonsense in NH's view.

4.5.4 Highways alternatives

4.5.4.1 In so far as highways alternatives, these are addressed in summary in NH/12.1 and in greater detail by the relevant NH expert witnesses. In short:

a) For the reasons set out above, the 2-lane scheme does not perform as well as the 3-lane scheme and no transport planner would objectively advise that it ought to be adopted. It is predicted even in the optimised Mr Singh/Mr Moore version to be overcapacity in 2041. It is said in MK's closings that the 2-lane scheme would be advantageous in terms of biodiversity (MK paragraphs 6.4.3.6, 6.4.4.4 and 6.4.4.6). This is plainly not a significant benefit as claimed. It is contrary to what Ms Cooper (NH's ecology witness) said: '*Taking into account ecological features only, the most favourable option for biodiversity is the construction of the flood compensation area, currently designed to be a floodplain meadow at its lowest point with woody*

[114] INQ-28.4.
[115] INQ-28.3.
[116] INQ-28.1.
[117] INQ-28.2.
[118] See INQ-29 (GG 101), paras 2.3 – 2.8.

vegetation planted around its boundaries.'[119]

b) NH considers that there is no advantage to Mr Moore's 3-lane scheme. It requires the same departures as the NH scheme in relation to entry path radius. The costs and delay that would be involved has been set out by Mr Clark. There is no basis on which to conclude it is better. Moreover, the land take is driven by the flood compensation area principally.

c) The third highway alternative is for land take to be shared between the north (MK's land) and south of C56 Dodwell Lane. There is no possible justification to such an approach in NH's view. No explanation has been provided of why such a scheme would be better in the public interest and so much so as to mean that the compelling case balancing exercise for the Order scheme as a whole would fail. In truth, it is merely an expression of MK wishing to 'share the pain' and should be dismissed.

4.5.5 Flood risk

The policy basis for flood risk mitigation

4.5.5.1 During the course of the Inquiries, it has been asked whether or not the flood mitigation is necessary in principle given that it addresses an existing situation rather than one caused by the proposed highways works. NH's unequivocal answer to that question is yes.

4.5.5.2 First, NH must exercise its functions in a manner best calculated to ensure the resilience of its network[120] and to conform with the principles of sustainable development[121] (meaning '*encouraging economic growth while protecting the environment and improving safety and quality of life for current and future generations*'[122]). In doing so NH must '*be aware of the actions needed to improve conditions for users, and manage or mitigate existing problems, to inform the future development and improvement of the network and its performance*'[123] and '*provide for sufficient flexibility and future-proofing in planning and long-term development and improvement of the network, taking*

[119] INQ-36, para 1 and also see para 4: "*In the Environmental Action Plan (CD B.1) a residual slight adverse effect on semi-natural broad-leaved and mixed woodland and plantation broadleaved woodland habitats was identified, relating to the loss of a small amount of woodland. I would not re-categorize that adverse effect in any of the above scenarios. This is because the areas of habitats lost are relatively small and the habitats are common and widespread in the landscape. However, the scenario where there is the most woodland planting (i.e. the current scenario), is the most beneficial for biodiversity of the three scenarios considered.*"
[120] INQ-33, App.2 (NH Licence), para 4.2(b) and para 5.4.
[121] INQ-33, App.2 (NH Licence), para 4.2(h).
[122] INQ-33, App.2 (NH Licence), para 4.3.
[123] INQ-33, App.2 (NH Licence), para 5.6(b).

account of long-term trends, uncertainties and risks – including… long-term trends in climate and weather conditions.'[124] Safety is a key consideration for NH. Water on the road[125] – as discussed below – is an obvious safety issue.

4.5.5.3 Secondly, national planning policy emphasises the need to minimise vulnerability and to improve resilience to climate change.[126] Mr Bedwell agreed in cross-examination that significant weight should be attributed to such policies.[127] A failure to provide flood mitigation as part of the overall scheme would plainly conflict with these important national policies.

4.5.5.4 Thirdly, specific national policies which relate to the development of the SRN also require that '*reasonable steps have been taken to avoid, limit and reduce the risk of flooding to the proposed infrastructure and others.'*[128] In particular, '*where linear infrastructure has been proposed in a flood risk area, the Secretary of State should expect reasonable mitigation measures to have been made, to ensure that the infrastructure remains functional in the event of predicted flooding.'*[129] Any reduction in the risk of flooding in the area surrounding new infrastructure is specifically identified as a benefit in the NN NPS.[130] Again, a failure to address the existing risk would be to fail to apply national policies endorsed by Parliament.

4.5.5.5 Mr Bedwell tried to suggest in evidence that '*reasonable mitigation measures*' is somehow limited to measures such as '*cleaning and optimising the operational capacity of the culvert*'[131]. That is clearly wrong in NH's view. No such limitation is to be found in policy, as he accepted in cross-examination and, moreover, it is not a sensible suggestion, in particular, in the context of policies addressing nationally significant infrastructure projects.

4.5.5.6 Fourthly, policy DM3 of the Local Plan requires all development to be designed to adapt to the predicted climate change impacts for the local area.[132]

4.5.5.7 Fifthly, the DMRB is clear that (a) water must be removed from the carriage way '*as quickly as possible to provide safety and minimum*

124 INQ-33, App.2 (NH Licence), para 5.6(c).
125 INQ-33, App.2 (NH Licence), para 5.15-5.16.
126 CD F.1 (NPPF), para 152.
127 See also Mr Bedwell p/e, para 5.91 [KEE/3/1].
128 CD F.2 (NN NPS), para 5.102.
129 CD F.2 (NN NPS), para 5.104.
130 CD F.2 (NN NPS), para 5.103.
131 Mr Bedwell p/e, para 5.54 [KEE/3/1].
132 INQ-5 (Local Plan), p.60.

nuisance to the road users'[133] and that '*…to ensure resilience of the road network during extreme weather conditions, all runoff from natural catchments draining to the road shall be intercepted and prevented from entering the road drainage network'.*[134]

4.5.5.8 Accordingly, both NH's licence terms (which comprise the Secretary of State's statutory directions and guidance under section 6 of the *Infrastructure Act 2015*)[135], national and local policies and the DMRB are clear that the existing flood risk must be addressed. A failure to do so would be in breach of policy in NH's view.

4.5.5.9 Moreover, these obligations and policies reflect one of the key aims of the Government, which is to address and provide resilience to climate change. Any suggestion that the flood mitigation is not required as a matter of principle because the flood risk is not caused by the highways works themselves runs against key Government policies on climate change.

4.5.5.10 NH confirms it is for this reason that one of the purposes of the Orders is to address flood risk. The notice of the Orders expressly identifies the purpose of the CPO to include the improvement of the highways.[136] Improvement to highways expressly includes addressing the prevention of surface water from flowing onto the highway.[137] Plot 11b was expressly included for that purpose.[138] As such the purposes of the Orders included addressing flood risk.

Whether or not the need for flood risk mitigation has been demonstrated

Introduction

4.5.5.11 Mr Moore confirmed in cross-examination that he is neither a hydrologist nor a hydraulic modeller. This is why he instructed JBA Consulting to run the model for him on the parameters/assumptions of his choosing.

4.5.5.12 NH considers that the Inquiries on flood risk was somewhat like Hamlet without the Prince of Denmark for JBA Consulting were not called to give evidence and as Mr Moore reluctantly conceded have not provided any commentary or endorsement on the parameters that Mr Moore asked them to run. JBA Consulting have not provided evidence, they have

[133] CD F.9c (DMRB CG 501), para 2.1 1.
[134] INQ-18, (DMRB CG 522), para 1.2 and see INQ-32, paras 1.47-1.48.
[135] INQ-33, App.1, s.6 and App.2, para 2.1.
[136] CD A.4 (CPO Notice).
[137] CD D.1, p.66, section 62(3)(g). The section is entitled "*General power of improvement*".
[138] See CD A.7, Annex A.

merely provided model outturns based on Mr Moore's assumptions.

4.5.5.13 NH says it is telling that MK has gone to the expense of instructing experts on hydrology and hydraulic modelling but has declined to call them to give evidence and has not gained any support from JBA Consulting for the assumptions put forward by Mr Moore.

4.5.5.14 Indeed, NH considers it is worse than that for in cross-examination Mr Moore stated revealingly – in the context of the ReFH2 peak flow method assumption he had used in Options B, C and D[139] – that the assumption he had used was not after all his case but just to show that a change in hydrological inputs made a difference to the modelled outputs. This is little more than a statement of the obvious and was, effectively, to stand back from any particular assumption he had used and merely to rely on uncertainty. This is the problem with having a non-expert make the case. Mr Pickering has been able to use his expertise to say what the appropriate assumptions are. In effect, Mr Moore abandoned his pretence that he could properly do so. This shows why the difference in qualifications really does matter. The Inquiries had one expert in the room, one expert outside of the room who declined to or was not asked to say anything contrary to Mr Pickering and Mr Moore, who ends up running MK's flood risk case, saying in cross-examination that his assumptions are not his case, just indications that changes in assumptions make a difference – which is, of course, a statement of the obvious. Mr Pickering's evidence has been thoroughly tested (with around 13 hrs of cross-examination). He demonstrated himself to be highly knowledgeable, credible and straight forward. In NH's submission, his evidence must be preferred.

4.5.5.15 Mr Moore's characterisation of Mr Pickering's work as 'incorrect' needs to be considered in the light of their relative qualifications.

Land take

4.5.5.16 NH indicates that the CPO was always made on the basis that Plot 11b was required for a flood compensation area.[140] At times this appeared to be questioned by MK. As explained by Mr Pickering,[141] Jacobs Stage 3 hydraulic modelling provided an outline conceptual design only (as represented in a trapezoid shape on the original environmental masterplan)[142] which was then worked up by Linkconnex in September 2020[143] to develop a buildable design and in doing so added the required earthworks to enable the proposed invert to be tied into the

[139] Mr Moore Supp p/e, pp.11-13 [NH/1/6].
[140] CD A.7 (Statement of Reasons), Annex A, p.56, Plot 11b.
[141] INQ-32, para 1.16.
[142] CD A.6, penultimate plan.
[143] CD B.6 (FCA Technical Note).

existing ground levels at a typical 1 in 3.5 slope to achieve ground stability in London clay soils. This extended the overall footprint of the flood attenuation basin to cover the whole of Plot 11b and this was the basis on which Orders were made.

The modelling

4.5.5.17 NH indicates that Mr Pickering explains the development of the model in some detail.[144] The following points should be noted:

a) MK's suggestion that the Stage 3 model was flawed is misplaced. The Stage 5 baseline model is a rebuild of the Stage 3 model using the data provided within the Stage 3 Flood Risk Assessment (FRA) and the Stage 3 model files. The Stage 5 model used GIS methods to represent the ground and floodplain surface of the model in a 2D environment with the exception of the culverts which remained in 1D. This approach removed all stability concerns which arose from the use of two pieces of software stitched together at Stage 3.[145]

b) Similarly, as Mr Pickering explained, the suggestion that Mr Pickering 'abandoned' the Stage 3 FRA is wrong. Rather he produced an FRA Addendum. (FRAa)[146] As the name suggests that work built upon the Stage 3 work but amended the seasonality of the rainfall event and used the critical duration which was an action for Stage 5 detailed in the Stage 3 FRA.

c) The modelling work is on-going. This is a basic but important point and one that MK's team appears not to have grasped. MK's team consistently referring to the FRAa as 'final'.[147] NH has shared draft work in order to assist MK's team as much as possible. It is not appropriate to take draft work and treat it as if it is final and criticise it on that basis. The work is sufficient to demonstrate the need for the flood risk attenuation but is not yet complete. It will be completed with the Stage 5 design.

d) MK expresses concern that there has been no Lead Local Flood Authority (LLFA) review or any peer review prior to making the CPO. However, the Order scheme is either not development or can be carried out under permitted development rights. The LLFA is not, therefore, a statutory consultee and nothing is subject to

[144] Mr Pickering p/e, s.4 [NH/3/2].
[145] Mr Pickering p/e, para 4.12 [NH/3/2].
[146] CD B.17 (FRAa).
[147] In direct contradiction to Mr Pickering's evidence and FRAa itself [CD B.17]. The FRAa is clearly marked at the bottom of each page as revision P03.01. The revision history refers to revisions P01 and P02 as being final and lists P03.01 but with no completion date.

approval by them. There is no additional policy which requires peer review. However, the model has, in fact, been reviewed by BMT UK Ltd and signed off as appropriate.[148]

e) Models are not inherently uncertain as suggested by Mr Moore.[149] As Mr Pickering explained, uncertainties within the model software itself are negligible.[150] The software and models used by the industry are extensively benchmarked by the Environment Agency (EA) in order to ensure consistency across the industry. Mr Moore's suggestion that models could be checked by hand calculations was revealing of his lack of expertise in this area. As Mr Pickering explained, one part of the model is the shallow water equation which involves calculating flows – how will the water travel through each 1m by 1m cell every quarter of a second. There are 576,745 cells in this model, and it can take 20 hours to run. The whole purpose of the software is to remove hand calculations and human error. Similarly, the suggestion that the model could be checked by the use of another software package would increase costs and inefficiency and moreover make the EA benchmarking exercise redundant. As Mr Pickering explains, the uncertainties which are identified in the EA Flood Estimation Guidelines (FEG) lie in the assumptions and parameters selected and placed into the model. These uncertainties are explained by Mr Pickering in INQ-32[151] and informed his choice of FEH statistical peak flows as being the less uncertain (see below).

4.5.5.18 Towards the end of the Inquiries, Mr Pickering found that the model had been run in error on ReFH2 peak flows. The flood mapping provided in evidence was based on these ReFH2 peak flows (save for 001 and 002 of INQ-60). NH considers that this is unfortunate but ultimately it does not make a difference to the case justifying the need for the FCA. It is an inputting error into what is a highly complex model. The allegation at paragraph 6.4.8.3 below that this was intentionally hidden from the Inquiries is wholly unfounded and was not put to Mr Pickering in cross-examination. That is wholly inappropriate and this is addressed in NH's response to MK's Costs Application. The Inspector will have formed a view on Mr Pickering's credibility and integrity. He is not the sort of witness to hide anything from view. He has been candid and straight forward throughout.

4.5.5.19 It is and has always been Mr Pickering's and NH's case that, in order to assess flood risk, the FEH Statistical peak flows should be applied to the

[148] CD B.17 (FRAa), Appendix B of Appendix A-Hydrology assessment record.
[149] INQ-64, para 20.
[150] INQ-32, para 1.31.
[151] Paras 1.32-1.40.

ReFH2 hydrograph (i.e. the hybrid method). Contrary to paragraph 6.4.8.8 below, 1.66 is the correct value and should be reported in the FRAa (not changed to 1.19). 1.66 reflects the FEH Statistical Peak which is NH's case. What needs to be updated (and now has been) is the input in the model to reflect 1.66. Any inconsistency between the FRAa flows and the model (and mapping derived from it) is to be reconciled by changing the inputs into the model and not by changing the FRAa. It is the model/ mapping that reflects the error and not the FRAa.

4.5.5.20 Critically, the result is, in NH's view, that the majority of the mapping provided underrepresents the extent and/ or depth of flood at the design event. This only serves to underscore the need for flood alleviation works as part of the Order scheme rather than undermine it. Contrary to paragraph 6.4.8.1 below, the FRAa is not unreliable, it under reports the baseline flood risk in its current draft form but still identifies the inherent flood risk to the junction.

4.5.5.21 NH considers that paragraph 6.4.8.9 below is wrong, there was no 'second hidden fact'. Res12 is not reported in the FRAa Final Results Table.[152] Res12 covers the area between FEP1 (at the gyratory) and FEP2 which is at the bottom of the catchment. FEP2 is equivalent to total flow. Res12 is a value equal to FEP2 less FEP1. It should, therefore, be 1.68, not 3.34 (FEP2 3.34 less FEP1 1.66). The total flow, therefore, is FEP2 which is 3.34 not 5. MK has assumed that FEP1 and FEP2 (1.66 and 3.34) need to be added together to get total flow. That is wrong.

Design event

4.5.5.22 In NH's view Mr Moore appeared in cross-examination not to understand the concept of the design event to which the flood mitigation must be designed to. There are two separate relevant design events: one for watercourse and one for highway drainage. The design event for the watercourse is laid down in paragraph 055 of the national *Planning Practice Guidance* (NPPG) on *Flood Risk and Coastal Change* under the heading 'what is meant by a 'design flood'. It provides: '*This is the flood event of a given annual probability, which is generally taken as: fluvial (river) flooding likely to occur with a 1% annual probability (a 1 in 100 chance each year)…against which the suitability of a proposed development is assessed and mitigation measures, if any, are designed.*'[153] Accordingly, there is no mystery or doubt as to the design event. A climate change allowance (CCA) is to be added to the design event in order to minimise vulnerability and provide resilience to flooding in the future. The *EA Flood Risk Assessments: climate change allowances* provides for an allowance of 105% in the South East 2070 to

[152] See CD B.17, Appendix A, p.22 of 22, Final results.
[153] CD F.15, para 55.

2115 Upper End allowance category for Essential Infrastructure.[154] This, however, has not been applied. An allowance of 35% only was agreed with the LLFA. This is recorded in the meeting minutes dated 10 May 2021 where the LLFA sought an allowance of between 20 and 40% but Mr Pickering was reluctant to go below the minimum allowance provided for by the *EA Flood Risk Assessments: climate change allowances* document[155] of 35%. This is considerably below 105% and is a clear demonstration of Mr Pickering not taking the most conservative option at every turn as alleged by MK. Mr Moore at least recognised this in cross-examination.

4.5.5.23 The design event for highways drainage is set out in the DMRB CG 501 (which Mr Moore agreed in cross-examination was the relevant standard for highways drainage design)[156] and is 1 in 100 years plus 20%.[157]

4.5.5.24 As a result of these differing design events, it was decided to separate out the attenuation for highways drainage and the watercourse. This approach was agreed with the EA. Minutes to a meeting with the EA on 20 March 2019 record that '*any compensation areas would be separate to the drainage attenuation ponds, which are being designed to attenuate highway run-off only.*'[158]

4.5.5.25 Towards the later part of the Inquiries, MK seemed to place some significance on the fact that Mr Pickering's flood risk analysis was focused on the design event and not other return periods. He explained that other return periods would be reported in the final FRAa but that they are not relevant to designing the mitigation required to address the volume of water at the design event. NH considers that is self-evidently correct. The fact that other return periods are yet to be reported is simply not material to whether or not the land take is justified in order to mitigate the design event, which is the justification NH rely upon.

Assumptions

4.5.5.26 Mr Moore questioned a number of assumptions in the model and provided alternative parameters which underlay his Options A to E addressed in Mr Moore's Supp p/e.[159]

[154] CD F.24.
[155] Mr Moore R, App.B, para 3 [KEE/1/4].
[156] And in doing so Mr Moore appeared to concede that the Defra "Non Statutory Technical Standards for Sustainable Urban Drainage Systems" is not the relevant guidance for the design of NH's assets. Mr Moore's reliance on this document was misplaced.
[157] CD F.9c, p.26, para 4:5 and p.27, para 5.3.
[158] INQ-16, para 3.
[159] KEE/1/6, s.3.

Hydrology

4.5.5.27 A key question had initially appeared to be the correct hydrology: whether the FEH Statistical or ReFH2 peak flows should be used. However, in cross-examination Mr Moore said that he did not, in fact, stand behind the ReFH2 peak flow numbers which, until then, had appeared to be a key plank in his case. As a result, NH considers that the Inquiries are left with the clear position and advice of the only expert hydrologist before it and someone who is not an expert in this field pointing out that different hydrological flows make a difference to the modelled outcomes which is plainly right but does not amount to advice – expert or otherwise – as to what the right assumption is.

4.5.5.28 Mr Pickering's position is clear that the correct method is to use the hydrographs derived from ReFH2 and to scale them to the FEH Statistical peak.[160] Flood estimates are particularly uncertain on small catchments (below 25 km^2).[161] The catchment in this case is 0.54 km^2 and falls into that category.[162] The EA's FEG states '*for estimating peak river flows in a typical catchment, often the results of the FEH Statistical method will be preferable*'[163] and to exercise particular caution when designing flood storage or where results are highly sensitive to volumes of flow which Mr Moore agreed in cross-examination was the case here.[164]

4.5.5.29 As Mr Pickering explains, uncertainty is high for both FEH statistical and ReFH2. The factorial standard error (FSE) for FEH Statistical is 1.43 (associated with a statistical pool with 6 donors) as compared to 1.47 for ReFH2.[165] Statistical uncertainty is an important factor that the modeller has to take into account as Mr Moore agreed in cross-examination. There is no good argument to take the more uncertain approach. Here, the more certain hydrology predicts greater flood risk. The less certain peak flow predicts less flood risk. In NH's view, the implications therefore of choosing ReFH2 over FEH Statistical is that flood risk may not be properly addressed if the more uncertain peak flow estimate is selected, which may lead to flooding of the junction 8 gyratory and a risk to people. Such a choice is plainly not appropriate.

4.5.5.30 Mr Pickering's choice is a judgement based on (a) the guidance as to when to use ReFH2 with caution; (b) taking the most certain data set – which ought to be uncontroversial; and (c) based on years of

[160] CD B.17 (FRAa), App.A, p.21 of 22. It should be noted that the numbers in the first box on this page are all correct save for Site Code 2 ReFH2 0.74 which should read 0.88 (see INQ-60, para 1.23). The fact that there was an error in the model does not impact on the accuracy of these numbers.
[161] CD F.25 (FEG), p.103, para 7.1, Reasons for uncertainty on small catchments.
[162] CD B.5 (FRA), p.57.
[163] CD F.25 (FEG), p.70, When to apply ReFH2 with caution.
[164] CD F.25 (FEG), p.70, When to apply ReFH2 with caution.
[165] INQ-32, para 139.

experience in this field. NH says it should be noted that JBA Consulting's judgement in an adjacent catchment was also to use the hybrid method precisely as Mr Pickering has done.[166]

4.5.5.31 As to paragraph 6.4.8.12 below, NH says that Tables 4 and 5 on page 81 of the EA's FEG[167] give confidence intervals for rural and urban ungauged catchments respectively. The catchment in question is slightly urbanised as defined by its Urbext2000 Value and therefore is treated as rural[168]. The confidence intervals are chosen because they are calculated from the FSE. The standard error is a measure of uncertainty in an estimate based on the data in a sample[169]. Table 4 is therefore appropriate. The values in Table 4 for 6 donors reflects the confidence range within which the true peak flow will lie. The 100 year estimate (1.23) is to be multiplied by 0.7 and 1.43 to know that there is 68% confidence that the true 100 year peak flow will lie between these two values. 1.23 should be multiplied by 0.49 and 2.05 to know that there is 95% confidence that the true 100 year peak flow lies between these two values. 1.43 given in INQ-60 reflects the 1.43 FSE when using 6 donors. 1.71 as given by MK is the 100 year urban 68% confidence interval FSE which is not appropriate given this catchment is not urban. The FSE of 1.43 given in Table 4 matches that which was provided within the 'non-authorised guidance' this is because the 'non-authorised guidance' expands on uncertainty and gives the figures which are behind Table 4 and 5 of the EA's FEG. As Mr Pickering explained on numerous occasions Wallingford Hydro Solutions are used by the EA to produce Guidance. So no, the assessment of uncertainty by Mr Pickering – again it has to be said the only expert in the room – is not inherently unreliable.

4.5.5.32 NH considers that, contrary to paragraph 6.4.8.14 below, the FRAa has reduced uncertainty by using the FEH statistical method and 6 donors (1.43) as opposed to using the ReFH2 method which has a higher uncertainty (1.47). This is a best estimate as opposed to simply seeking greater flows.

Gauging

4.5.5.33 MK criticised NH for not gauging the watercourse to check flows from 2018 when Jacobs began assessment and optioneering in relation to flood risk. However, as Mr Pickering explained, this is not a sufficient period for gauging. The EA's FEG state that the original FEH recommendation was to rely on the pooled group growth curve unless there is a record length at the relevant site which is twice the length of

[166] INQ-32, para 1.56 and App.D.
[167] CD F.25 (FEG), p.81.
[168] CD F.25 (FEG), p.108, slightly to moderately urbanised catchments treat as rural.
[169] CD F.25, p.80.

the required return period.[170] This would mean needing a record of 200 years in this case to avoid using the statistical pooled group and to rely solely on local data. The EA's FEG goes on to state that an enhanced single site analysis (one which uses gauged data in a statistical pooling group) can only be derived for a site with at least 8 years of data.[171] So at best a gauge is only going reduce uncertainty if there is more than 8 years' worth of data and then would only be combined as part of a pooling group with other donors as part of a FEH statistical enhanced single site analysis. Moreover, as Mr Moore accepted in cross-examination, achieving a gauged record is dependent on having a wet river channel. It won't be useful if the channel is dry for long periods as this watercourse appears to be. NH indicates that gauging in this case is not going to materially change the analysis as you would not be relying on the gauge but on a pooling group (including the gauge), the factorial uncertainty of which would remain 1.43 for the FEH Statistical, as any local gauge would replace one of the 6 donors, thereby not altering the factorial uncertainty of the estimate.

4.5.5.34 With reference to paragraph 6.4.9.4 below, NH considers that whilst 2 years of temporary flow logging on *typical catchments* would be enough to improve the estimate of Qmed versus a Qmed estimated from catchment descriptors only, it would have similar factorial uncertainty (~1.54)[172] which is why for a local gauge to be included within the enhanced single site analysis, a minimum of 8 years of data is required.

Intervening catchment

4.5.5.35 NH considers that for all Mr Moore's sarcasm about water not flowing uphill and Mr Pickering's baseline being 'incorrect' for not excluding 18% of the flows, he conceded eventually that it is appropriate to feed the flows from the intervening catchment back into the watercourse and not to remove those flows altogether. However, that is not what he asked JBA Consulting to do.[173] He asked them to remove the flows altogether. As a result, those of Mr Moore's Options removing 18% of the flows can be set aside (being most of Mr Moore's Options).

4.5.5.36 In NH's view it is obviously correct that the flows be accounted for as it

[170] CD F.25 (FEG), p.61, The issues.
[171] CD F.25 (FEG), p.62, Row 2. In addition, p.58, Row 4 makes it clear that records shorter than eight years should be excluded. CD F.26 (ReFH2 Technical Report), para 6.1 recommends 14 years.
[172] INQ-32, para 1.33: FSE (0 donor) provides factorial uncertainty for estimates from catchment descriptors only, similar to that for temporary flow gauges with 2 – 6 years of data.
[173] And indeed it is clear that JBA Consulting do not endorse this approach. In its assessment of the Hamble catchment, JBA Consulting include a concept model of an intervening catchment that does precisely what Mr Pickering advises and that is to account for the flows from the intervening catchment and not simply to remove them (see INQ-32, App.D, p.6). Mr Moore accepted in cross-examination that JBA Consulting appeared to take the same view as Mr Pickering on this issue.

represents real water taking up capacity downstream of the culvert head which will have a real impact on the amount of water that can flow into the culvert. The culvert has a finite capacity which when exceeded will lead to overtopping.

4.5.5.37 As Mr Pickering explained in evidence in chief, when the correct approach is taken of adding back the flows from the intervening catchment at MH507 the impacts are minimal: there is a 6mm reduction in depths on the slip road, 16mm on the gyratory, and an increase in 24mm downstream within the river.[174]

Manning's

4.5.5.38 Mr Pickering accepted that there could be some adjustment to the Manning's n value attached to the culvert and in order to demonstrate the impact of altering Manning's independently of other changes, ran the model based on Mr Moore's suggested 0.015. Mr Pickering indicated that by making this change, the maximum depth on the slip road reduces by 30mm (from 262mm to 231mm). This is shown in Sweco's INQ-32 mappings of depth difference (m) P2 vs P3 (within the 0.01 – 0.05m depth band). Depths drop at the southern side of the gyratory from 690mm to 577mm reflecting the impact from culvert roughness to the west as well as east (see map BLN_P2_P3_Depth_Comparison_A3). The hazard map (BLN_P4_ZUK1_Hazard_A3) includes the intervening catchment and Manning's at 0.015 for the culvert and yet still indicates a Danger to some and Danger to most on the gyratory.[175]

4.5.5.39 What was more controversial was Mr Moore's change of the Manning's value for the channel which he changed from 0.045 to 0.03.[176] Again, Mr Moore asserts that any other value is incorrect but the experts in this field do not take that view. Mr Pickering says 0.045 channel roughness is a typical value for a natural brook with this form of channel morphology. JBA Consulting are notably silent on the issue but BMT support the position taken by Mr Pickering.[177] The correct roughness is a matter of judgement and NH considers that the views of the experts should be accorded the most weight.

4.5.5.40 The majority of the watercourse is not culverted such that it is this roughness that is applied to the greater part of the watercourse. As Mr Moore agreed in cross-examination, the watercourse is not

[174] INQ-32, para 1.12, paras 1.50-1.51. Mr Pickering further explained that the EA regard changes in depth of +/- 10mm as no change which is indicative of quite how small the impacts are in this case.
[175] INQ-32, para 1.41 and para 1.54. Noting that these outturns are based on the ReFH2 peak flows in error and therefore understate the flood risk.
[176] This can be seen in the legend on Mr Moore's options. See, for example, Option A, [KEE/1/6, p.11].
[177] CD B.17 (FRAa) App.B, Table 1.

straight. It is also relatively overgrown. Mr Moore has selected 'Minor streams top width at flood stage less than 30m, Streams on plains, clean, straight, full stage, no rifts or deep pools'.[178] As Mr Pickering explained, this represents a smooth surfaced, straight stream such as an engineered grass channel. NH considers that the watercourse in this case is plainly not that. It is neither straight nor clean. There is plenty in the channel to slow water down as can be seen on site. Mr Moore's selection simply does not fit with the facts on the ground and Mr Pickering's position should be preferred.

Impacts

4.5.5.41 As Mr Pickering explains, his flood mapping submitted with INQ-60[179] (which uses Mr Moore's Manning's value at 0.015) shows that it is only where ReFH2 is used and 18% of the flows are removed that the flood risk is addressed at the design event (see P2X). However, it is now agreed that this scenario is inappropriate given Mr Moore's concession that 18% of flows should not simply be removed from the catchment (and, further, his disowning of ReFH2 as his own case). NH considers that as a result, although not stated by MK's team, the effect is that the agreed position before the Inquiries is that there is flood risk to the highway at the design event.

Approach to risk

4.5.5.42 One of the points repeatedly made by MK's team is that NH has consistently made choices, described as conservative, which increase the volume of flow and need for attenuation.[180] NH says that is clearly not so. First, as set out above, the choice of CCA was materially below the level indicated in the guidance (35% versus 105%). Secondly, the choice of hydrology was based on the most certain – which Mr Moore agreed was a reasonable basis of choice – and not flows. As such, the basic charge is simply not made out on the facts.

4.5.5.43 The irony is that it was Mr Moore who sought to choose parameters on the basis of flow. At each turn, Mr Moore's choices were driven by his instructions to avoid the need to take MK's land. That drove Mr Moore to options that created the least flow. That approach is contrary to the guidance[181] and, moreover, landownership is not a relevant factor in determining the extent of flooding and any required mitigation at the design event.

[178] INQ-38, p.357, A7
[179] This flood mapping was produced after the error in the model was found and, as such, does properly reflect NH's case.
[180] See, for example, Mr Moore Supp p/e, para 2.3 [KEE/1/6].
[181] CD F.25, pp.34-35, Table – More Guidelines on choice of flood estimation approach, Row 4.

Safety

4.5.5.44 NH considers that MK's approach to safety has been bizarre. MK's case is that even looking at hazard maps which show danger to most and danger to some on the gyratory, there is no safety concern.[182] It is not an argument that can be reconciled to either policy or common sense.

4.5.5.45 What the DMRB directs is for water to be removed from the carriage way '*as quickly as possible to provide safety and minimum nuisance to the road users*'.[183] A 'must' in the DMRB.

4.5.5.46 As Mr Clark explained in evidence, safety is integral to NH's role and built into its licence obligations. Improving safety for all is a key performance indicator.[184] NH has an ambition that no one will be harmed on the SRN by 2040.[185] Mr Clark explained how small amounts of water can cause aquaplaning and damage the road surface in cold weather. Permitting sufficient volume of water on the highway so as to be a danger to most or some is plainly antithetical to these obligations and ambitions.

4.5.5.47 In NH's view, it should be a statement of the obvious that avoiding flooding on the highway from watercourses and ensuring the carriageway is cleared of surface water as quickly as possible is part of providing a reliable, safe and well-functioning highway. Suggestions to the contrary should be given little weight.

Other matters in relation to flood risk

Maintenance

4.5.5.48 Much was made by MK's team of whether or not the culvert has been properly maintained. NH considers that this is of no relevance to designing mitigation of the design event. As Mr Moore accepted in cross-examination, the model represents the culvert free of debris. Maintenance is not therefore relevant to the assessment of the design event.

[182] INQ-32, P4 BLN ZUK1.
[183] CD F.9c (DMRB CG 501), para 2.1 1).
[184] INQ-42.
[185] INQ-43.

Anecdotal flood evidence[186]

4.5.5.49 In NH's view two points should be noted in relation to the anecdotal evidence on flooding. First, it does not assist in demonstrating what might happen at the design event. The design event is a predicted future event. As a result, historical events are unlikely to reflect it and the absence of an equivalent event ought to be of no surprise. Secondly, it does, however, indicate what happens when capacity is exceeded in the culvert (whatever the cause be it blockage or amount of flow) and that is flooding on the highway. It is that which is sought by NH to be avoided.

Flood risk and alternatives

The Sequential Test, the Exception Test and essential infrastructure

4.5.5.50 NH notes that, as Mr Bedwell agreed in cross-examination, the principal source of the Sequential and Exception Tests is the *National Planning Policy Framework* (NPPF). The NN NPS effectively incorporates the NPPF and NPPG tests.[187] The NN NPS must be read as applying the latest guidance and not stuck in the past. In the result, the focus of these submissions is on the tests as set out in the NPPF as supported by the NPPG.

The Sequential Test

4.5.5.51 The aim of the Sequential Test is to steer new development to areas with the lowest risk of flooding from any source.[188] The test is about site selection.[189] What is required is a comparison of the site proposed with others available and suitable sites with lower risk of flooding.

4.5.5.52 The Order scheme proposed here comprises improvement works to particular junctions. The works are identified in the Local Plan in the specific location of the junctions.[190] Indeed, the Order scheme can only be carried out in the location of the existing junctions. As such, there are no other suitable sites for the Order scheme as a whole. Paragraph 33 of the NPPG on Flood Risk and Coastal Change is clear that a pragmatic approach is required on the availability of alternatives. It specifically envisages that there may be no suitable alternative sites

[186] See INQ-32, App.A, HADDMS flood incident record and App.C, Meeting minutes dated 19 December 2018 in which the LLFA said "*Flooding to the north east on slips roads for M27 Junction 8 has also been observed.*"
[187] CD F.2 (NN NPS), para 5.91, para 5.95 and 5.98.
[188] CD F.1 (NPPF), para 162.
[189] As Mr Bedwell agreed in cross-examination when taken to INQ-26 (Flood risk assessment: the sequential test for applicants), p.2 of 8 and p.4 of 8.
[190] INQ-5 (Local Plan), pp.46-47, policy S11 and proposals map (as a red star).

where the works proposed are alterations to an existing building.[191] The same applies here.

4.5.5.53 During the Inquiries, it was suggested that the Sequential Test should be applied to the flood mitigation aspects of the Order scheme. It is NH's submission that this is not a policy requirement but in the event that it were the Sequential Test would either not apply or be passed.

4.5.5.54 NH considers, as Mr Bedwell agreed in cross-examination, policy documents need to be construed fairly and as a whole and the words used given the ordinary meaning they bear in the context used. The planning and flood risk section of the NPPF must similarly be read as a whole. The introductory paragraph provides: '*Inappropriate development in areas at risk of flooding should be avoided by directing development away from areas at highest risk (whether existing or future)'*.[192] The Sequential Test at paragraph 162 of the NPPF must be read in context. What is sought to be avoided is inappropriate development in areas at highest risk of flooding. That is only common sense. What is the point of directing water compatible development away from water? Such an approach would only be inefficient and ineffective.

4.5.5.55 The NPPF tells us that flood control infrastructure is water compatible development.[193] Water compatible development is appropriate development in all flood zones.[194] NH indicates that properly construed, the sequential test does not apply to appropriate development in flood zones.

4.5.5.56 As set out above, policy does not advise carving up schemes in the manner contemplated above. Paragraph 167(a) of the NPPF provides only that within a site the most vulnerable development is located within areas at the lowest risk of flooding.[195] This policy is replicated in the NN NPS.[196] The design places only the water compatible elements of the Order scheme in areas at risk of flooding. This accords with policy.

4.5.5.57 Accordingly, NH considers that there is no proper basis on which to conclude the Sequential Test is not passed.[197]

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191 CD F.15, para 33.
192 CD F.1 (NPPF), para 159. A policy to which Mr Bedwell attached very significant weight (see Mr Bedwell p/e, para 5.95 [KEE/3/1]).
193 CD F.1 (NPPF), p.75.
194 See Mr Pickering p/e, p.26 [NH/3/2] which reproduces Table 3 from the Flood Risk and Coastal Change section of the NPPG.
195 CD F.1 (NPPF).
196 CD F.1 (NPPF), para 5.99 and 5.115.
197 The Yiewsley Decision Letter does not assist MK [INQ-8.1]. First, as MK implicitly recognises in

The Exception Test

4.5.5.58 NH says that on the suggested approach addressed above of applying the Sequential Test to the flood compensation works separately, the Exception Test would not be applicable as the Exception Test is not required for water compatible development in Zone 3.[198]

4.5.5.59 As explained by Mr Pickering, NH has applied the NPPF on the basis of the whole Order scheme.[199] The Order scheme is, sensibly viewed, essential infrastructure. First, a well-functioning SRN is described as critical in the NN NPS.[200] As Mr Bedwell agreed in cross-examination, this means well-functioning all the time – including in times of flood. This is made explicit by paragraph 5.107 of the NN NPS which states that the SRN needs '*to remain operational during floods*.'[201] Secondly, Annex 3 of the NPPF (flood risk vulnerability classification), only identifies transport infrastructure as critical. There is no non-critical category for transport infrastructure. Thirdly, the local view (of HCC) indicates that NH assets should be viewed as critical infrastructure.[202] This merely echoes what Parliament has said in the NN NPS. The SRN is plainly essential transport infrastructure on any sensible view. Contrary to MK's oral submission in closing, nowhere does policy require a particular piece of infrastructure or development to be 'classified' as a being in a particular flood risk vulnerability category. That is a judgment for the decision maker.

4.5.5.60 The Exception Test is laid down in paragraph 164 of the NPPF[203] and requires a site specific FRA. It was suggested by Mr Bedwell that there was no site-specific FRA.[204] NH considers that is plainly wrong, the FRA and FRAa are site specific and obviously so. The further suggestion that there is no FRA which reflects the tests of the NPPF 2021 is also wrong in NH's view.[205] In so far as the Exception Tests requires a site-specific

paragraph 149 of MK's Closing Submissions, Policy S11 is effectively an allocation. Allocations in the Local Plan do not need to be subject to the sequential test. As a result, MK suggests treating the flood mitigation separately but for the reasons set out above this is not inappropriate development and not subject to the sequential test. Secondly, in that case there was an identified alternative site.

198 See Mr Pickering p/e, p.26 [NH/3/2] which reproduces Table 3 from the Flood Risk and Coastal Change section of the NPPG.

199 On the basis that Mr Pickering has assessed the site as a whole to be at risk of flooding from the ordinary watercourse and is in this regard in Flood Zone 3. Table 3 from the Flood Risk and Coastal Change section of the NPPG shows that the exception test is required for essential infrastructure in Flood Zone 3 (see Mr Pickering p/e, p.26 [NH/3/2] which reproduces Table 3 from the Flood Risk and Coastal Change section of the NPPG).

200 CD F.2 (NN NPS), para 2.13.

201 CD F.2 (NN NPS), para 5.107.

202 INQ-23, para 4.17 and 4.18. See also INQ-22.

203 CD F.1 (NPPF).

204 Mr Bedwell R, paras 5.3-5.9 [KEE/3/3].

205 CD B.17 (FRAa), para 1.2 and 1.6.2 which demonstrate that the NPPF 2021 tests were applied.

FRA, it is passed.

4.5.5.61 NH considers it is clear that the delivery of a scheme, recognised to be in the public interest in both transport and planning policy documents and which would address congestion which has been identified over a long period as being a problem, would provide wider sustainability benefits.

4.5.5.62 Moreover, what is proposed would remove the identified flood risk and, further, what is proposed in the area that would be at risk of flooding is flood mitigation works which are water compatible. The benefits would clearly outweigh the flood risk.

4.5.5.63 NH indicates that there is no argument between the parties that the development proposed would be safe in its lifetime: MK argues that there is too much mitigation (as Mr Moore put in cross-examination it would have '*quite a lot of resilience*').

4.5.5.64 MK's argument oft repeated (see, for example, paragraph 6.4.6.42 below) that the Order scheme would increase flood risk on MK's land (and therefore 'elsewhere') is untenable: as Mr Bedwell agreed in cross-examination, if the FCA is built it would not be built on MK's land, the site for the FCA will have had to have become NH land before construction. MK's land forms part of the site of the Order scheme such that the Order scheme would attenuate water within its own boundaries. There will be no increase in flood risk elsewhere.
Mr Pickering did not concede the same. The Inspector will have his notes. Mr Pickering acknowledged that MK's land as it is now would be subject to increased flood risk but only in circumstances where it had become NH's land and formed part of the Order scheme. The risk of flooding would be managed within the Order scheme. This has become a key tenant of MK's case – it is a mantra that ran through his closings – but it is not a good point at all in NH's view.

4.5.5.65 For these reasons, NH considers that both the Sequential Test and the Exception Test are passed.

The consideration of other locations for the FCA

4.5.5.66 NH indicates that, as Mr Pickering explains,[206] a number of options were considered for alternative locations for the FCA on Plot 11b:

a) Land to the west of the M27 was excluded as hydraulically

[206] NH/3/2, paras 5.1 to 5.8 and see also NH's statement of case on alternatives (CD A.8, s.9).

separate.

b) Land within NH boundaries (essentially a small strip of land down the highway) was considered but the available land is limited and insufficient to deal with the volumes required to be attenuated. In so far as MK's team has intimated that it would be possible to have – in the words of Mr Bedwell – 'a ladder' of attenuation features, Mr Pickering was clear that he did not see how this was possible given the volumes to be attenuated and MK put forward nothing more than an assertion that the required volumes could be attenuated in NH land. NH do not understand how. It has not been explained. It is the sort of vague and inchoate alternative to which little weight can be attached.

c) Land to the north is further limited by the St John's Phase 2 (Ref: F/17/80651) housing development which is located along the path of the watercourse and within the HE2 allocation. As can be seen in Figure 2-1 of Mr Pickering's Proof of Evidence the watercourse currently runs through the HE2 allocation, and along the boundary between the HE2 and HE4 (employment) allocation. Placing a flood attenuation basin in HE2 or HE4 would create a fundamental conflict between the Scheme and the adopted Local Plan, as it would prevent the use of part of HE2 or HE4 for its allocated purpose. The Inspector queried during the Inquiries why planning permission F/17/80651 was considered a constraint, while the Link Road planning permission was not. As set out elsewhere, it is NH's position that the Link Road and the Order scheme can co-exist. While there is an overlap between Plot 11a and the indicative location of one of the balancing ponds shown on some of the approved drawings for the Link Road,[207] the two projects can co-exist, and due to the lack of consistency in the approved drawings, Mr Bedwell acknowledged in cross-examination that an amendment to the Link Road planning permission will be required in any event.

d) Technically, flow could be conveyed to the land to the south east of Dodwell Lane and flood attenuation provided, however, this would require a large shallow culvert to be provided underneath Dodwell Lane to match the capacity of the proposed culvert at Peewit Hill Close. As Mr Pickering explains,[208] this would likely require a precast box culvert which to install would require the excavation of Dodwell Lane which would be extremely disruptive to the highway network, requiring significant road closures and rerouting of utilities. The box culvert would need to be shallow to

[207] See the Link Road FRA at [INQ-40], approved drawings at [INQ-41], decision notice and location plan at [INQ-45] and revision P5 of the drainage drawing at [INQ-46].
[208] NH/3/2, para 8.52-8.57.

achieve the required cover between the soffit and the road deck. A shallow culvert would introduce a higher risk of blockage and risk of significant flooding to the carriageway. Culverts always have a risk of blockage, however, providing a flood basin upstream of a culvert would provide additional storage in the event of a blockage, and allow reactive maintenance of the culvert to be carried out prior to any risk to the highway being realised. Locating the basin downstream of a culvert would remove this benefit and severely limit any reactive maintenance time to reduce risk to the highway. However, the main issue to this option is the physical constraints in the land to the south east of Dodwell Lane. The land rises to the east and falls sharply to the west. In order to install a flood basin, excavations of up to 5m deep would be required to enable the basin to fully drain back by gravity into the watercourse and keep most of the water stored below the existing ground level. Towards the southern end of a basin, the water level would be above the existing ground level to enable the culvert to tie into the existing watercourse levels. This would require extensively deep sheet piling supported by earthworks embankments/flood walls above ground to the order of 3m in height. It is clearly not a preferable alternative to the proposed FCA on Plot 11b.

e) Mr Moore's Option E is not properly speaking an alternative at all. In Option E,[209] Mr Moore suggests upsizing the existing 450mm culvert to 675mm. This, however, only passes flood risk downstream which is fundamentally at odds with policy which states time after time that flood risk should not be increased elsewhere.[210]

4.5.5.67 As a result, NH considers it can fairly be concluded that all areas within the vicinity of the M27 junction 8 have been considered for the location of FCAs for the protection of the highway from flooding. There is no better alternative to the FCA proposed on Plot 11b in its view.

Section 110

4.5.5.68 A continual refrain in MK's Closings is that section 110 of the *Highways Act 1980* is a 'complete answer.' It is not in NH's view.

4.5.5.69 Section 110 permits a highway authority to: '*carry out any other works on any part of a watercourse, including a navigable watercourse, if, in the opinion of that authority, the carrying out of the works is necessary or desirable in connection with— (a) the construction, improvement or*

[209] This option is based on reducing flows by 18% and as such should not be relied upon.
[210] See for example CD F.1 (NPPF, para 164 b)).

alteration of a highway…'.

4.5.5.70 MK has suggested that NH should utilise this power to replace the existing culvert with one of a larger diameter, but NH considers that this simply does not address the flood risk issues. As Mr Pickering explains, maintaining the size of the culvert at Dodwell Lane: *'…is needed to limit discharge from the new watercourse to existing rates currently at Peewit Hill Close, thereby maintaining existing flow conditions in Bursledon Brook downstream of Junction 8 and meeting requirements of NPPF [CD.F.1 paragraph 158] and DMRB LA 113 [CD.F.9a paragraph 3.68, page 23].'*[211] Maintaining existing flow conditions is in relation to the design event and is effectively a synonym for not increasing flood risk.

4.5.5.71 Mr Pickering reiterated in cross-examination that upsizing the culvert would be passing the problem downstream, contrary to policy.[212] This ties into the Sequential and Exceptions Tests, discussed earlier.

4.5.5.72 Increasing the size of the existing culvert would therefore not be a solution of itself, and a flood attenuation basin would *still* be required. For the reasons set out above, Plot 11b is the only viable area to attenuate the level of flows required to be attenuated.

4.5.5.73 Section 110 of the *Highways Act 1980* cannot be relied on by NH without limitation. Section 110(3) requires NH to consult every council in whose area the works are to be carried out. Section 110(5) requires notice to be served on the owner or occupier of the land affected by the proposed works. The clear evidence from Mr Pickering is that the volume of water to be attenuated is too great to be addressed on NH's land. Against this MK has only provided vague assertion as to how it could be done. He has singularly failed to demonstrate the existence of a viable alternative on NH land. It is not an answer to say the onus is on NH to justify the Orders. If MK says there is an alternative he needs to demonstrate that. Otherwise all CPOs would flounder against objectors who merely assert the possibility of an alternative. That is not how the system can or should work.

4.5.5.74 Section 110(6)(b) provides that if there is an objection to the works, Ministerial consent is required before the works can be carried out. Section 110(4) provides that where works cause any person to suffer damage in consequence by the depreciation of any interest in any land, then that person is entitled to recover compensation in respect of the

[211] Mr Pickering p/e, para 5.11 [NH/3/2]. The reference to para 158 of NPPF is a reference to paragraph 158 of the 2019 NPPF, which now appears in the same terms at para 162 of NPPF [CD F.1]
[212] See, for example, CD F.1 (NPPF), para 164(b).

damage.

4.5.5.75 NH says section 110 is not, therefore, a complete answer. It is not wholly in the control of NH and even more importantly does not change the volume of water to be attenuated. No sensible choate explanation has been provided as to how the volume required to be attenuated could be addressed on NH land. The evidence of NH is clear: it could not and that is why the options in all geographic quadrants of junction 8 were explored as alternatives to Plot 11b.

Response to MK Closings (which are set out in section 6 below)

4.5.5.76 NH indicates that many of the points raised by MK in closing are addressed above but the following further points are noted:

a) Paragraph 6.4.6.4: quite why MK places such reliance on Mr Pickering's statement made in error during a very long cross-examination that the culvert is within MK's land is not understood, especially so when Mr Pickering made it quite clear it was a mistake and not NH's understanding.[213]

b) Paragraph 6.4.6.16: the table referred to is for the water environment in relation to impacts from the highway drainage, not flood risk which is why flood risk is not mentioned here.

c) Paragraphs 6.4.9.8-11: (in relation to JBA mapping): the JBA assessment removes 18% flow from the catchment which is incorrect and that was agreed by Mr Moore in cross-examination to be incorrect. Therefore, no weight can be placed on this mapping.

d) Paragraph 6.4.11.15: increasing the capacity of Peewit Hill Close culvert was considered but it is necessary to attenuate the increase in flow prior to it entering the brook downstream of the Order scheme in order to comply with the NPPF 2021.

e) Paragraph 6.4.11.17 and 6.4.11.21-24: It is wrong to say the risk in a 1 in 100 year plus climate change event is the same risk along a watercourse where you alter capacity at structures along that watercourse. The existing flood risk in the design event is set. The flow through the culvert in the design event is at full capacity in the baseline. If this capacity is increased, the flow in the watercourse is increased downstream and the flood risk is increased to receptors downstream as there is more volume and

[213] INQ-32, para 1.49.

out of bank flooding downstream. The problem is simply passed downstream. Without attenuation, that is increasing flood risk elsewhere and is contrary to policy.

f) Paragraph 6.4.11.18: DMRB CD 529 refers to the design of culverts, and therefore is referring to designing the presence and probable size of new culverts early in the design phase, this was done during the earliest part of the design phase by Jacobs and is being refined at stage 5. It doesn't refer anywhere to existing culverts.

g) Paragraph 6.4.11.19: This is not a public watercourse, it is private as it is owned by NH where adjacent to the highway, it is also an ordinary watercourse and therefore the LLFA are consulted in preference to the EA. Still, the EA were consulted about the scheme and its design.[214]

Response to 'Reply submissions of Mr Keeling on…misstatements of fact'

4.5.5.77 NH indicates that whilst other points are responded to later, those related to JBA and flood modelling are dealt with here:

a) JBA were not called to give evidence. They provided no view on the appropriateness of the parameters they were asked to run by Mr Moore.

b) The Inspector understands the position with the flood model and the error. The key point is that the hydrology in the FRA (Annex A) is correct but that is not what was plugged into the model. The outturns of the model and their reporting in the FRA do not therefore reflect the hydrology. It is the outturns and the reporting that would be updated to reflect the hydrology and not the other way around. Importantly, although the error is unhelpful for all involved, the effect of using the correct hydrology will be to increase the flow, as Mr Pickering explained. As such, the error does not undermine the case for FCA but in fact underlines it.

c) For completeness NH appends its notes of the exchanges with Mr Pickering on this matter in Appendix 1 of INQ-98. Contrary to what is asserted in paragraph 244 of INQ-92, paragraph 116 and footnote 123 is what Mr Pickering said as recorded in the first exchanges in paragraph 240 of INQ-92. Contrary to what is asserted in paragraph 246 of INQ-92, evidence of an error in the model being found is exactly what Mr Pickering explained to the

[214] INQ-16 Meeting minutes with the Environment Agency.

Inquiries. The Inspector will have his notes.

4.5.6 ***Landscape***

4.5.6.1 Mr Black explained that:

> '*The purpose of landscape and visual mitigation planting in the context of a large scale highway scheme is to do two principal things:*
>
> - *To seek to visually screen*[215] *the Scheme within particular views that might otherwise be harmed, often including the screening of the Scheme in views from private property and individual houses; and*
> - *To integrate the infrastructure within its specific landscape character context in the wider public and environmental interest.*'[216]

4.5.6.2 Mr Black set out in section 3 of his proof the national and local planning policy which supports the approach taken to landscape design of the Order scheme. This includes paragraphs 29, 130, 131 and 132 of the NPPF[217] which: '*underline the need for good design and that all development should allow sufficient space to incorporate appropriate landscaping. Whilst development is encouraged to minimise adverse environmental effects it is also expected to identify proportionate opportunities to deliver landscape integration and enhancement. In the context of compulsory purchase, I consider that this necessitates adequate land take to deliver adequate landscape integration.*'[218]

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[215] In evidence in chief Mr Black explained that in relation to visual impact, the aim is to protect visual amenity and public interest, rather than respond to specific visual receptors.

[216] Mr Black p/e, para 3.12 [NH/4/2].

[217] CD F.1 (NPPF).

[218] Mr Black p/e, para 3.6 [NH/4/2]. In evidence in chief Mr Black also referred to the NN NPS [CD F.2], which discusses 'Criteria for 'good design' for national network infrastructure' on pages 36-37. Paragraph 4.29 states that projects should be "*sensitive to place*" and have "*an appearance that demonstrates good aesthetics*". Mr Black explained that "*sensitive to place*" relates to landscape character, and "*good aesthetics*" involves visual screening. Mr Black also referred to paragraph 4.32 which states that projects should be "*as aesthetically sensitive, durable, adaptable and resilient as they can reasonably be*"; paragraph 4.33, which states that "*aesthetics (including the scheme's contribution to the quality of the area in which it would be located*)"; and paragraph 4.34, which recognises that there may be "*only limited choice in the physical appearance of some national networks infrastructure*" but "*there may be opportunities for the applicant to demonstrate good design in terms of siting and design measures relative to existing landscape and historical character and function, landscape permeability, landform and vegetation*." Mr Black further referred to paragraph 5.149, which states that "*Projects need to be designed carefully, taking account of the potential impact of the landscape. Having regard to siting, operational and other relevant constraints, the aim should be to avoid or minimise harm to the landscape, providing reasonable mitigation where possible and appropriate*,"; paragraph 5.158, which states that consideration has to be given to whether "*the virtual effects on sensitive receptors, such as local residents, and other*

4.5.6.3 Mr Black also identifies that the site forms part of Area 11: M27 Corridor in the Eastleigh Borough Council Landscape Character Assessment 2011[219] (LCA) and that the design of development within Area 11 is expected to respond to and reflect the key landscape characteristics described at paragraph 4.170 of the LCA. Mr Black notes that this is required by policies S1, S5, S9 and DM1 of the Local Plan.[220]

4.5.6.4 In relation to Policy S6 of the adopted Local Plan, relating to the protection of settlement gaps, Mr Black explained that settlement gaps cannot be equated with visual openings, that settlement gaps do include woodland, which is not visually open but does not undermine the function of the settlement gap. He considered that the intention of the settlement gap is not to maintain openness in all circumstances, and that it can include substantial areas of woodland.

4.5.6.5 Mr Black explained[221] that detailed design of landscape mitigation planting will be undertaken in accordance with DMRB LD 117[222] and that paragraph 4.3.1 of LD 117 sets out buffer distances that are required between the highway edge and proposed planting of different heights for safety, operational and maintenance reasons. He notes that *'larger tree species (that would provide good screening) must be placed at least 9m back from the edge of the carriageway.'* Mr Black explains at paragraph 4.19 of his proof that this requirement has informed the proposed Scheme layout. A linear strip of planting with an approximate width of 5m has been allowed for. As the planting cannot be placed in the flood attenuation basin, the basin is required to be positioned approximately 14m back from the edge of the carriageway to ensure landscape mitigation planting can be accommodated. Mr Black explains that *'the basin cannot be positioned closer to the carriageway without compromising the effectiveness of the landscape mitigation planting*

receptors, such as visitors to the local area, outweigh the benefits of the development."; and paragraphs 5.159 – 161, which discuss the use of mitigation, and that "*Adverse landscape and visual effects may be minimised through appropriate siting of infrastructure, design (including choice of materials), and landscaping schemes*"

[219] CD G.12

[220] INQ-5. In evidence in chief, Mr Black identified in particular the requirements of Policy S1(i) for new development to *"maintain local environmental quality"* and Policy S1(k) for new development to "*maintain, enhance, extend and connect the natural habitats within and landscape value of the Borough*"; and the statement at Policy S5(2)(a) that, in permitting new development in the countryside, the Council will seek to *"avoid adverse impacts on the rural, woodland, riparian or coastal character, the intrinsic character of the landscape"*. Mr Black also referred in evidence in chief to DM1, which sets out general criteria for new development, in particular DM1 (a)(i), which states that new development should "*not have an unacceptable impact on, and where possible should enhance:" "residential amenities of both new and existing residents; the character and appearance of urban areas, the countryside and the coast".* Mr Black also pointed to DM1 (d) which states that loss of trees and woodlands should be replaced with features of equivalent or enhanced value and DM1 (e) which states new development should include a landscaping scheme.

[221] Mr Black p/e, para 4.18 [NH/4/2].

[222] CD F.9f.

shown on the Revised Masterplan of September 2020.'

4.5.6.6 In evidence in chief Mr Black noted that the introduction on page 4 of LD 117 states '*Integration and minimising the impact of disturbance of new roads within the rural or urban landscapes and improving the landscape character of existing roads is the basis for good environmental landscape design*.' This ties into the twin purposes identified by Mr Black. In evidence in chief Mr Black also referred to paragraph 2.8 of LD 117, which states that '*Good road design shall be at the right scale to manage and minimise the impact of temporary works and to respect and integrate with: 1. The landscape's natural beauty, its importance and sensitivity; 2. The landscape's views and visual amenity…'*. Further, in relation to integration, paragraph 3.2 states that '*Good road design shall blend a road into the surrounding landscape*' and paragraph 3.6 that good road design will avoid or minimise '*intrusion into undisturbed, high-quality landscapes*' and '*intrusion into views from nearby property and public places*'.

4.5.6.7 Chapter 7 of the Environmental Assessment Report (EAR) concluded that: '*In the long-term, adverse landscape and visual effects could be adequately mitigated through landscape planting and the provision of an environmental barrier, and there would be no residual effects worse than slight adverse. The proposed Scheme would not impact any designated landscapes and its overall significance of landscape effect is assessed as slight adverse.'*[223]

4.5.6.8 The proposed mitigation is discussed at paragraph 7.8.2 of the EAR, and states: '*Highways vegetation removed due to the proposed Scheme will be replaced where possible by the planting of belts of woodland tree, and shrub planting and hedgerows. Proposed planting will generally consist of native species found in the area to reflect the composition of removed vegetation. Planting will integrate the proposed Scheme within the surrounding landscape and provide visual screening to reduce adverse visual effects resulting from the proposed Scheme.'*

4.5.6.9 The Register of Environmental Actions and Commitments in Section 3 of the Outline Environmental Management Plan sets out NH's commitments in terms of landscape at items L1 – L6, and this includes at L4 the '*Provision of mitigation landscape planting to provide a visual screen by year 15 and to integrate the proposed Scheme within the landscape*.'[224]

4.5.6.10 The environmental masterplan referred to in the EAR was revised following the evolution of design of the flood attenuation basins. The

[223] CD B.1 (EAR), para 7.9.4.
[224] CD B.8.

revised environmental masterplan[225] shows two lines of landscape mitigation planting within Plot 11b, one line immediately adjacent to the roundabout to the south of the basin, and one additional line of planting to the north of the basin. Mr Black confirmed that: *'I agree that the introduction of a larger FCA at Hillside was appropriately integrated through the inclusion of this additional line of planting. The purpose of this landscape mitigation planting on the northern edge of plot 11b at Hillside is to both contribute to screening of the Scheme in views from the residential house at Hillside and also to deliver landscape integration as required by national and local policy.'*[226]

4.5.6.11 Mr Black explained in evidence in chief that the line of planting south of the flood attenuation basin is provided to compensate for tree removal required due to changes of geometry of the highway as a result of the Scheme, to provide landscape integration through continuity of tree cover, and to provide visual screening. He also explained that the line of planting north of the basin was also providing a landscape integration function. He explained that both lines of planting were necessary for visual screening purposes – that planting to the south would screen traffic movements on the altered junction in the short-term, but that planting to the north would be the most effective in screening the elevated motorway when it obtains maturity and height.

4.5.6.12 In relation to Mr Moore's 3-lane Scheme, Mr Black explained in evidence in chief that the additional land available in Mr Moore's alternative proposal was not a consistent width, and is 6 metres only at its widest point. He explained that: '*Whilst the alternative channel line would to a small degree reduce constraints to planting larger trees in this location, the overall quantum of proposed planting would remain adequate but not excessive. Continuity of planting along the junction frontage is still only just achieved (i.e. limited to shrub planting at the narrowest point between the basin and carriageway) and the additional areas where larger trees could be accommodated (principally on the south western edge of the basin) are limited, remain within the parameter of 'adequate', and do not become 'excessive'.'*[227]

4.5.6.13 His ultimate conclusion was that: '*I am of the opinion that the space available for landscape mitigation planting between the basin and the carriageway was (within NH's general arrangement) adequate but not excessive and still remains (in the context of Mr Moore's alternative channel line) adequate but not excessive.*'

4.5.6.14 NH considers that appropriate landscaping of large-scale highway infrastructure is clearly in the public interest and ensuring appropriate

[225] CD B.4, p.3.
[226] Mr Black p/e, para 4.11 [NH/4/2].
[227] Mr Black R, para 2.6 [NH/4/3].

landscape and visual integration and screening is a consistent theme within national and local policy.

4.5.6.15 Whilst MK sought to challenge Mr Black to be innovative with his planting in a lesser amount of space, Mr Black is the only expert in the room and was absolutely clear that the land was required for landscaping and no scheme would be adequate in landscaping terms without the land take.

4.5.6.16 At paragraph 6.4.4.1 MK states Mr Black accepted that landscape is '*parasitic*' on the need for an FCA on MK's land. That is not quite correct, Mr Black accepted only that the proposed planting to the north of the basin would not be required if the basin were not to be implemented as part of the Scheme. The same paragraph of MK's Closings quotes from paragraph 8.8.2 of the EAR.[228] It should be noted that quote is taken from the biodiversity chapter of the EAR, rather than the landscape chapter, and different considerations apply. NH's position remains that land is required for the twin purpose of landscape integration and visual screening. Mr Black's evidence demonstrates a need for landscape planting sufficient to provide integration and screening. It is not simply about a change '*from pasture to tall trees*' as suggested by MK – plainly pasture grass would not achieve a height which will deliver landscape integration and visual screening of the Order scheme consistent with the landscape character context.

4.5.6.17 The reference in paragraph 6.4.4.2 to '*uncharacteristic landform*' is correct but, in NH's view, misses that the purpose of the third paragraph of paragraph 7.9.3 of the EAR is to explain that the proposed landscape planting forms part of the mitigation required to '*soften'* the uncharacteristic landform and features introduced as part of the Scheme, to ensure that it does not create significant adverse impacts.

4.5.6.18 Reference in paragraph 6.4.4.3 to '*wildflower verges*', and the suggestion that these could be created on the limited areas between the edges of the channel line and MK's land fail to recognise that this, again, is taken from the biodiversity chapter of the EAR, where different considerations are being addressed. As with pasture, wildflower verges clearly would not provide sufficient landscape and visual integration and screening. NH considers that it is absurd to suggest that large scale highway infrastructure in the vicinity of a split-level motorway junction can be successfully integrated into the surrounding well wooded landscape character context using a planting palette limited to low level wildflower grassland.

[228] CD B.1 (EAR).

4.5.7 ***Mitigation***

4.5.7.1 NH indicates that INQ-33 explains how mitigation would be secured. If that is not accepted, then NH has offered an undertaking to the Secretary of State. The suggestion made by MK in paragraph 6.2.1.14 to the effect that the undertaking sought to defer assessment of the environmental effects of the Order scheme is wholly wrong. The package of mitigation was taken into account in screening the proposed Order scheme. Expert contributors to the EAR are well able to judge if broad mitigation measures can address potential environmental effects in advance of their detailed development. That is an ordinary part of project development and Environmental Impact Assessment. NH considers it is telling that MK has not put forward an iota of evidence to demonstrate that the proper assessment of effect has been inappropriately deferred. In the result, no more need be said.

4.5.8 ***Conclusion on compelling case***

4.5.8.1 In NH's view, the Order scheme would bring about very material public benefits, few disbenefits, and the balance, NH submits, amounts to a compelling case in the public interest.

4.6 **Human rights**

4.6.1 In the NH's submission no individual right which is affected by the Order scheme is of such importance or impacted to such an extent so as to outweigh the public benefits the Order scheme would deliver. Neither would the cumulative impact on private rights across the Order scheme as a whole be of such magnitude or severity as to outweigh the public benefits.

4.6.2 Any private losses would be mitigated by the fact that landowners, and those with the benefit of interests in land affected by the CPO, would be entitled to compensation.

4.6.3 For these reasons, NH considers that any interference with Convention Rights would be proportionate and legitimate and in accordance with the law.

4.7 **The intended use of the CPO land**

4.7.1 NH indicates that there can be no real doubt that NH has a clear idea as to how it intends to use the land. All the land sought to be acquired is for the purposes of delivering and operating the Order scheme.

Appendix A to the SoR[229] provides an explanation of how each plot in the CPO is intended to be used.

4.8 Funding

4.8.1 NH has full funding for the Order scheme. The estimated cost of the Scheme is £35.19 million.[230] The funding for the project is secured through the Government's commitment to Road Investment Scheme 2 (RIS2). RIS2 pledges £27.4 billion of capital investment during, what is known as, Road Period 2 (2020 – 2025). The Order scheme is identified as one of the schemes that is 'committed' for Road Period 2, meaning that funding is committed and construction is expected to start by 1 April 2025.

4.8.2 The Delivery Plan for 2020-2025, published in August 2020,[231] sets out how NH intends to deliver the commitments made in RIS2 and invest the £27.4 billion of Government funding during Road Period 2. The Delivery Plan reconfirms the commitment to delivering the Order scheme as one of the enhancement schemes for which £14.2 billion of this funding has been allocated.

4.8.3 As a result, NH says that all the necessary funding would be available for the Order scheme to proceed at the necessary time and that the test in paragraph 14 of the CPO Guidance is met.

4.9 Planning

4.9.1 *Mr Bedwell's approach to the assessment of planning policy*

4.9.1.1 NH indicates that Mr Bedwell's evidence was entirely predicated on the application of section 16(8) of the *Highways Act 1980*. That was extraordinary given (a) the SRO is not made under that section[232] and section 16(8) expressly is limited to schemes made under that section[233] and (b) it *wholly* ignores the CPO which is, again, not made under that section. The fact that Mr Bedwell ignored the application of planning policy to the CPO is totally unexplained. Mr Bedwell agreed in cross-examination, that even if he was right about the applicability of section 16(8), it plainly does not govern the approach to considering the CPO. The tests for the CPO are laid out in the CPO Guidance and the overarching test being whether there is a compelling case in the public interest. As Mr Bedwell accepted, the extent to which the Order scheme

229 CD A.7.
230 Mr Clark p/e, para 5.9 [NH/9/2].
231 CD F.8.
232 See CD A.3 (SRO) which is made under sections 18 and 125 of the Highways Act 1980.
233 CD D.1 (Highways Act 1980), p.24, section 16(8).

complies with planning policy is relevant to the public interest case (whether or not the particular statutory tests for planning permission (section 38(6) of the Planning and Compulsory Purchase Act 2004) or development consent (section 104 of the Planning Act 2008) are engaged. The application of section 16(8) of the *Highways Act 1980* across the entirety of Mr Bedwell's evidence was plainly wrong and the entire foundation of Mr Bedwell's policy analysis is, therefore, unsound. This clearly and markedly undermines his evidence.

4.9.1.2 NH considers that it gets worse. Even if one were to assume that section 16 did apply, Mr Bedwell's approach of seeking to identify and have regard only to 'requirements' within policy rather than the totality of any relevant policy is both novel and, as he admitted in cross-examination, wholly unsupported by any case law, policy or guidance.

4.9.1.3 Mr Bedwell could not point to any case law, policy or guidance that would assist in understanding how to differentiate between policies that fall to be considered as 'requirements' and others which do not. Nor could he identify any text in any relevant policy document that seeks to identify which of its own policies are requirements and which are not. In the end, Mr Bedwell ended up identifying requirements in emerging policy[234] whereas emerging policy plainly cannot be a 'requirement', such policies may be material but that is for the individual decision maker to determine. This revealed the lack of principle to his approach. In cross-examination Mr Bedwell accepted that a Policy such as S11 which includes support for the principle of improving junction 8 would not be a policy he took into account since it would not fall to be considered a 'requirement'. NH considers that this demonstrates neatly how inappropriate Mr Bedwell's approach was and the perverse results it could have. Mrs Williams' simple and orthodox approach of assessing the Scheme against relevant policy is plainly to be preferred.

4.9.1.4 It is noteworthy that in paragraph 6.4.2.6 MK leans on Policy S11 as support for the Link Road but fails to mention the support it lends to the Order scheme.

4.9.1.5 NH indicates that there was a further quirk to Mr Bedwell's approach. He sought to apply different weight to the same policies depending on whether the particular works in question fell within the definition of development or not. Mr Bedwell applied more weight to policy when it was applied to works which are not excluded from the definition of development compared to when it applied to works that did not comprise development.[235] That meant distinguishing between works

[234] Mr Bedwell p/e, para 5.206 [KEE/3/1].
[235] Mr Bedwell p/e, paras 4.12-4.15 [KEE/3/1].

within and outside of the highway but the policy is the same whether applied in or outside of highway boundary, as is the overarching Order scheme. There is no legal or policy basis on which to make such a distinction. It is the sort of legal obstacle course deprecated by the courts[236] with no practical benefits. Moreover, it is inconsistent with his acceptance in cross-examination that planning policy is developed in the public interest and compliance with it is relevant to the compelling case test.

4.9.2 ***The status of the relevant highways***

4.9.2.1 NH notes, as Mr Bedwell confirmed in cross-examination, it is no part of MK's case to challenge the definition of special road as provided in the SRO.[237] He accepted in cross-examination that the M27 is a special road.[238] Mr Bedwell further accepted that the slip roads are part of the special road (as reflected in the Jurisdiction plans[239]) and as such the slip roads (and special road as defined in the SRO) formed part of the SRN as defined in the NN NPS.[240] This position established in cross-examination is wholly contrary to Mr Bedwell's prior position as expressed in writing and on which his evidence was based[241]. Again, this materially undermines his evidence.

4.9.3 ***Relevance of NN NPS***

4.9.3.1 Mr Bedwell's view was that the NN NPS cannot be applied to local roads.[242] However, NH considers that the following points should be noted:

a) As set out above, it overlooks Mr Bedwell's acceptance that the Scheme includes part of the SRN.

b) As Mr Bedwell agreed in cross-examination, no part of the NN NPS states that in such circumstances the policies of the NN NPS

[236] Excessive legalism has no place in planning and the courts should always resist over-complicating concepts that are basically simple (per Lindblom LJ) in *East Staffordshire BC v SSCLG* [2018] PTSR 88 at [50]; *St Modwen v SSCLG* [2017] EWCA Civ 1643 at [7]).
[237] CD A.3.
[238] All motorways are special roads. Special roads are limited to certain classes of vehicles defined in the Special Roads Act 1949. That Act designed to allow the creation of motorways. An ordinary highway is a right of way to all the world, not particular classes of vehicles (for example bicycles are not allowed on motorways but are on normal roads), statutory undertakers have rights to lay infrastructure in ordinary highways but not in special roads, landowners have rights of access to highways and can build alongside them but not so special roads. It is this status and these restrictions that allows motorways to be what they are. M27 is limited to Class I (cars, motorcycles and light vans with pneumatic tyres) and Class II traffic (goods vehicles and military vehicles).
[239] CD A.12.
[240] CD F.2 (NN NPS), para 1.5 and ftnt.7.
[241] INQ-51, para 3.12.
[242] Mr Bedwell, para 5.15 [KEE/3/1].

are inapplicable.

c) The NN NPS itself contemplates the policies being applied to non-NSIP schemes, as it identifies itself as a potential material consideration in the Town and Country Planning Act context.[243]

d) Mr Bedwell agreed in cross-examination that the materiality of these policies is for the decision maker in circumstances where the scheme is partly SRN. So long as the policies are properly understood, their application is for the decision maker.

e) He further accepted that it can be said with certainty that it would be wrong to advise the Secretary of State that the NN NPS is inapplicable or an irrelevant consideration in considering the Order scheme.

f) A relevant consideration in evaluating the relevance and weight to be given to the NN NPS is RIS2 which identifies the Scheme as committed for Road Period 2 and so is supported by the Department for Transport and is, accordingly, funded. Significantly, RIS2 identifies the Order scheme as including '*improvements to the Windhover Roundabout*', i.e. on the local road network. What is funded, therefore, in the Government's strategy for the SRN is improvements to junction 8 *and Windhover Roundabout*. This demonstrates that it is the Government's position that improvements to the local network can be directly relevant and necessary to the improvements to the SRN. This position derives from an obvious point: journeys are made from point to point. The local road network needs to deliver the road user over the last mile in order to give utility to the SRN and to, in the words of NN NPS, '*provide critical links'* and '*join up communities*.'[244]

4.9.3.2 In light of this NH considers that the policies of the NN NPS are plainly relevant. The NN NPS establishes a '*critical need'* and/ or '*compelling need'* to improve the SRN.[245] That identification of the need to improve and develop the SRN in order to ensure a well-functioning SRN which is said to be '*critical in support of the national and regional economies*'[246] provides clear support for the Order scheme. This may sometimes mean related improvements to the surrounding local road network as the SRN is part of an 'integrated system'. There is a relationship between the performance of the SRN and the local roads, which may legitimately

[243] CD F.2 (NN NPS), para 1.4.
[244] CD F.2 (NN NPS), para 2.1.
[245] CD F.2 (NN NPS), para 2.10 and para 2.13.
[246] CD F.2 (NN NPS), para 2.13

require a local road improvement to get the benefit to the SRN.[247]

4.9.4 ***Policy analysis***

4.9.4.1 With the adoption of the new Local Plan, Mr Bedwell and Mrs Williams agreed that previous policy is no longer relevant. NH indicates that there are two principal policies to which regard is required. First, Policy S11(l). This policy provides express support for the principle of improvements to junction 8, as Mr Bedwell accepted in cross-examination.[248] The improvements are a '*key proposal*' in the Local Plan. Mr Bedwell argued that the support was for a scheme, not the Scheme, but that point does not take away the in principle support and, moreover, as Mr Bedwell acknowledged in cross-examination, Local Plan policies do not set out the detailed design of schemes. Policy S11 is a recently adopted policy – i.e. it was found sound including on the basis that it was justified by evidence – which lends additional and important support for the Order scheme.

4.9.4.2 Secondly, Policy S6: settlement gaps, Mr Bedwell said that this policy is breached by the Scheme. It plainly is not. As Mr Bedwell acknowledged, this policy is about keeping settlements '*physically separate*' but allows for development within the settlement gaps that meets the criteria set out in the policy.[249]

4.9.4.3 Whereas Mr Bedwell seemed to suggest that planting could adversely affect the settlement gap, that (a) does not accord with the underlying requirement to keep settlements physically separate because planting does not impact separation of urban areas and (b) goes against the assessment in the settlement gap study which expressly identifies planting as being capable of furthering the aims of the policy.[250] Mr Bedwell also referred to impact on openness but that is not a feature of the policy, as he accepted in cross-examination.[251]

4.9.4.4 As both Mrs Williams and Mr Black said in evidence, there is no conflict with this policy when properly applied. The policy needs to be read with regard to the fact that the Local Plan supports improvements to the junctions through Policy S11. Mr Bedwell agreed in cross-examination that Policy S6 could not be applied blind to Policy S11(l). In NH's view the Order scheme plainly does not undermine the physical extent

[247] CD F.2 (NN NPS), para 2.10: "*there is a compelling need for development of the national networks – <u>both as individual networks and as an integrated system</u>*" (NH's emphasis).
[248] INQ-5, p.46.
[249] INQ-5, p.256, para 4.33.
[250] Mr Bedwell App to R, App.E, [KEE/3/4], Settlement gap study, p.239, B9 and p.241, B7.
[251] Mr Bedwell App to R, App.E, [KEE/3/4], Settlement gap study, p.241, B7 which notes that planting has an impact on openness but also improves the settlement gap function (B7 is noted to play "*a role in physical and visual separation*").

and/or visual separation of the settlements and nor does it have an urbanising effect detrimental to the separate identities of Bursledon and Hedge End. Mr Black in re-examination confirmed that there would be no urbanising effect on the character of the countryside (in the light of the conclusions in the EAR which says there would be a slight adverse landscape effect[252]). Mr Black is, of course, the only landscape expert the Inquiries has heard from.

4.9.5 ***Impediments***

4.9.5.1 Paragraph 15 of the CPO Guidance provides that:

> '*The acquiring authority will also need to be able to show that the scheme is unlikely to be blocked by any physical or legal impediments to implementation. These include: the programming of any infrastructure accommodation works or remedial work which may be required; and any need for planning permission or other consent or licence*.'[253]

4.9.5.2 NH indicates that there would be no physical or legal impediment to NH building out its Order scheme.

4.9.5.3 It is agreed between the parties as confirmed by Mr Bedwell in cross-examination that there is no requirement for express planning permission or development consent. The Order scheme could be built out under permitted development rights and as such NH has the consents required in place.

Link road

4.9.5.4 As explained by Mrs Williams, the existence of a planning permission for the Link Road does not amount to an impediment to the Order scheme being built out.

4.9.5.5 NH identifies that there is inconsistency in the approved drawings attached to the Link Road planning permission with some requiring two ponds and some, one (generally the later plans).[254] The FRA accompanying the Link Road planning permission is drafted on the basis of a single pond[255] and anticipates the drainage scheme to be further developed. The inconsistency in the approved plans will require to be ironed out and, as such, some form of application will need to be made by the developer. That will be an opportunity to address any

[252] CD B.1, p.84.
[253] CD F.13, p.13, para 15.
[254] INQ-41.
[255] INQ-40: FRA, para 5.16, para 5.19 and para 7.8.

inconsistency with the Order scheme, not that it is accepted that there is any inconsistency as (a) it is clear that, even if the approved Link Road scheme included the southern pond, there is no reason that it cannot be built out consistent with the Order scheme given the nature of the works required and (b) as Mrs Williams said – applying her expert judgement – even if the southern pond is required, there is sufficient room within the redline of the Link Road in that vicinity to provide a pond of the same size such that they do not overlap at all. Indeed, that conclusion is obvious from a glance at the plans.[256] Mr Bedwell did not seek to suggest otherwise.

4.9.5.6 Moreover, Mr Bedwell agreed in cross-examination that: there would be no legal reason why NH could not implement its Order scheme; there is no programme for the construction of the Link Road; Foreman Homes has not exercised its option over the relevant land; Foreman Homes does not, in any event, have an option over the land required for the southern drainage pond; MK is not going to build out the Link Road himself; Eastleigh Borough Council (EBC) wish to CPO MK's land to ensure the delivery of the Link Road[257] *but do not object to the Scheme* and, indeed, it is now clear that EBC do not regard there to be any inconsistency and if there were to be that it could be resolved.[258] EBC's position could not more clearly demonstrate that there is no impediment.

4.9.5.7 As to wider related public interest factors, as Mr Bedwell agreed in cross-examination, none of the housing to the north is reliant on the Link Road and has been consented without any limitation on its use contingent on the delivery of the Link Road. As such, NH considers that there can be no effect on the delivery of housing as planned for in the Local Plan arising from any inconsistency with the Link Road consent. The same is not true for the employment allocation (policy HE4) as the Link Road is required under policy HE4 but for the reason set out above, both the Link Road and the Scheme can be delivered alongside each other. Accordingly, there is neither an impediment within the meaning of the guidance nor any potential negative impact to be considered in the public balance.

NH's position should FCA not be permitted

4.9.5.8 It has been questioned as to whether or not NH's position set out in INQ-62 could amount to an impediment to the Order scheme. NH says it does not. The terms of the guidance are very clear as to what an impediment means: they are either physical or legal. The situation envisaged would be neither. There is never any compulsion on an

[256] INQ-47.
[257] KEE/3/8, para 3.4.
[258] INQ-56.

acquiring authority to deliver a scheme. A failure to confirm the Orders on the basis that (a) FCAs are removed against NH's case and (b) in those circumstances INQ-62 would amount to an impediment would be a de facto requirement on acquiring authorities to act on compulsory purchase powers. That would be to enter new territory without good reason.

4.10 **Last resort**

4.10.1 NH indicates that Mr Tremeer's evidence[259] sets out in detail the extensive engagement with landowners and resulting agreements. Through hard work NH has reached the position where it is only really MK who has not come to some form of agreement and who is actively objecting to the Orders.

4.10.2 MK aside, compulsory purchase powers are still required in order to assemble the totality of the land required, including the plots of unregistered land that are in unknown ownership for which there is no other option than compulsory purchase, to ensure titles are cleansed and to mitigate any risk of failure to complete agreements where they are agreed in principle but not yet concluded.

4.10.3 NH considers that it is quite clear from the extensive engagement with landowners that it can be properly concluded that the use of compulsory purchase powers in this case is as a 'last resort'.

4.10.4 MK interprets 'last resort' to be a synonym for 'least intrusive means'. In NH's view there is no basis for that submission. It is wholly novel. It will be noted that the case law above on 'least intrusive means' does not use the expression 'last resort'. The phrase last resort derives from paragraph 2 of the CPO Guidance. It provides:

> 'Acquiring authorities should use compulsory purchase powers where it is expedient to do so. However, a compulsory purchase order should only be made where there is a compelling case in the public interest.
>
> *The confirming authority will expect the acquiring authority to demonstrate that <u>they have taken reasonable steps to acquire all of the land and rights included in the Order by agreement</u>…*
>
> *Compulsory purchase is intended <u>as a last resort to secure the assembly of all the land needed for the implementation of projects</u>. However, if an acquiring authority waits for negotiations to break down before starting the compulsory purchase process, valuable time*

[259] NH/7/2.

will be lost. Therefore, depending on when the land is required, it may often be sensible, given the amount of time required to complete the compulsory purchase process, for the acquiring authority to:

- *plan a compulsory purchase timetable as a contingency measure; and*
- *initiate formal procedures*

This will also help to make the seriousness of the authority's intentions clear from the outset, which in turn might encourage those whose land is affected to enter more readily into meaningful negotiations.'

4.10.5 NH indicates that when read in context and fairly it could not be clearer that the phrase last resort is employed in the CPO Guidance in relation to the need for acquiring authorities to seek to acquire land by agreement before reaching for their compulsory purchase powers.

4.11 Need and justification for the SRO

4.11.1 The SRO is made under Sections 18 and 125 of the Highways Act 1980 and if confirmed by the Secretary of State, would authorise NH to:

a) Improve lengths of the A3024 Bert Betts Way, A3024 M27 junction 8 Roundabout, A3024 Windhover Roundabout, A27 West End Road, A3024 Bursledon Road, A3025 Hamble Lane, A27 Providence Hill, Peewit Hill Close, and C56 Dodwell Lane.

b) Stop up a private means of access to MK's land.

c) Provide two new means of access to the proposed FCAs.

4.11.2 The Secretary of State is unable to confirm the Order unless satisfied either (a) that no access to the premises is reasonably required (Section 125(3)(a) of the *Highways Act 1980*), or (b) that another reasonably convenient means of access to the premises is available or will be provided under the SRO or otherwise (Section 125(3)(b) of the *Highways Act 1980*).

4.11.3 The private means of access (PMA) to be stopped up is to MK's pasture land from the C56 Dodwell Lane. It is the land proposed to become an FCA. Another reasonably convenient means of access to MK's land is available off the C56 Dodwell Lane roundabout and, additionally, from Peewit Hill Close. There is also a future Link Road planned through MK's land, off which access to the remainder of his holding will be provided. Section 125(3)(b) of the *Highways Act 1980* is, accordingly, satisfied by

current existing access arrangements.

4.11.4 NH identifies that two new PMAs are proposed to the FCAs, one located to the north west of M27 junction 8 and north of the A3024 Bert Betts Way and the other on the northeast side of the M27 junction 8 and north of the C56 Dodwell Lane. They are intended for NH's use in relation to the construction and maintenance of the FCAs and, in relation to the basin to be located to the north west of M27 junction 8, for HCC to access the rear of the A3024 Bert Betts Way carriageway retaining wall and its highway verge margin behind, for the maintenance of the wall.

4.11.5 Ultimately, the need and justification for the SRO follows the need for the Order scheme. A failure to confirm the SRO would prevent the necessary changes being made to the local highway network to enable the implementation and delivery of the Order scheme. In NH's view the SRO is, therefore, integral to the ability to deliver the Order scheme and to ensure the consequent benefits.

4.12 Modifications

4.12.1 In the event that the Secretary of State does not accept NH's case and considers that the Orders should be modified so as not to include land sought for the FCA on MK's land, it is NH's position that the CPO should be modified as set out in MOD3[260] (or MOD4[261], if the Secretary of State considers that the land for the north-western FCA on Plots 9 and 9d should also be excluded) and the SRO should be modified as set out in MOD10[262] (or MOD11 [263], respectively).

4.12.2 Preparation of CPO plans takes considerable time and are usually informed by a Stage 3 preliminary design. In the time available to it, NH indicates that it has prepared the modified plans (and consequent modified schedules) in MOD3 and MOD4 to provide the minimum land take it is considered reasonably necessary to provide the highways works. This includes acquisition of land for the creation of the embankment, acquisition of a 3m strip behind the embankment for structure, fences, drainage, etc., and acquisition of sufficient land to allow a 13m strip from the channel line for landscape planting alongside the gyratory and motorway.

4.12.3 MOD10 (and MOD11) retains the provision of powers to improve the specified lengths of highway and to stop up MK's PMA, but MOD10 does

[260] INQ-82.3 and 83.3.
[261] INQ-82.4 and 83.4.
[262] INQ-71.
[263] INQ-71.

not include the provision of new means of access to the north eastern basin and MOD11 does not include the provision of new means of access to the north eastern or the north western basins. Given the works which would be proposed between the channel line and the modified redline boundary (including creation of embankment and landscape planting), NH considers it is reasonably necessary to stop up MK's PMA.

4.12.4 NH/11[264] sets out the minor modifications which NH sought to be made to the Orders. These are reflected in MOD3 and MOD10. MOD12 sets out various changes required to the CPO Schedule.

4.12.5 On 8 June 2022, MK submitted a 'refined CPO' (MK's CPO), 'refined SRO' (MK's SRO), and 'draft access inspection licence' (with an updated draft licence submitted on 9 June 2022) (Draft Licence). MK's CPO contains no provision for the acquisition of land or rights from MK. This was acknowledged by MK's team and they appear to accept that this is an omission that would require correction. Two plans are provided, one which suggests access for inspection could be taken by way of a voluntary licence (Licence Plan), and the other which suggests access for inspection could be taken by way of Section 250 of the *Highways Act 1980* (the 'Section 250 Plan').

4.12.6 The covering letter dated 8 June 2022 which accompanied these documents stated that MK's proposals '*are the least intrusive means to enabling the inspection desired by National Highways*'. This is predicated on: (i) there being a legal obligation for the 'least intrusive' means to be used, which is not correct, as set out above; and (ii) none of MK's land being required in order to provide Mr Moore's 3-lane alternative scheme, which NH does not consider is correct (NH's MOD1 sets out the land which NH considers is required in order to provide Mr Moore's 3-lane alternative scheme, including a strip for structures, fences, drainage, etc. and land to allow for landscape planting).

4.12.7 While the Section 250 Plan purports to extend the CPO boundary around the land shaded blue, this is not provided for in MK's CPO or the Schedule to it. There is no reference to the acquisition of new rights which would need to be included as MK seemed to accept.

4.12.8 The Draft Licence was produced for the first time by MK just before closing submissions and would require due legal review and negotiation. It is not certain that a licence could be agreed and completed. In NH's view it cannot therefore overtake the need for compulsory acquisition of rights in the CPO. It is also unsatisfactory for maintenance access rights, which require to be held in perpetuity, to be secured by way of a

[264] Also referred to as [INQ-74] and as MOD9.

personal licence which can be revoked and thereby do not provide the necessary certainty (the situation is different where the land is required only temporarily).

4.12.9 MK's SRO deletes provision for the stopping up of the existing private means of access. As discussed above, NH considers this stopping up to be reasonably necessary. Section 125 of the *Highways Act 1980* provides that no Order stopping up an access shall be confirmed unless either (a) no access to the premises is reasonably required, or (b) another reasonably convenient means of access is available or will be provided. As set out in paragraph 17.3 of the Statement of Case,[265] there are other reasonably convenient means of access available.

4.12.10 NH considers that MK's SRO wrongly deletes provision in the Schedule for the new means of access to the north western flood attenuation basin.

4.13 Response to INQ92 (and 93)-'Reply submissions of Mr Keeling on...misstatements of fact'[266]

4.13.1 NH considers that MK's further submissions, INQ-92, go way beyond what was agreed at the Inquiries. He was afforded an opportunity to respond to six cases referred to in NH's closing but not previously referred to at the Inquiries.

4.13.2 What MK described as 'misstatements of fact' – which characterisation of NH's submissions is wholly rejected – NH says was dealt with at the Inquiries but from paragraph 6.3.22.1 MK effectively replies line by line to NH's Closings. In NH's view, MK has thus abused the opportunity given to him and submitted a document that is materially longer even than his closing submissions and extends beyond what was agreed. It even raises new arguments not yet ventilated which is plainly inappropriate. These should be given no weight. If MK has not raised them before he cannot think they are good points.

4.13.3 NH says the allegation – made apparently without awareness of the irony – that new points were raised by NH in closing is wrong. It is further perpetuated by the Blake Morgan letter dated 14 June 2022 (INQ-93). In brief NH's response is as follows:

a) First, it is inappropriate for these points to be raised outside of the Inquiries.

b) Secondly, it is not helpful for a person who did not attend the

[265] CD A.8.

[266] Inspector's Note: the points of law set out in NH's response to INQ-92 and 93 are included in earlier sections of this report.

Inquiries to make detailed points on what evidence was given or not given.

c) Thirdly, as to Article 6. MK's reliance on Article 6 rights as a means of seeking to ensure all of his points are considered (see paragraphs 3, 7 and 8) is to misuse Article 6 which requires – in the broadest of terms – MK to have a fair hearing. It does not dissolve MK of responsibility in his participation in the hearing nor disapply the rules to him. This would include agreeing the scope of a reply and then ignoring it. No one could suggest with a straight face that MK's concerns have not been heard without scrupulous fairness and diligence.

   It ought to be recorded that NH itself has bent over backwards to assist MK in his objection and provided MK an enormous amount of information at MK's request, recognising the impact on his rights the Scheme would have.

d) Fourthly, as to the specific assertions set out in the Blake Morgan letter dated 14 June 2022 (INQ-93), adopting the same numbering:

   i. This was in response to reliance placed by MK on DMRB CD 529 for the first time in closing (his paragraph 6.4.11.18) and the first time it was alleged that the watercourse is a public watercourse (his paragraph 6.4.11.19). This issue had not been put in play and was not understood to be controversial. It should not be controversial that it is not a public watercourse: there is no right of navigation over it (there is no right of navigation on non-tidal watercourses save for a few larger rivers administered by navigation authorities which does not apply here). It is private in that sense. Notably MK does not actually suggest otherwise;

   ii. Paragraph 4.5.5.7/NH's footnote 197 is perfectly fair, it expressly refers the reader to paragraph 6.4.7.26 and states that that paragraph *implicitly* recognises that Policy S11 is effectively an allocation. That is because MK goes onto deal in paragraph 6.4.7.27 with the Sequential Test as if Policy S11 were an allocation, having said that MK does not accept the same;

   iii. NH's case very clearly was that an FCA would be required south of Dodwell Lane if the culvert was upsized, otherwise there would be flooding downstream. This was because of the volume of water required to be

attenuated[267]; and,

iv. (iv) NH said in closing that Mr Pickering was referring to not increasing flood risk elsewhere. That much should be clear. The sentence is '*to limit discharge to existing rates…thereby maintaining existing flows*' in the context of the design event whilst '*meeting the requirements of the NPPF [CD F.1 paragraph 158]* [Note: this is a bad reference as it is to the NPPF 2019, it should read paragraph 162 which is the equivalent paragraph in NPPF 2021] *and DMRB LA 113 [CD F.9a, paragraph 3.68, page 23]*' which refers to mitigation measures *not increasing flood risk elsewhere*. NH thought that meaning was clear until it read paragraphs 6.4.10.1-2. The DMRB explicitly refers to not increasing flood risk elsewhere. It was not put to Mr Pickering that he meant anything else.

4.13.4 NH notes that the Inspector will draw his own conclusions on this issue and NH does not seek to trouble either him or the Secretary of State on these points. It is agreed by NH that new points not ventilated in the Inquiries or supported by evidence ought to be given no weight by the decision maker (whoever so makes them).

4.14 Conclusions

4.14.1 For the reasons set out above, NH considers that the Order scheme meets the required tests in the CPO Guidance and any interference with the rights of landowners would be, should the Orders be confirmed, in accordance with the law, necessary in the public interest and proportionate. The need for the SRO follows from the need for the CPO.

4.14.2 For all these reasons, NH invites the Inspector to recommend to the Secretary of State that the Orders be confirmed and the Secretary of State, ultimately, to confirm the Orders.

[267] NH/3/2 para 8.60

5 THE CASES FOR THE SUPPORTERS

The gist of the material points made by those supporters who did not appear at the Inquiries in their written submissions were:

5.1 **Hampshire County Council** (HCC)

5.1.1 HCC confirms its support for the Orders and the importance of the associated scheme. HCC is a key stakeholder for the Order scheme and has been working with NH (formerly Highways England) for a number of years to bring forward the improvements to Windhover Roundabout and M27 junction 8.

5.1.2 HCC considers the improvements that would be delivered as part of the NH improvement scheme are essential to help improve the operation of the local highway network, ensure that it is resilient to future demands, and that it is able to support sustainable economic growth in the area. The Order scheme would also provide very important new infrastructure for pedestrians and cyclists at both Windhover Roundabout and M27 junction 8, which would connect to and add value to committed investment in new cycle infrastructure by HCC along the A27 Providence Hill and A3024 Bursledon Road, as part of the Southampton Transforming Cities Fund. Without the NH improvements at Windhover Roundabout in particular, there would be a key missing link in the local cycle network.

5.1.3 HCC is aware of current issues of traffic congestion caused by the A3025 Hamble Lane/Portsmouth Road junction that are outside the scope of the M27 Southampton junction 8 Improvement Scheme. HCC has had plans to implement complimentary improvements on this northern section of the A3025 Hamble Lane for several years and has developed a preferred improvement scheme that has been subject to two separate public consultation exercises and was ratified by their Executive Member for Environment and Transport in March 2019. HCC continues to seek potential opportunities to secure funding to deliver these improvements.

5.1.4 Congestion on Hamble Lane can make a significant contribution towards congestion at both Windhover Roundabout and M27 junction 8, as well as vice versa with congestion at Windhover and beyond impacting the operation of Hamble Lane. It is for this reason, and others, that HCC has always maintained that the improvements for Windhover, M27 junction 8 and Hamble Lane are complementary, and that all are required in order to improve the operation of the highway network in the area.

5.1.5 It would severely weaken the benefits of HCC's scheme for improving

Hamble Lane, and therefore the prospects of securing funding, if the improvements to Windhover and M27 junction 8 do not go ahead as planned. It would also significantly undermine the Hamble Lane Improvement scheme, which is addressing a long term issue of constrained access and egress to the Hamble peninsula if traffic seeking to exit Hamble Lane to the north was impeded by a congested and unimproved Windhover Roundabout and M27 junction 8.

5.2 **Bursledon Rights of Way and Amenities Preservation Group** (BROWAPG)

5.2.1 BROWAPG was formed in 1990 with a brief to protect, preserve and provide public rights of way, public open spaces and other natural amenities in Bursledon, in partnership with others.

5.2.2 Bursledon, Hamble and Hound are neighbouring parishes on what is known locally as the Hamble Peninsular in the southern part of the Borough of Eastleigh.

5.2.3 BROWAPG indicates that before construction of the M27 motorway in the 1970s which is aligned roughly east to west across the northern part of Bursledon parish, there were six connecting lanes (public highways) linking Bursledon/Hound to Hedge End.

5.2.4 However, under the original M27 Side Roads Order made in the 1970s, some of these connecting lanes were bisected by the motorway works and stopped up to form cul-de-sacs each side of the motorway. The lanes truncated were, from east to west, Windmill Lane, Peewit Hill and Netley Firs Road.

5.2.5 The other three lanes, Blundell Lane, Dodwell Lane and St John's Road were all bridged over the M27.

5.2.6 A new M27 link road was formed between the northern section of Dodwell Lane to the new M27 junction 8 roundabout, together with a dual carriageway link road southwards from junction 8 roundabout to Windhover Roundabout.

5.2.7 Hence, whereas before construction of the M27 there were six vehicular highways available for all traffic including walkers and cyclists connecting the Hedge End area and Bursledon/Hound, BROWAPG indicates that this was reduced to just three existing highways together with the new M27 junction 8 link road from Windhover Roundabout (which was later named Bert Betts Way).

5.2.8 Of the three existing roads which bridge across the M27 only St John's

Road has a continuous footway for walkers alongside it. The other lanes and motorway link road north of Windhover Roundabout (Bert Betts Way) have no footways provided alongside them.

5.2.9 Over the last 40+ years since the M27 opened, traffic volumes have increased tremendously with much new development having been built in the surrounding areas. However there has not been corresponding improvements for NMUs wishing to journey by walking or cycling between Hedge End and Bursledon.

5.2.10 In BROWAPG's view, this has prejudiced those members of the public who do not have access to a motor vehicle from easily and safely passing from one side of the motorway to the other via the existing highways due to the lack of footways, narrow width of roads and perceived unsafe traffic conditions.

5.2.11 There is only one rural public footpath connecting between Bursledon and areas north of M27 which runs alongside the edge of the River Hamble from the A27 into River Hamble Country Park. However this passes through a boatyard and privately owned farmland which is occasionally grazed by cattle and requires climbing over three stiles rendering it unsuitable for some users and for cyclists.

5.2.12 The M27 junction 8 scheme now proposed includes provision for construction of a brand new foot/cycle way link from north of the M27 at Dodwell Lane/Pylands Lane junction, around the junction 8 roundabout on the east side and then south to Windhover Roundabout. Crossing facilities are included to assist walkers and cyclists to negotiate various carriageway crossings needed at junction 8 and Windhover Roundabout.

5.2.13 Accordingly BROWAPG support the proposed scheme and associated orders as it will provide for easier and safer routes, benefitting walkers and cyclists travelling between the areas north of M27 to areas south of M27.

5.2.14 The junction 8 scheme would tie into the proposed HCC foot/cycle way scheme from Windhover Roundabout west along A3024 Bursledon Road to the Southampton City Council boundary near Botley Road.

5.2.15 Also the Order scheme would tie in with the proposed HCC foot/cycleway scheme from Windhover Roundabout east along A27 Providence Hill and Bridge Road to the junction of A27 Church Lane, west of the River Hamble bridge.

5.2.16 To the north of the M27 junction 8 the new proposed foot/cycle way scheme would tie in with the recently constructed foot/cycle ways

provided alongside the Barnfield Way development link road.

5.2.17 In summary, BROWAPG supports the M27 junction 8 and Windhover Roundabout improvement scheme associated orders in that they would create much needed new foot/cycle ways and crossing improvements enabling easier and safer travel for non-car users between areas north and south of the M27 junction 8 and around Windhover Roundabout.

6 THE CASE FOR OBJECTOR MR MARK KEELING (MK)

The gist of the material points made by Mr Keeling in his written and oral submissions were:

6.1 Introduction

6.1.1 These are the submissions of MK in relation to the taking of his land against his will by NH under the *Highways Act 1980*. MK indicates that they do not rehearse extensive and iteratively engaging expert evidence or oral evidence, notwithstanding either parties' different characterisation of what was actually said by a given expert.
MK recognises that the Inspector is his own expert tribunal and cannot be bound by another expert, nor can the Secretary of State.
These submissions focus on what MK considers are the apparent main issues.

6.1.2 In NH/3/2, Mr Pickering of Sweco, on behalf of NH, said this:

> *8.50 The fluvial flooding mechanism which creates risk to the highway is attached to the 450mm diameter culvert underneath Peewit Hill Close at the northern extent of Plot 11b. When the capacity of the culvert is exceeded, flood water spills over the parapet and joins the M27 southbound slip road, leading to flooding of the Junction 8 gyratory. To address the predicted flood risk, a mitigation solution needs to be implemented at or upstream of the 450mm diameter culvert.*

6.1.3 MK considers that he has been led a merry dance in this matter. Section 110 of the *Highways Act 1980* was and remains the complete answer to NH's concerns about its culvert on its land.

6.2 Legal Framework

6.2.1 Case law and the correct legal tests

6.2.1.1 The parties rely on a number of cases to which MK responds as follows.

6.2.1.2 MK indicates that properly considered, the cases relied on by NH support the case of MK and demonstrate orthodox principles of compulsory purchase law in operation and applied to the particular facts of each case.

6.2.1.3 MK says that importantly, this matter is not about whether there are alternative 'sites' but about the means or how an envisaged and as yet incompletely designed scheme may be further refined on its eastern

edge adjacent to Mr Keeling's land so as to not result in the taking of that land against his will. He is not seeking to overturn the Order scheme, but wants to retain his land.

6.2.1.4 By contrast, many of the cases do concern alternative locations for the whole of the particular scheme. This matter is not one of those cases.

6.2.1.5 Nor is this case a High Court challenge where the correct scope or standard of legal challenge is required to be ascertained. Cases such as *de Rothschild*; *Swish Estates*; *Bexley*; are fact sensitive High Court challenge cases wherein a claim is confined to a legal error and does not concern evaluative judgements. By contrast, these are Inquiries of fact finding and evaluation as the logically prior state to such a Court situation. Particular considerations apply as set out below to the evaluative exercise by the Inspector and by the Secretary of State.

Prest[268]

6.2.1.6 In MK's view, *Prest*, which is a case where an objector offers alternative sites for a proposal, establishes a number of fundamental principles of law in the sphere of compulsory purchase:

a) Use of compulsory purchase powers is 'only' available when 'it is necessary' and 'in the public interest';

b) 'where the scales are evenly balanced – for or against [compulsory purchase]… the decision should come down against [compulsory purchase]';

c) Only if the public interest 'decisively' so demands, then and only then can compulsory purchase be authorised;

d) 'if there is a *reasonable* doubt on the matter, the balance must be resolved in favour of the citizen;[269] For example, where there is evidence of uncertainty, the balance must be resolved in favour of the citizen.

e) A reasonable doubt does not mean a doubt held that is considered in itself to be 'reasonable' in the sense that it is a view that is held per se but means a doubt that is supported by *evidence*. See an example of the application of that 'principle' where there was such *evidence*;[270]

f) At an Inquiry, the onus of showing the justification for acquisition lies squarely on the acquiring authority, NH. This is a statement

[268] CD J.1
[269] CD J.1 page 3.
[270] CD J.1 page 3

of the obvious because it would be nonsense for a landowner to justify that his land should not be taken against his will. That onus was properly and expressly accepted by the acquiring authority in *de Rothschild*[271] at page 940c*;* in *Mopac*[272] at paragraph 35*; and in Aquind*[273]. Furthermore, '*The taking of a person's land against his will is a serious invasion of his proprietary rights. The use of statutory authority for the destruction of those rights requires to be most carefully scrutinised*.'[274]

***De Rothschild*[275]**

6.2.1.7 MK indicates that the *de Rothschild* case, which was a High Court challenge case, is an example of the application of *Prest* principles by the Inspector: the Inspector found by fact and degree that the alternative sites in that case fell to be excluded for different reasons such that he could evaluate that the acquiring authority's proposed route in a compulsory purchase order was 'unequivocally' (as in *Prest*, 'decisively') the last resort in the sense that the other routes 'cannot' (not should not) be supported. See paragraphs 940c, 941c and 943b. It is obvious that in a High Court challenge there is no 'special rule' in relation to a compulsory purchase order 'case', the ordinary rules for a High Court challenge apply, but this is an Inquiry and not a High Court challenge 'case'. Unsurprisingly, subsequent cases summarise, iteratively, earlier cases and ratios may be blurred, so other cases refer to 'best' or 'better'; that is not the test.

6.2.1.8 MK says that the evaluation by the gauge of 'cannot' (as opposed to 'should not') is consistent with *Prest* and the illustration of the 'principle' of a 'reasonable doubt'. That is, 'doubt' must be excluded so that there is no reasonable (as in, *evidenced*) doubt. Hence, in *Prest*, it being held that if there was 'in fact' 'other suitable land', then 'no reasonable Secretary of State faced with that fact could [not should] come to the conclusion that it was necessary … to acquire other land … for precisely the same purpose' (noting that a 'purpose' can be broad, even if particular, and that no more detailed particularity is required to sustain a reasonable doubt). See also *Bexley*.

6.2.1.9 MK indicates that in the sphere of compulsory purchase:

a) There is no test of 'better' or 'best'. The test remains 'decisively' as in 'no doubt' – CPOs are the 'last resort'. As in *de Rothschild*,

[271] CD J.2
[272] INQ-8.2
[273] INQ-8.3
[274] CD J.1 page 11.
[275] CD J.2

at page 940c and 943b, 'best' is simply a summary of a conclusion of 'unequivocally'. Hence in that case, at page 941c, the Inspector concluded that the objections 'cannot' be supported. And at page 938i, the decision maker must '*be satisfied that the compulsory purchase order is justified on its merits before he can* [not should] *properly confirm it*' [an order] and '*must not exercise his powers capriciously*' (as in, exercise his powers in the absence of evidence, as in, where there is a gap in the evidence). In this case there is a gap in the Sequential Test and Exception Test evidence;

b) The correct legal test requires the 'least intrusive means' of achieving the legitimate aim be used by the acquiring authority; and if that is so done, then the acquisition must then be proportionate. In opening NH disagrees, suggesting, with reference to the *Clays Lane* case, that a test of 'reasonably necessary' is appropriate. However, Mr Keeling considers that the test of 'reasonably necessary', which is less rigorous than 'least intrusive means', is for cases other than compulsory purchase. The Clays Lane case was not a compulsory purchase order case. It was '*not one of naked property deprivation but one where the statutory regulator, having unobjectionally decided upon transfer, had to choose between alternative courses of action and in that context the appropriate test of proportionality required a balancing exercise and a decision which was justified both on the basis of a compelling case in the public interest and as being reasonably necessary to accomplish the objective; that proportionality did not necessarily oblige the Housing Corporation to choose the course of action which involved least interference with the claimant's rights under Article 1 of the First Protocol*'.[276]

c) The correct approach to statutory construction is, 'where a statute is *capable* of more than one construction, that construction will be chosen which interferes least with private property rights'. That is a golden thread for compulsory purchase orders. See *Sainsbury's*[277], paragraph 11, and affirming *Prest* at paragraph 10. Paragraph 11 bears in the current case in relation to section 18 of the *Highways Act, 1980*, which links to Schedule 1 including a power to modify an order, so as to ensure the least interference with property rights here;

d) The Court of Appeal '*requires' 'the most careful scrutiny'* to be applied by the Inspector (*not* to the Objector's case but) to the evidence and case advanced by the acquiring authority. See for example, *Prest* per Watkins; *Clays Lane*, para 12;

[276] INQ-7.1 For the distinctions see page 2229 para G as well as pages 2235-2241 paras 11, 12, 14, 15, 17, 19, 23 and 25 in particular.
[277] CD J.4-The Supreme Court on the compulsory purchase under Town and Country Planning Act, 1990.

e) The Secretary of State's *CPO Guidance* requires consideration of whether the 'purpose could [not should or may] be achieved by other means, such as through alternative proposals'. See Mopac[278] at paragraphs 35 and 36(iii) where the Inspector affirmed that Guidance as recently as 20 January 2022.
The threshold of 'could' is consistent with the *Prest* case; and *de Rothschild* at page 941 C ('cannot') referred to above. The 'could' threshold is the most recent actual expression used by the Secretary of State for Housing, Communities and Local Government in the updated CPO Guidance. It was also applied as the correct test in *Aquind*[279] on 20 January 2022, where an application for the grant of a development consent order, including provisions for compulsory purchase, for an electrical interconnector was refused. At paragraph 4.19 where the 'could' threshold is expressed as a 'possibility' and paragraphs 4.19-4.20 identify a gap in the evidence which, at paragraph 4.21, meant the '*Secretary of State cannot grant consent*'. In the current case such other means include refinements to the eastern edge of the Order scheme and simple upsizing of a culvert.

6.2.1.10 Examples of the recent application of those principles by different Secretaries of State in 2022 are in:

a) The *Mopac* Decision of the Secretary of State for Housing, Communities and Local Government and made on his behalf by an Inspector;
b) The *Aquind* Decision of the Secretary of State for Business, Energy & Industrial Strategy.

6.2.1.11 MK says that NH disputes these trite principles of compulsory purchase order law and appears to disagree with the Secretary of State's CPO Guidance referred to at *Mopac* paragraph 36(iii) and the dispute itself indicates that NH has approached the taking of Mr Keeling's land against his will from a *fundamentally erroneous starting point*. NH has not applied the correct threshold in meeting his objection in MK's view.

Secretary of State for Business, Energy and Industrial Strategy Decision letter- Application for the Aquind Interconnector Order (Aquind)[280]

6.2.1.12 Further, MK says that Aquind at paragraphs 4.20-4.21 illustrates the position that a developer (like NH) might place the decision maker in if the developer does not provide evidence to support its proposed

[278] INQ-8.2
[279] INQ-8.3
[280] INQ-8.3

compulsory acquisition and place that evidence before the Inspector and Secretary of State, such as in relation to the Sequential and Exception Tests.

The Queen on the application of Save Stonehenge World Heritage Site Ltd V SoS for Transport & Highways England & Historic England [2021] EWHC 2161 (Admin) *(Stonehenge)*[281]

6.2.1.13 In MK's view, the *Stonehenge* case properly interpreted the NN NPS, paragraphs 4.26 and 4.27 and held the former to not be closed but to encompass common law consideration and legal requirement of the evaluation of 'alternatives' in the broadest sense. See paragraphs 245(iii); 246-258; 259-261; 276-277; 285 and 289-290 of the Stonehenge case. NH's attempt to close down the scope of paragraphs 4.26-4.27 was rejected by the court. NN NPS paragraph 4.27 relates to optioneering and the EAR provided in the current case undertakes such optioneering. Whilst NN NPS paragraph 4.26 provides examples, such as Environmental Impact Assessment, which has also been done, the Stonehenge case indicates that the legal requirements are not closed by the examples in that paragraph. Furthermore, having regard to paragraphs 276-277 the Secretary of State was not entitled to not go further than those examples, but was required to consider other tunnel options.

Smith v SoS for the Environment, Transport and Regions [2003] EWCA Civ 262[282]

6.2.1.14 MK indicates that *Smith v SoS for the Environment, Transport and Regions* [2003] EWCA Civ 262, paragraphs 32 and 33, provides the legal basis for evaluating certain decisions in the Environmental Impact Assessment sphere and is apposite here for want of evidence of the 'likely details and their impact on the environment'. *Paragraph 33 indicates that 'the decision maker is not however entitled to leave the assessment of likely impact to a future occasion simply because he contemplates that the future decision maker will act competently. Constraints must be placed on the planning permission within which future details can be worked out, and the decision maker must form a view about the likely details and their impact on the environment.'* NH's noise witness was given the opportunity to give those details and declined. NH declined to modify the Orders to provide constraints within which future details could be worked out. Instead NH has provided an undertaking which suggests that they can be relied upon to act competently. However, the Secretary of State is not entitled to leave

[281] INQ-88.4
[282] INQ-88.3

the assessment until later.

Kane v New Forest District Council [2001] EWCA Civ 878 (Kane)[283]

6.2.1.15 Lastly, MK indicates that the *Kane* case is authority for the proposition that the creation of a dangerous state of affairs by a decision maker is not immune under statute from damages claimed from resulting injury. In this respect, Mr Keeling notes that it is now (tardily) accepted by Mr Warburton on behalf of NH that its eastern edge proposals would breach paragraph 3.20 of DMRB CD 116[284], which the note attached to that paragraph indicates is a key determinant of safety. Mr Keeling urges caution in these circumstances. Furthermore, it is impossible to predict whether NH's Overseeing Organisation, which is not Graham Construction or Sweco, would approve such a departure from standards faced by such foreseeable real danger. Mr Keeling considers that this is a factor supporting the existing 2-lane southbound off-slip road alternative, as opposed to the proposed 3-lane option, as such danger does not arise in the existing situation.

6.2.2 **Statutory framework**

6.2.2.1 MK notes that the envisaged Orders are being advanced exclusively under the *Highways Act 1980*. *The Town and Country Planning Act 1990* (TCPA 1990) is not relevant because section 55 excludes development within the highway boundary from the scope of that Act; and permitted development rights are granted under that Act for any development falling outside of the exclusion of section 55. Consequently, the Planning Act 2004 and section 38(6) and section 70 of the TCPA 1990 are irrelevant to the exercise of power under the *Highways Act 1980.*

6.2.2.2 Nor is development consent required for the Order scheme. Consequently, MK considers that the *Planning Act 2008* is not relevant and nor is its tests under section 104 of 'important and relevant'.

6.2.2.3 Under section 1(1)(aa) of the Highways Act 1980, the SoS was the highway authority for the special road comprised of the M27 until his transfer of the authority in April 2015 to NH under licence. See subsection (c). By section 2(2)(a), the County Council appear to have become the highway authority for the Junction 8 gyratory including because that highway authority in fact maintains the highway atop the subsoil. That authority is also the highway authority for all County roads under section 1(2) deems the County to be the authority for non-

[283] INQ-88.2
[284] KEE/1/2 Appendix A DMRB CD116 Geometric Design of Roundabouts

section (1) and (1A) roads. Consequently, the current position remains, at least, that the jurisdiction as highway authority of NH can only extend to the M27 mainline and to such of the slip roads that NH does in fact currently maintain. MK considers that is key, not sub-soil ownership. However, in MK's view, the CPO terms and Schedule evidence that the County Council in fact maintains the slip roads that are situated above the subsoil and so properly occupies such land as maintainer and is the highway authority for the slip roads.

6.2.2.4 Under Part II, the deeming provision of section 16(1) in relation to 'special roads' remains subject to section 1(2) as above. So too, under section 16(2).

6.2.2.5 Section 16(8) provides for the making or confirming of a scheme under this section and engenders requirements to be satisfied, as a general provision. Section 18(1) provides further for 'provision in relation to a special road' and so necessarily presupposes a logically prior 'special road'. The scope of section 18 is drawn on terms requiring a relationship between the special road such as subsection (1)(c)(i) that conditions the power to NH to improve highways that 'cross or enter' the route of the special road or is or will be otherwise affected by the construction[285] of the special road. But here, the M27 has been constructed, so the case does not involve the construction of a special road. Subsection 18(1)(c)(ii) concerns construction of a new highway. Subsection (d) concerns the transfer of a highway 'constructed' by NH. Subsection (e) concerns authorization of functions. Subsection (f) is parasitic on (1)(a)-(e). (f) concerns[286] purposes incidental to the construction, maintenance of, or dealing with the special road – but does not include 'improvements'. Subsection (2) is parasitic on (f). That is, only section 18(1)(c)(i) refers to 'improve'. And so is more narrowly drawn than appears at first.

6.2.2.6 MK indicates that, properly interpreted in the context of a threatened CPO of MK's land (and that of others), and in line with the Sainsbury's case on the proper construction of statutes in that context, the scope of (i) is confined to cases arising where a highway crosses or enters the route of a special road or is or will be otherwise affected by the *construction* or *improvement* of a special road. The special road has already been constructed. The special road must then be 'improved' and the scope of what may be done to other highways is limited to where the highway crosses or enters the route and no more. To like effect, a highway must be 'otherwise affected' by the improvement. Therefore, an intricate evaluation exercise is required in MK's view. Otherwise, it is necessary to revert to section 16 in order to expand the scope of the

[285] Inspector's note- '…otherwise affected by the construction or improvement of the special road'.
[286] Inspector's note- 'for any other purpose incidental to the purposes aforesaid or otherwise incidental to the construction or maintenance of, or other dealing with, the special road.'

special road.

6.2.2.7 MK considers that it remains difficult to see how the reach of section 18(1)(c) can extend beyond that limited scope of 'crosses or enters' and be extended to encompass two gyratories including one that is distant from the mainline special road.

6.2.2.8 In MK's view, on that basis, a prior section 16 extending order and scheme would be required under section 16(5)(c). That analysis is reflected by the Jurisdiction plan under which the County Council appears accepted as the highway authority for the highway over the subsoil, that authority is to be transferred to NH to itself improve the highway, and then NH will transfer the improved highway back to the County to maintain. On that basis, section 16(8) would ordinarily apply but no such section 16(5)(c) order has been sought or made. There is no other provision for a highway authority to *usurp* lawfully the statutory functions of the relevant existing highway authority.
An agreement would not require the transfer of jurisdiction of the highway above the subsoil to NH and then back to the County Council. So far as section 4 is relied on, MK considers that subsections (4)-(5) completely answer any recent *indemnity* 'concerns' raised by NH.

6.2.2.9 Section 18 also falls to be interpreted with Schedule 1 to *require* modifications.

6.3 The legal framework and the errors in NH's approach

6.3.1 MK considers that the NH closing submissions (INQ-91) contain a number of fundamental legal errors and various misstatements of fact that would result, if left uncorrected, to also mislead the Inspector and Secretary of State on the correct legal test. In light of the NH refusal to self-correct its closing submissions at the invitation of Mr Keeling, and the insistence of NH that the Secretary of State see the NH closing submissions, fairness and Article 6 of the ECHR requires that Mr Keeling have the opportunity to reply in law and to also correct misstatements of fact. The misstatements of fact include the inclusion in the closing submissions of asserted 'evidence' presented as if it were evidence of fact given to the Inquiries in the taking of Mr Keeling's land against his will, but which was not given and he did not have the opportunity to test in cross-examination. Instead, such assertions appeared firstly in the closing submissions. This is in breach of Article 6 of the ECHR by NH.

6.3.2 'The compulsory purchase procedure is a determination of the Claimant's civil rights… Article 6 is therefore engaged' (see *Pascoe* judgment at paragraph 92). Article 6 of the ECHR requires that a person whose land is being taken against their will has a right to a fair hearing. The extent of that right encompasses the opportunity to reply in law

and on misstatements of fact (INQ-92).

6.3.3 MK indicates that thus, as NH so 'insisted' orally in closing, he 'insists' that his reply goes before the Secretary of State to ensure he is appraised of the true facts and not led into legal error on the correct legal test in determining whether or not to confirm the taking of Mr Keeling's land against his will. For example, unlike *Pascoe* paragraphs 50 et seq (Ground 2), which is not law, as was held the *Smith* case relied on by NH:

> *'41. … Pascoe's case is not strictly binding upon me. Forbes J's analysis of the issue of proportionality was obiter.*
>
> *43. I am conscious, however, that an alternative view point is clearly arguable. It is for that reason that I proceed on the basis, contrary to my view, that a decision to confirm this compulsory purchase order will not be proportionate unless, on the particular facts of the case, it is the least intrusive measure open to the decision maker.*

6.3.4 Further, in *Secretary of State for Education v Tameside MBC* [1977] AC 1014, the House of Lords held at 1040 – 1042 and 1065:

> *'One assumes that [the Secretary of State] is going to know all the relevant facts, not just that he is going to do his best. He must inform himself of all the relevant facts…*
>
> *The court does not ask, is the Secretary of State acting reasonably (subjectively). If he has not all the relevant facts, his decision, objectively, goes. If his function is, as it is, to have regard to the true facts, evidence was admissible in the Divisional Court to establish what those facts were. …*
>
> *The Secretary of State has a duty to inform himself of all relevant facts, not just to take all reasonable steps to do so…*
>
> *It is not right as a matter of law to say that the court is confined to looking at the material which the Secretary of State himself had, or ought to have had, unless by that one means all the relevant material…'*

6.3.5 MK's 'Reply in Law' is set out here and his reply with respect to what he considers to be 'misstatements of fact' follows towards the end of his case. NH has presented no less than six new cases for the first time in its Closing Submissions. MK indicates, to borrow NH's rhetoric, that revelation of its case is 'extraordinary' for an acquiring authority on whom it is true that the burden of proving its case lies and is in breach of Article 6. NH for the first time in Closing Submissions particularised in paragraphs 45-49 its reliance on section 18(1)(c)(i) of the Highways Act 1980 such that only now has NH disclosed the particular statutory provision upon which it relies for its CPO and SRO, and so the statutory fulcrum on which its Orders rely. Nowhere in its SoR for Making the Order nor in its Statement of Case, nor in any other document than its Closing Submissions is there any actual reference to section 18(1)(c)(i).

This too, by way of further example, is in breach of Article 6 in MK's view.

6.3.6 MK considers that NH has incorrectly analysed the cases it has provided so as to 'present' to the Inspector and Secretary of State as 'law' as to be stated as in those cases but which, on their correct analysis, is not 'the law' as correctly stated in each of those cases when properly read, for example, is obiter or unsupported by the detail of the judgments made. Instead, NH has taken isolated elements of the cases and stitched them together to present the law as being something which it is not. Consequently, MK has had to undertake a more granular analysis of the case law than he would have anticipated. Context is all.

6.3.7 MK indicates that three examples of such legal errors are apposite as examples (only): a) NH asserts that the CPO Guidance 'codifies' the *Prest* case. This is misconceived. Guidance cannot 'codify' law. In fact, the Guidance does not 'codify' the *Prest* case and *Prest* cannot be subverted by the Guidance. *Prest* says what it says and was affirmed by the Supreme Court in the 2012 *Sainsbury's* case. Instead, the CPO Guidance 'fairly reflects' the 'balance' element of the proportionality test (see Pascoe Judgment at paragraph 66(1): '*the policy requirement ….fairly reflects the necessary element of balance required*' ; b) NH in paragraph 163 of its closing submission[287] asserts that section 23 of the *Land Drainage Act 1991* results here to 'prohibit' any person from altering a culvert and that: 'Nothing in the *Highways Act 1980* or the *Land Drainage Act 1991* creates an exception to Section 23 where works are carried out under S.110'. In fact and law that is a highly misleading statement of fact and law by NH because, under section 23 of the *Land Drainage Act 1991*[288]:

> '*1) No person shall — …*
>
> *c) alter a culvert in a manner that would be likely to affect the flow of an ordinary watercourse, without the consent in writing of the drainage board concerned…*
>
> *6) Nothing in this section shall apply — …*
>
> *b) to any works carried out or maintained under or in pursuance of any Act or any order having the force of an Act*.'

6.3.8 MK indicates that, as must be known to NH because it is itself a

[287] Inspector's note-In para 13 of INQ-91 NH confirms that para 163 of its original closing submissions was in error and indicated that that paragraph should be deleted. It has not been included in this Report, therefore.
[288] CD D.8.

highway authority under section 1 of that Act, by section 110[289]:

'*1) Subject to the provisions of this section, a highway authority may divert any part of a watercourse, other than a navigable watercourse, or carry out any other works on any part of a watercourse, including a navigable watercourse, if, in the opinion of that authority, the carrying out of the works is necessary or desirable in connection with —*

a) the construction, improvement or alteration of a highway;

2) Before carrying out any works under this section, the highway authority shall consult every council in whose area the works are to be carried out…

3)…

4) Where works are carried out by a highway authority under this section and any person suffers damage in consequence thereof by the depreciation of any interest in any land to which he is entitled or by reason of the fact that his right of access to a watercourse is extinguished or interfered with, then, unless the works are carried out on land, or in the exercise of rights, acquired compulsorily in the exercise of highway land acquisition powers, that person is entitled to recover from the highway authority compensation under this subsection in respect of the damage…

5) Subject to subsection (7) below, a highway authority who propose to carry out any works under this section shall serve on the owner and the occupier of the land affected a notice stating their intention to carry out those works and describing them and informing him that he may within 28 days after service of the notice on him by notice to the authority object to the proposed works.

6) …

7) Subsections (5) and (6) above do not have effect in relation to works that are to be carried out — …

a) on land that has been acquired by the highway authority in question, either compulsorily or by agreement, in the exercise of highway land acquisition powers, for the purpose of carrying out those works, or

b) in the exercise of rights so acquired by that authority for that purpose.'

6.3.9 MK says it must be self-evident to at least the Inspector and Secretary of State that section 110(1) supplies statutory authority to NH to carry

[289] CD D.1.

out 'any works' to a watercourse.

6.3.10 MK considers it follows that section 23(6) is engaged and, thereby, section 23(1) cannot 'apply' so as to criminalise the carrying out of works by NH to the watercourse on its own land. It further follows that, somewhat surprisingly, NH is misleading the Inspector and Secretary of State in paragraph 163 where it boldly states 'Nothing … creates an exception'. Mr Keeling submits further that NH appears to have made its CPO in legal error if, as appears, it had presumed it could not lawfully rely on section 110(1).

6.3.11 In MK's view, the third legal error (c) is to have asserted in paragraph 34 that: 'the advice given to Mr Moore and the approach underlying it does not properly reflect the law' and footnote 21 'A detailed analysis of the law on least intrusive means is set out in Pascoe …'. In fact and law, properly analysed (as below): i) the NH CPO and SRO are not understood to have been made under the *Town and Country Planning Act 1990*, nor the *Planning Act 2008*, nor to benefit from a grant of planning permission, nor are unobjectionable, nor is 'need' accepted in relation to 'the' scheme as opposed to 'a' scheme, and, in consequence of which, having regard to the obiter (non-law) considerations in the *Pascoe* Judgment paragraph 73: 'in the context of decision making in the planning field', no amount of arm waving by NH and assertions that it desires otherwise can lawfully bring its situation within the scope of 'decision making in the planning field' nor a situation where need for the scheme is accepted by Mr Keeling as the landowner. Consequently, as in *Clays Lane*, the *Samaroo* process and approach applies, and as is succinctly expressed in *Smith, Reilly and Reilly v Secretary of State for Trade and Industry* [2007] EWHC 1013 (Admin) (*Smith*) helpfully provided by NH in its closing and by a Judge who made a legal holding: (Emphasis added)

> '*42. … I stress, however, that the context is all important. In this case the issue of proportionality has to be judged against the background that <u>everyone accepts</u> that an overwhelming case has been made out for compulsory acquisition of the sites for the stated objectives and that compulsory purchase is justified…*
>
> *43. I am conscious, … that an alternative view point is clearly arguable. It is for that reason that I proceed on the basis, contrary to my view, that a decision to confirm this compulsory purchase order <u>will not be proportionate unless</u>, on the particular facts of the case, <u>it is the least intrusive measure open</u> to the decision maker.*'

6.3.12 Here, MK says, section 110 remains 'open' to the decision maker NH and it is not disempowered in any way from relying on that section, even if it follows certain procedures if it chooses to execute works on land not in its ownership.

6.3.13 MK indicates as that Learned Judge went on to also hold:

> *'50. All that said, I do not find that the defendant's decision to confirm the order was unjustified or disproportionate. In my judgment, it was the least intrusive measure available to him. Realistically, the only way of ensuring that a substantial proportion of the order lands (which included the sites) was under the control of the LDA by mid-2007 was to make the order. No other measure, in my judgment would have achieved that objective.'*

6.3.14 MK replies that NH has addressed the fundamentally wrong legal test in its CPO and SRO, both before they were made and after it. Samaroo applies. See below.

6.3.15 **Tesco**[290]

6.3.15.1 MK indicates that at paragraph 4.4.18 and footnote 30, NH relies on the case in the High Court of *Tesco Stores Limited v Secretary of State for the Environment, Transport and the Regions* (2000) 80 P&CR 427 ('*Tesco*') that related to the *Town and Country Planning Act 1990* ('TCPA 1990') and predated the coming into force of the *Human Rights Act 1998* (HRA). This is a surprising case for NH to rely upon given the very different statutory framework today because Mr Keeling understands NH to have made its orders under the *Highways Act 1980* and not under the TCPA 1990. In addition, the CPO Guidance provides particular guidance for TCPA 1990 CPOs that is not the same as for *Highways Act 1980* CPOs. It is surprising also because the facts are very different to the current Inquiries under the *Highways Act 1980*.

6.3.15.2 NH then elides *Tesco* with the ECHR context. But *Tesco* predated the HRA.

6.3.15.3 In relation to the *Tesco* case, the instant matter is Inquiries into the taking of land by NH against the will of MK under the *Highways Act 1980*. NH has not suggested that it is taking land under the TCPA 1990 and has made no agreement under that Act to use section 246 powers of compulsory purchase of the local planning authority.

6.3.15.4 The *Tesco* case concerned the acquisition of land in High Wycombe comprised of a food store for 'the purpose of carrying out a substantial redevelopment of the Western sector of the town centre'. [428]

6.3.15.5 There was an inquiry at which Tesco objected. The Inspector evaluated that there was a compelling case in the public interest. The CPO was

[290] INQ-91.4

recommended to be confirmed with minor modifications. [428]

6.3.15.6 The Inquiry pre-dated the coming into force of the HRA later in that year and so predated the binding nature of that statute. [429]

6.3.15.7 MK indicates in that legally different and particular factual context, the Inspector considered 'the possibility of an alternative redevelopment scheme'. [429]

6.3.15.8 There were three Grounds. The first ground was: [429] (Emphasis added)

> *'In a nutshell, it is submitted that the Inspector focused upon the public interest but did not place Tesco's private property interest in the balance. That interest made it particularly necessary to consider whether an alternative redevelopment scheme <u>could</u> be devised which would enable Tesco to remain in the town centre, either in its existing store, remodelled/refurbished as necessary; or in a replacement Category 3 Store (that is to say a store of around 54,450 square foot gross, by comparison with the current store, which is 101,050 square foot gross) incorporated in a revised form of redevelopment.'*

6.3.15.9 The second ground was: [429]

> *'It is submitted that there was evidence to support the proposition that a smaller number of unit shops, together with a Category 3 Tesco store, would produce a financially viable scheme and the Inspector has either ignored or failed to give adequate reasons for rejecting that evidence.'*

6.3.15.10 The third ground was: [429]

> **'***The Inspector said this in the final sentence of paragraph 4.254:*
>
> *'I believe that reappraisal to assess whether a viable scheme could be modelled with a Category 3 store for Tesco, even with the company's expressed flexibility, would not result in any fundamental change in conclusion or in the composition of the scheme.'*
>
> *It is submitted that it is unclear whether the Inspector was merely concluding that the Council would not change its view if there was a reappraisal, in which case the Inspector was sidestepping the need to form his own view of whether a reappraisal would be appropriate, or, if the Inspector was expressing his own view of the likely outcome of any reappraisal he has not given sufficient reasons for his conclusion*

that such a reappraisal 'would not result in any fundamental change in the conclusion or the composition of the scheme.'

6.3.15.11 On ground one, the Court held this at [432]:

'Mr Purchas submits that the Inspector is here focusing on the public interest, he is not placing Tesco's private property interests as a landowner into the balance…'

6.3.15.12 The Court rejected the submission of Mr Purchas and held:

'Given the way that Tesco had presented its case, its own commercial interest was subsumed within the wider public interest and was, therefore, considered by the Inspector…

Thus, the only specific matter which was advanced on behalf of Tesco which was not subsumed within its case as presented in terms of the wider public interest was dealt with by the Inspector. For these reasons, the first ground of challenge is not made out; the Inspector was fairly responding to the manner in which Tesco had put its objection…'

6.3.15.13 On grounds 2 and 3, the Court set out particular facts and held that 'the Inspector was entitled to conclude':

'1. The redevelopment of the Western Sector, which was described as appearing "harsh and dated" with "unused land a wasted asset", was desirable in planning terms. (Paragraph 4.228)

2. It was essential that High Wycombe should seek to increase its profile and offer as a shopping destination. (Paragraph 4.231)

3. None of the objectors had opposed the principle of a department store.

4. Whilst "a smaller scheme without a department store might go a long way to stemming further out flow … it would not provide a strong enough catalyst for maintaining the comparative standing of the town." (Paragraph 4.231)

Thus, the key question before the Inspector which was addressed in detail by both Tesco's and the Council's evidence was whether a Tesco store could be retained in a redevelopment scheme which included a department store. I refer to "a Tesco store" rather than "the Tesco store" because two possibilities were canvassed by Tesco:

1. To retain the existing store with such relatively minor modifications as might be necessary in order to build a revised redevelopment scheme around it.

2. To demolish the existing store but to incorporate a new Category 3 Tesco store into a revised redevelopment…

Having considered that evidence it is plain that the Inspector (in paragraph 4.253) has, for the reasons which had been advanced by the Council, rejected Tesco's contention that a modified existing store could be incorporated into the MAB scheme.'

6.3.15.14 With the foregoing facts set out, the Court then considered ground 2 first by setting out Counsel's submissions:

'Mr Purchas has pointed out that the House of Fraser letter was in error in referring to the department store square footage as being 40,000 sq ft; that related simply to the ground floor of the department store in the Spen Hill proposal.

That error was pointed out in forceful terms during the course of submissions before the Inspector…

The Spen Hill proposal was the only illustrative suggestion which was put before the Inspector as to how a new Category 3 Tesco store might be incorporated into a revised redevelopment…

Mr Purchas submitted that the Inspector had been in error in paragraph 4.231 in saying:

"There is nothing to suggest that a smaller number of unit shops in conjunction with the existing mass of the Octagon centre would be financially viable."

Mr Chase had advanced just such a suggestion.'

6.3.15.15 The Court rejected ground 2 as follows:

'In my judgment, ground two is founded on an unduly literal reading of the words "there is nothing to suggest".

… Having considered those rival contentions, the Inspector was entitled to accept the Council's case that a critical mass of around 35 units was required in order to attract a department store. Apart from general assertion Mr Chase sought to support his evidence in relation to the financial viability of a proposal containing a smaller number of units solely by reference to the Spen Hill proposal…

It is plain from the passages which I have cited above that the Inspector did have the Spen Hill proposal well in mind. Having considered that proposal, since it was the only illustration of how a new Category 3 Tesco store might be incorporated in a revised redevelopment, the Inspector was entitled to conclude if he rejected Spen Hill that there was indeed nothing (of substance) to suggest "that a smaller number of unit shops in conjunction with the existing mass of the Octagon Centre would be financially viable."..

Mr Chase's proposition, insofar as it was relied upon, that the Spen Hill proposal produced a positive site value, was not a point of any substance if that proposal, even considered upon an illustrative basis, was flawed, as contended by the Council and accepted by the Inspector.'

6.3.15.16 The Court considered ground 3: (Emphasis added)

'*In my view it is plain that the Inspector was expressing his own view as to the likely results of any reappraisal. It might be argued that, in principle, any reappraisal may offer the prospect that some additional information may be forthcoming. It was for the Inspector, having heard 11 days of evidence and submission in relation to the Tesco objection, to decide whether such a prospect was a realistic one. He considered the question on the most favourable basis to Tesco. That is to say that the company's "expressed flexibility" could be relied upon.*

The Council had argued that Tesco had been inflexible in its requirements during the negotiations to which the Inspector referred in his report. Tesco had argued to the contrary. The Inspector found it unnecessary to resolve those arguments because he concluded that "even with the company's expressed flexibility", reappraisal would not produce a different conclusion; that is to say that a new Category 3 Tesco store could be accommodated together with a department store.

The Inspector's reasoning is perfectly intelligible. … Standing back for a moment, it is not surprising that the Inspector reached the conclusion that reappraisal would serve no useful purpose…

It is perfectly true that the burden in a Compulsory Purchase Order inquiry lies on the acquiring authority to demonstrate a compelling case in the public interest. The Council supported by, inter alia, the letters from House of Fraser and BHS, to which I have referred, had explained why in its view a new Category 3 store could not be satisfactorily accommodated together with a department store.

Once the Spen Hill proposal had been rejected, in the absence of any other illustration of that possibility, the Inspector was entitled to conclude, in the light of the mass of information which was available to him, that reappraisal would serve no useful purpose. The parties had said all that could usefully be said upon the topic…

*It follows that ground three is not made out and that this application, together with the application in respect of the Stopping Up order, must be dismissed***.'**

6.3.15.17 MK considers that it is clear from the above that ground 3 concerned a 'reappraisal' of a situation and that the incoming store owner had evidenced that the 'illustrated' proposal by Tesco 'could not' be accommodated together with the department store.

6.3.15.18 It is also clear that the reference to 'realistically' and to the prospect of 'realistic' is equivalent to the threshold of 'could'.

6.3.15.19 It is further clear that, Sullivan J. (who was later elevated to Lord Justice Sullivan, a renowned Planning Court Lord Justice of Appeal) was affirming the *Prest* case that determined that the 'onus' of showing its justification for a compulsory acquisition lies 'squarely' on the acquiring authority when Sullivan J. ajudged:

> *'It is perfectly true that the burden in a Compulsory Purchase Order inquiry lies on the acquiring authority to demonstrate a compelling case in the public interest.'*

And this is in contrast with *de Rothschild* in which that Court was considering whether the burden lay on the acquiring authority and/or the confirming Secretary of State in a High Court challenge (as opposed to a prior public Inquiry hearing). In *de Rothschild*, that Court held that that 'onus' did not lie on those parties and that that 'onus' was not a 'special rule' for CPO cases before the High Court.

6.3.15.20 Therefore, MK considers that, so far as of relevance, and it is relevant to the 'could' test, to the relevant threshold of 'could', and to the allocation of the burden of proof at an Inquiry hearing (as opposed to in a High Court hearing), the *Tesco* case provided by NH helpfully supports Mr Keeling's Objection that the onus of showing the justification for taking his land against his will remains 'squarely' on NH and he need do nothing.

6.3.16 **Pascoe**[291]

6.3.16.1 NH relies on *Pascoe* in its submissions at paragraphs: 4.4.20 above ('no special rule') and footnote 33; 4.4.25 (in the context of 4.4.23 as to the test of 'reasonably necessary but not obligatory'); and footnote 35.

6.3.16.2 MK indicates that in essence, NH asserts that the current CPO and SRO must be tested by reference to a 'reasonably necessary' test (and in the sense that 'reasonably' necessary means 'Wednesbury' reasonable in the sense that if NH decides that something is the case, then it follows that it must be 'Wednesbury' reasonable and so the test of 'reasonably'

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necessary is automatically satisfied).

6.3.16.3 MK has submitted from the outset of his objection that NH has not applied the correct test. The correct test is as articulated by *Smith* at 43:

> *'43. … a decision to confirm this compulsory purchase order will not be proportionate unless, on the particular facts of the case, it is the least intrusive measure open to the decision maker.'*

6.3.16.4 In this context, and context remains 'all', 'least intrusive' does not mean 'literally' the *absolute* minimum but means a *lesser* intrusive means as expressed by the Court of Appeal in *Samaroo*:

> *'61. In his judgment in Samaroo's case [2001] UKHRR 1150, paras 19–20, Dyson LJ put the matter in this way:*
>
> *"19. … in deciding what proportionality requires in any particular case, the issue will have to be considered in two distinct stages. At the first stage, the question is: can the objective of the measure be achieved by means which are less interfering of an individual's rights?*
>
> *"20. At the second stage, it is assumed that the means employed to achieve the legitimate aim are necessary in the sense that they are the least intrusive of Convention rights that can be devised in order to achieve the aim. The question at this stage of the consideration is: does the measure have an excessive or disproportionate effect on the interests of affected persons?"'*

6.3.16.5 That is, 'least' intrusive means the less intrusive of a range.

6.3.16.6 Hence, in *Pascoe*, it was submitted that 'the legitimate aim could be achieved by less intrusive means' [paragraph 64 and 65].

6.3.16.7 MK considers that the *Pascoe* case is also of relevance to the instant Inquiries because it provides legal analysis of the correct approach to evidence required to support a CPO per se and without which a CPO must fail (in that case) if there is a gap in necessary evidence. By way of example, there is a gap in the NH evidence because it shows only as white and of unknown content an area of Mr Keeling's land on the Draft General Arrangement Plans. Mr Keeling submits it is not possible to know what is to go on that land because it is white and, thereby, unjustified.

6.3.16.8 The case of *Pascoe v First Secretary of State* [2007] 1 WLR 885 concerned the compulsory acquisition of land by the Urban Regeneration Agency (URA) under section 158 of the *Leasehold Reform,*

Housing and Urban Development Act 1993 (1993 Act) to take the land of Ms Pascoe – her terraced home – as part of many other terraced homes in Edge Lane, Liverpool, also within the red line area of the CPO for the purposes of enabling the construction of a new highway into Liverpool.

6.3.16.9 MK says importantly in the *Pascoe* case:

a) Unlike the existing current position of fact before a CPO or an SRO is confirmed, in *Pascoe*, the geographical area of the CPO Order land actually benefited from planning permission *before* the matter came to be evaluated in front of the Inspector and Secretary of State. Thus, in paragraph 24, internal paragraph 431 of the *Pascoe* judgment, the Learned Judge recorded the inspector recording:

> *'24. …*
> *431. … The highway corridor works benefit from detailed planning permission. The wider regeneration scheme has outline planning permission'.*

Self-evidently, the demolition and replacement of the existing houses 'required planning permission' under section 57(1) of the TCPA 1990 because that was 'development' within section 55(1) and (1A)(a). In that case, the actual grant of planning permissions before the CPO was made meant that the public interest in that *development* (that required planning permission) had already been established by that actual grant and so too did the planning permissions evidence that the 'requirement' under section 57(1) for the development under the TCPA 1990 to be permitted had been in fact established by those same grants;

b) the same geographical land area as the outline planning permission within the same area as the proposed Order included numerous individual HM Land Registry freehold land parcels on which stood discrete homes within a number of terraces each comprised of discrete land titles. The home of Ms Pascoe was one of those terraced homes and titles. [paragraphs 8-9]. However, in order to engender the *power* to make the Order, URA, and in order to have the power to confirm the Order, the Secretary of State, had to first satisfy – by shown facts - the statutory criteria of section 159(2)(a)-(c) [see paragraphs 13, 36 and 40-41]. The URA relied on (b) [paragraph 36]. The URA had garnered *some* evidence in relation to *some* but not all of the individual land parcels inside the geographical area of the Order land but it was not *possible* for URA to 'say what proportion of the Order land consists of non-qualifying land' within section 159(2)(b).

[paragraphs 24; and 45]

'24. .. [I]t is necessary to quote a significant amount of the inspector's conclusions:

…

"430. Paragraph 17 of Part 1 of Circular 06/2004 reiterates the long established principle that a CPO should only be made where there is a compelling case in the public interest. Paragraph 19 further indicates that land should only be taken compulsorily where there is clear evidence that the public benefit will outweigh the private loss, the Human Rights Act 1998 (HRA) reinforcing this basic requirement. I (must) therefore come to an overall conclusion as to whether a compelling case in the public interest for confirmation has been established…

431. The order is promoted to secure area-wide regeneration. The regeneration scheme comprises two interlinked elements: highway corridor improvements to Edge Lane West, which are part of a wider strategy for such improvements over the entire length of Edge Lane; and transformational redevelopment, with residential and commercial components flanking the highway improvements. The highway corridor works benefit from detailed planning permission. The wider regeneration scheme has outline planning permission.

432. The details that are likely to come forward within the scheme would include the provision of residential accommodation of varying types, commercial, retail and community uses, and public spaces aimed at fostering a sustainable community. The highway corridor improvements aim to enhance environmental quality and safety for the benefit of all. They include the provision of a tree-lined boulevard 'gateway' entrance to the city centre, with wider traffic lanes and footways, in order to ease traffic congestion, improve parking and reduce pedestrian severance to the north and south created by the existing road.

433. Whilst many plots of land and individual properties are already in public sector ownership, or have already been acquired by agreement, there are others which have not. These are in differing ownerships, some of it in investment property let to short-term tenants. It is unlikely that all interests could be acquired by private treaty. The land and property is required to enable the

comprehensive regeneration scheme to progress within a reasonable timescale…

26. …

452. There is little dispute that the area generally is in need of regeneration. Clearly there is disagreement that certain properties need to be acquired and demolished to effect regeneration. Likewise, there is disagreement with the generality of the currently proposed scheme to bring this about on an area-wide basis. In securing regeneration it is a question not so much as whether it should be done but the methods by which it should be achieved and, in particular, whether it is necessary to acquire the amount of land/property that is proposed.

453. The basis on which it is claimed that regeneration is necessary is set out in paras 435 and 437 above. It is established that the order land is predominantly under-used or ineffectively used urban land. One element underpinning this is the claim of housing market failure within the order land. EP's evidence is that the area was suffering housing market failure before any regeneration scheme was agreed."

459. I was able to see externally all the order land properties on my site visits but in the absence of specific evidence on their individual condition I made no attempt to form a judgment on this. It is not therefore possible to say what proportion of properties within the order land fall into any of the mentioned categories [of section 159(2)(a)-(c)]. That said, it is clearly apparent that some properties are in need of physical attention of one sort or another and that the numbers of vacant and boarded properties inevitably lend an air of neglect and unsightliness. As already mentioned in para 438 above, there has been no challenge to the categorisation of properties as vacant, unused, derelict, neglected or unsightly. On the other hand, in the absence of detailed evidence from EP of the condition of properties within the order land, I do not consider that it can be claimed that the properties there can be classified as necessarily obsolete. As I saw on my formal site visit, there are properties providing appropriate and acceptable living accommodation…

27. Having completed his consideration of the matters specified in para 14 of Appendix C to the Circular (which included a consideration of alternative proposals: see IR paras 462 to 471), the inspector dealt with various other matters such as "Equality of Arms" (IR, paras 493 and 494) and the effect on Human Rights (IR, paras 495 to 497), before coming to his overall conclusions, which he expressed in the following terms:

Overall conclusions

The order has been made using the correct powers under the 1993 Act. The order land is predominantly under-used or ineffectively used. It is partly characterised also by vacant, unused, derelict, neglected and unsightly land. There is general agreement that its regeneration is necessary to address problems within the area. Whilst there is no evidential basis pointing to the number of properties within the order land which are unfit, in substantial disrepair or non-decent, this does not deflect from the findings within the NRA for Kensington that these problems manifest themselves within this wider area.'

6.3.16.10 So, MK says, it can be seen in *Pascoe* that the acquiring authority URA, upon whom the 'onus squarely' lay at the Inquiry to itself justify its CPO, had not in fact 'shown' evidence that each of the terraced houses situated on each of the discrete land parcels upon which each discrete house in each terrace was situated; and, having not shown in fact that each and every discrete such house (and so, each discrete land parcel within the red line area of the made Order land area) within each discrete land parcel satisfied the particular criteria of section 159(2)(a)-(c); in order to seek to bridge that gap in evidence, the URA asserted that it was enough that the 'predominant' number of discrete parcels qualified within section 159(1)(b), even though, in fact some land parcels and the individual terrace home on such individual land parcel of those, did not satisfy the section relied on by the URA.

6.3.16.11 Consequently, the URA asserted (in the face of incomplete evidence) to the Inspector that the Order area land was 'predominantly' under-used or ineffectively used and that it was in law enough to show 'predominant' and not all of the land titles so qualified. (It will be seen that that assertion and interpretation of the statute was in error and resulted in the CPO being quashed).

6.3.16.12 The Court also noted, at paragraph 27, internal paragraphs 502-503, that the scheme otherwise accorded with national, regional and local planning and regeneration policy.

6.3.16.13 The Inspector having so reported, the Court recorded the Secretary of State as agreeing with the Inspector's conclusion and that the former agreed that the 'Order land is predominantly under-used or ineffectively used and is partly characterised by vacant, unused, derelict, neglected and unsightly land'. [paragraph 28].

6.3.16.14 So, in MK's view, it can be seen from the above references to paragraphs in that case that the Secretary of State also relied (and agreed) on the use of the asserted 'predominantly' to seek to cover the gap in evidence of fact resulting in some of the discrete land parcels and the homes standing on such parcels as not in fact satisfying the section 159(2)(b) criteria, and in particular, that the acquiring authority had not 'shown' those discrete homes as also qualifying inside of the section. The onus remaining 'squarely' on the URA as the acquiring authority.

6.3.16.15 Further, the sole dispute between the parties related, therefore, to whether there was a gap in evidence required to first satisfy section 159(2)(b) resulting from the absence of facts shown by the URA about each of the certain properties in particular terraces inside of the Order land.

6.3.16.16 The Court then looked at the question of 'predominantly', therefore, and whether the use of that subjective adjective (predominantly) was enough to cover the gap in the evidence of fact so that section 159(2)(b) could be shown by the URA as to be satisfied. [See paragraphs 36-38]. In particular, the acquiring authority asserted that section 159(2)(b) could be, and here was considered by the Inspector to be satisfied by evaluating the Order 'land as a whole' [paragraph 36] and that the numbers of individual properties were agreed at paragraph 37: 178 properties were considered to be vacant and unused; 270 neglected; and 277 unsightly and over 160 were derelict and that was 'unchallenged'; and so (it was contended by the URA), it was enough for the Inspector to be satisfied of the 'general contention that the Order land is under-used or ineffectively used'.

6.3.16.17 But, as Ms Pascoe noted, at paragraph 38, in fact the Inspector did not draw a conclusion that 'as a whole' the Order land was under-used and/or ineffectively used – 'rather his conclusion was that it was predominantly so' with the result that the inspector had 'watered down the statutory test' of section 159(2)(b). [See paragraph 38].

6.3.16.18 The Learned Judge then said this: (Emphasis added)

> *'39. <u>I have given this aspect of the matter much anxious thought</u>. I am very aware that the inspector's report and the Secretary of State's decision letter must be read as a whole, in a reasonably flexible manner and without applying the exacting and precise*

standards that are applied to a contract or a statute. I am also very conscious of the point made so forcefully by Mr Cameron, namely that the inspector clearly understood and recorded the agency's case correctly (which does not contain any "impermissible watering down") and gave no indication or sign at any stage of having any intention of departing from that case. Nevertheless, I find myself driven to the conclusion that both the inspector and the Secretary of State fell into error in the manner submitted by Mr McCracken on this aspect of the first ground of challenge.'

6.3.16.19 He then said this: (Emphasis added)

'40. In para 440 of the inspector's report the crucial sentence is as follows,

"However, there is sufficient evidence to support the view that the order land falls predominantly within the defined categories and (emphasis added) that it is under-used or ineffectively used".

I accept that it is arguable that the word "and" in that sentence is disjunctive and that it is then followed by a finding of fact that the order land is under-used or ineffectively used. However, in my view, the sentence can also be read as meaning that the order land is under-used or ineffectively used to the extent that it falls predominantly within all three defined "categories". In my view, it would be consistent with this latter interpretation to go on to describe the order land subsequently as "predominantly under-used or ineffectively used", which is precisely the expression used by the inspector in paras 453 and 501 of his report and by the Secretary of State in para 8 of his decision letter (as to which, see below).'

6.3.16.20 The Learned Judge then held: (Emphasis added)

'41. As it seems to me, para 453 of the inspector's report is perfectly clear. In that paragraph the inspector states unequivocally

"It is established that the order land is predominantly under-used or ineffectively used urban land."

In my judgment, the inspector made a clear statement in that paragraph as to what he considered had been established by the evidence, namely that the order land was "predominantly under-used or ineffectively used urban land". I agree with Mr McCracken that such a finding does not accord with the statutory requirements of section 159(2)(b) of the 1993 Act (i e the section relied on as empowering the agency to compulsorily acquire the land in question), namely that the land is "under-used or ineffectively used". I agree with Mr McCracken that the inspector's finding involves an

impermissible watering down of that statutory requirement.'

6.3.16.21 So the Learned Judge agreed and ajudged that, notwithstanding compliance with a range of policies, the absence of facts required to be shown by the acquiring authority resulted to preclude it, in law, from relying on section 159(2)(b), and because that section must have been satisfied on evidence of fact and in relation to each and every part of the discrete land parcels of each and every terraced home in the Order land. Therefore, the Inspector had erred in law, and so too had the Secretary of State, all in reliance of the original submissions of the acquiring authority, there, the URA, which had originally contended, at the Inquiry [see paragraph 36: '*the Agency sought to rely on section 159(20(b) …*', notwithstanding '*the absence of specific evidence*' [paragraph 26, internal paragraph 459], and that this was judged to be '*an impermissible watering down of the statutory test*' [paragraphs 38-39].

6.3.16.22 Further, the absence of evidence shown by the acquiring authority in that case as to the actual physical condition of the *individua*l land titles of each property and the condition of the internal parts of each home situated on each of those, resulted to preclude the acquiring authority, the Inspector, and the Secretary of State from being in a position to know what proportion of the Order lands did not qualify within section 159(20(b): (Emphasis added)

'45. Finally, in the alternative, Mr Maurici contended that if (contrary to his primary submissions) the Secretary of State has decided that the order land is predominantly under or ineffectively used (as, in my view, he has), then it follows that the Secretary of State has also accepted that some of the order land is not under or ineffectively used (i e that some of the order land falls outside the terms of section 159(2)(b) : for convenience, hereafter referred to as 'the non-qualifying land'). It is important to note that neither the inspector nor the Secretary of State was able to indicate what proportion of properties within the order land fell into any of the specified descriptions (see IR, para 459). As it seems to me, it is therefore not possible to say what proportion of the order land consists of non-qualifying land.'

6.3.16.23 This absence of evidence that URA had failed to adduce to show that its Order was lawfully justified on actual evidence had the further result that the Order fell to be quashed: (Emphasis added)

'46. So far as concerns the non-qualifying land, Mr Maurici referred to and sought to rely on sections 160(1)(a), 160(4) and 162(1) of the 1993 Act and submitted that, since the non-qualifying land was required as part of the order land for the purpose of the agency achieving its objects or for purposes incidental to that

purpose, section 160(4) and section 162(1) empowered the agency to acquire the non-qualifying land compulsorily, on being authorised to do so by the Secretary of State, notwithstanding that it did not come within the terms of section 159(1) . Mr Maurici submitted that by having recourse to section 160(4) in respect of the non-qualifying land the Secretary of State's overall decision-making could be rendered lawful and the confirmation of the order would thus be valid. He therefore submitted that, since the otherwise ultra vires decision-making could be rendered lawful in this straightforward way, I should exercise my discretion against making a quashing order. In my view, to take such a course would be exceptional: see Berkeley v Secretary of State for the Environment [2001] 2 AC 603, 616, per Lord Hoffmann.'

6.3.16.24 The Court quashed the whole Order:

'47. However, as Mr McCracken pointed out, the agency had made it perfectly clear, in both opening and closing its case at the inquiry, that its case was that the objects of the agency would be furthered by the compulsory acquisition of the order land because the whole of it came within the description specified in section 159(2)(b) .
He submitted, correctly, in my view, that it would be wrong for me to uphold the order on what would be, in effect, a different basis (i e that part of the order land came within the description specified in section 159(2)(b) and that the balance, including the claimant's property, could be acquired under section 160(4)) because such an approach (i) would involve a degree of usurpation of the function of the specialist decision maker and, more importantly, in my view, (ii) would deprive the claimant and other objectors of the opportunity to challenge the new basis for the agency's intervention and to present evidence upon it.

48. Given the nature and condition of the claimant's property and its location at the very edge of the order land, it seems to me that a successful challenge to the argument that its compulsory acquisition was for the purpose of achieving the agency's objects or for purposes incidental to that purpose cannot be dismissed as fanciful, particularly if its immediate neighbourhood also consists of land that is not unused or ineffectively used. It is important to bear in mind that, in this context, the claimant's land (and possibly some of the neighbouring land) does not itself form part of an area (i e the order land) that has been found to be under-used or ineffectively used.'

6.3.16.25 The Court quashed the Order confirmed by the Secretary of State as follows (Emphasis added):

'49. For those reasons I prefer Mr McCracken's submissions on this aspect of the matter and I reject the arguments put forward by both Mr Maurici and Mr Cameron. In my view, the error made by the Secretary

of State in confirming the order in respect of order land that had only been found to be " predominantly under-used or ineffectively used" cannot properly be remedied by recourse to section 160(4) of the 1993 Act. It therefore follows that, for the foregoing reasons, this first ground of challenge succeeds.'

6.3.16.26 That is, the Order was confirmed on the basis of a gap in the evidence shown by the acquiring authority with the result the Inspector had acted on no evidence (as in, pure public law irrational), and recommended the Secretary of State do the same, and he did, all in reliance of the original contention of the acquiring authority that erred in law in respect of its interpretation of what it was required to show.

6.3.16.27 MK considers that so too in the current case, NH has a number of gaps in the evidence that it is required to show in support of its taking of MK's land. For example, the absence of evidence of land ownership and of sequential search evidence for the Secretary of State and also gaps in its FRA evidence; and also gaps in its landscape and highways design; and in its consideration of less intrusive means. Those gaps remain fatal to its CPO.

6.3.16.28 (In *Pascoe*, Ms Pascoe was represented at the public inquiry by Mr Zwart who also appears on behalf of MK. See paragraph 109, internal paragraph 63.9 of the Judgment that refers to him: 'Mr Zwart [the claimant's pro bono inspector]' [sic]. Thus, Mr Zwart is not unfamiliar with the territory being trodden by NH today).

6.3.17 **The correct legal test in circumstances where there is an actual pre-existing grant of planning permission in relation to the same area of land over which a CPO is *subsequently* sought**

6.3.17.1 As NH has made clear in its Closing Submissions, it exclusively relies on a legal test of 'reasonably necessary' by which to sustain its justification for a CPO and an SRO.

6.3.17.2 NH asserts in its Closing Submissions at, for example, paragraph 23 that:

'23. The compelling case test means that compulsory purchase powers should be exercised only if "necessary". However, it is clear from the cases that this means "reasonably" necessary, rather than "strictly" or "absolutely" necessary (see further below in the context of least intrusive means).'

6.3.17.3 MK submits that this is a misstatement of the law of CPO, fundamentally misconceived and the Secretary of State is invited to not be led into error by NH because the legal position is not as stated and is

more sophisticated.

6.3.17.4 NH boldly asserts that 'necessary' means, in all CPO cases, *'reasonably necessary', rather than 'strictly' or 'absolutely' necessary (see further below in the context of least intrusive means).* NH's contention is fundamentally misconceived. One only has to point to *Smith* at paragraph 43 in which a confirmed CPO was subject to challenge and being legally tested by the Court that held:

> *'43. … a decision to confirm this compulsory purchase order will not be proportionate unless, on the particular facts of the case, it is the least intrusive measure open to the decision maker.'*

MK considers this judgment shows that NH's contention flies in the face of its own case provided in its own closing submissions. It follows that NH is misleading the Inspector and Secretary of State to state that 'the cases' are clear that 'necessary' means (exclusively) 'reasonably' necessary. In fact and law, the cases clearly show the opposite and that each case must be individually evaluated on its facts and in its legal context. That is what MK has done but is not what NH has done. As was said in *Smith* (and what has not been analysed by NH at all) 'context is all important'. In particular, the instant case is on no view able to qualify as a decision in the planning field because it is a decision in the *Highways Act 1980* field and highways development is excluded by statute from qualifying as development by section 55(2) of the TCPA 1990; and NH has in fact and law no permitted development rights at this time. See Mr Keeling's Statement of Case and Response documents where that remains set out.

6.3.17.5 Returning to Pascoe and what was said (not held) in that case, because the Court had upheld the claim on Ground 1, strictly, Ground 2 was not necessary and is not binding law, being instead, merely *obiter dicta,* and as was recognised in *Smith* at paragraph 41.

6.3.17.6 Thus, in *Pascoe* the Learned Judge said this:

> *'54. I accept Mr McCracken's submission that if (as I have held to be the case) the Secretary of State did err in confirming the order for the reasons given above when dealing with the first ground of challenge, it follows that the interference in question is not in accordance with the law, is therefore not justified and constitutes a breach of section 6(1) of the Human Rights Act 1998 . Thus, in consequence of my conclusion on the first ground of challenge, this second ground of challenge must also succeed on that basis in any event. Accordingly, in the paragraphs that follow I propose to set out my analysis and conclusions on this second ground of challenge on the assumed basis that I was wrong to uphold the first ground of challenge for the reasons that I did.'*

6.3.17.7 In that context and on the *assumed* basis described by the Learned Judge, it will be recalled that outline and detailed planning permission had already been granted.

6.3.17.8 The assumed claim by the Claimant was that the Inspector and Secretary of State had not set out in a structured – or *'formulaic'* – manner their evaluation in their report and decision letter the requirements of Articles 8 and 1 of the First Protocol.

6.3.17.9 Hence, the Learned Judge said this: (Emphasis added)

> *'58. Mr McCracken submitted further that for an interference to be "necessary in a democratic society", the interference must be proportionate to the aim pursued. It was Mr McCracken's submission that the word "necessary" in the context of article 8 does not have the flexibility of meaning of such expressions as "useful", "reasonable" or "desirable", but implies the existence of a "pressing social need" for the interference in question: see Dudgeon v United Kingdom (1981) 4 EHRR 149.*
>
> *59. In support of that submission, Mr McCracken referred to and relied on R (Daly) v Secretary of State for the Home Department [2001] 2 AC 532, Samaroo v Secretary of State for the Home Department [2001] UKHRR 1150 and R (Baker) v First Secretary of State [2003] EWHC 2511 (Admin).'*

6.3.17.10 The Learned Judge then set out the Claimant's 'formulaic' approach as follows: (Emphasis added)

> *'60. In the course of his speech in Daly's application [2001] 2 AC 532, para 27, Lord Steyn said:*
>
> *"The contours of the principle of proportionality are familiar. In de Freitas v Permanent Secretary of Ministry of Agriculture, Fisheries, Lands and Housing [1999] 1 AC 69 the Privy Council adopted a three-stage test. Lord Clyde observed, at p 80, that in determining whether a limitation (by an act, rule or decision) is arbitrary or excessive the court should ask itself: 'whether:*
>
> *(i) the legislative objective is sufficiently important to justify limiting a fundamental right;*
>
> *(ii) the measures designed to meet the legislative objective are rationally connected to it; and*
>
> *(iii) the means used to impair the right or freedom are no more than is necessary to accomplish the objective.'"*
>
> *61. In his judgment in Samaroo's case [2001] UKHRR 1150, paras 19–20, Dyson LJ put the matter in this way:*
>
> *"19. … in deciding what proportionality requires in any particular*

case, the issue will have to be considered in two distinct stages. At the first stage, the question is: can the objective of the measure be achieved by means which are less interfering of an individual's rights?

"20. At the second stage, it is assumed that the means employed to achieve the legitimate aim are necessary in the sense that they are the least intrusive of Convention rights that can be devised in order to achieve the aim. The question at this stage of the consideration is: does the measure have an excessive or disproportionate effect on the interests of affected persons?".'

6.3.17.11 So, in MK's view, what the Court is here spelling out is that the House of Lords and Court of Appeal held that certain rights cannot be impaired ascertaining whether ('can') the impairment be achieved by means which are 'less interfering' and that at the second stage, the evaluation of 'proportionality' assumes that less interfering means *is* the means and it is tested for excess. That is the two stage '*Samaroo* process'.

6.3.17.12 The Court went on to record this: (Emphasis added)

'62. Mr McCracken submitted that Dyson LJ's formulation in Samaroo's case was clearly consistent with the principle enunciated by Lord Steyn in Daly's application and had been expressly followed by Nicholas Blake QC, sitting as a deputy High Court judge, in Baker's application [2003] EWHC 2511 (Admin) . On the issue of proportionality, Nicholas Blake QC posed the question, at paras 43 and 45:

"43. … was it the only alternative, or, to adopt the words of d. Samaroo's application, was it the least intrusive means of securing the public interest?"

"45. That consideration has to be reflected in the decision-making process. Proportionality is not simply whether at the end result the balance is fair, but whether, in getting there, it has been decided that the most appropriate course of conduct is also the least interfering with human rights, having regard to the public benefit to be achieved and the different means of achieving it."'

6.3.17.13 It will be recalled that the *Baker* case was referred to in the *Clays Lane* case in which the Court of Appeal considered the case law on '*least intrusive means*' in the category of cases relating to '*naked property deprivation'* (at paragraph 24 and *Baker* at paragraph 17) as opposed to the category of cases relating to an '*unobjectionable*' decision compelling transfer of property (in the *Clays Lane* case, the mismanagement by a housing association of stock resulted in its regulator directing a transfer of the stock to a different housing association).

6.3.17.14 Therefore, Mr McCraken in *Pascoe* was submitting *both* that the least intrusive test applied in the situation of Pascoe and that the Inspector and Secretary of State had not *physically* set out in their report and decision letter their evaluation of the ECHR position as Lord Justice Dyson had required to be done in 'two stages'.

6.3.17.15 The Court summarised this as follows: (Emphasis added)

> *'63. Mr McCracken submitted that neither the inspector nor the Secretary of State had properly applied the proportionality test in respect of the interference with Convention rights in this case nor, for that matter had there ever been a proper consideration of the human rights issues by the agency, the inspector or the Secretary of State. Mr McCracken referred to the agency's board minutes for 22 September 2004 and suggested that there had been only a cursory consideration of the human rights issue in this case. He submitted that the section in question consisted of nothing more than a mere recital of the most basic principles and the bald conclusion that any interference with human rights was considered to be justified in order to secure the desired regeneration and the public benefits that the regeneration proposals would bring and that the proposed compulsory purchase order would strike a fair balance between the public interest and private rights. Mr McCracken suggested that the agency appeared only to have considered the area as a whole and that it had made no assessment of any individual human rights and that the agency's statement of reasons and statement of case were similarly deficient.*
>
> *64. Mr McCracken referred to the inspector's report and to the Secretary of State's decision letter and submitted that treatment of the human rights issue by both the inspector and the Secretary of State had also been very cursory and consisted of little more than bald statements to the effect that the interference would be proportionate and that a fair balance would be struck between the public interest and the private interests. Mr McCracken argued that neither had engaged with the issue of whether the legitimate aim could be achieved by less intrusive means and submitted that, as a result, both had failed to apply the proportionality test properly. In short, he submitted that the order had been made without any, or any adequate analysis of the interference with the claimant's Convention rights (a further important aspect of which was the exclusion of the claimant from the housing market that it is said will result from the inadequacy of compensation for property in this area of housing market failure and that the interference was disproportionate and not justified.'*

6.3.17.16 The Learned Judge considered (still on the assumed basis) that Mr McCracken's Ground 2 distilled to the following: (Emphasis added)

'65. … [S]o far as concerns the second ground of challenge, the real focus or the central point of the claimant's case is the alleged lack of proportionality that the interference with the claimant's rights under both articles gives rise to. I also agree with Mr Maurici's submission that the claimant's case on this aspect of the matter rested on the following three main points: (i) that less intrusive alternatives were not considered; (ii) that there had been a failure to consider properly the human rights issues; and (iii) that compensation will be inadequate.'

6.3.17.17 The Secretary of State, in essence, submitted that there was no requirement to set out in the decision letter the formulaic evaluation of '*the necessary element of balance required in the application of Article 8 and Article 1 of the First Protocol*':

'66. … in a formulaic way the extent to which rights are interfered with. The inspector's report and the Secretary of State's decision letter should be read as a whole in order to determine whether the necessary balancing exercise has been properly carried out. I accept that submission as correct.'

6.3.17.18 In particular, faced with the criticism that the Inspector's reasoning had not disclosed the application of the 'proportionality test', the Learned Judge set out the Defendant Secretary of State's submissions in response. MK considers that these lead to the recognition by *Pascoe* of what MK summarily describes as a 'Category 2' case (i.e. a case where Samaroo process does not apply and where Samaroo is a 'Category 1' case a different legal test applies) (Emphasis added):

'65. I agree with Mr Maurici's observation that, so far as concerns the second ground of challenge, the real focus or the central point of the claimant's case is the alleged lack of proportionality that the interference with the claimant's rights under both articles gives rise to. I also agree with Mr Maurici's submission that the claimant's case on this aspect of the matter rested on the following three main points: (i) that less intrusive alternatives were not considered; (ii) that there had been a failure to consider properly the human rights issues; and (iii) that compensation will be inadequate. However, before turning to consider each of these matters, it is necessary to refer first to four key points made by Mr Maurici (and adopted by Mr Cameron) with regard to the relevant legal context.'

6.3.17.19 The Learned Judge then set out the four points that concerned two aspects: a) the way that the Inspector had physically set out his considerations; and b) the content of the considerations. In this respect, the Judge recorded: (Emphasis added)

'66. Mr Maurici submitted first that the policy requirement that a CPO

> *will not be confirmed unless there is a compelling case in the public interest (see also para 17 of the Circular quoted in para 18 above) fairly reflects the necessary element of balance required in the application of article 8 and article 1 of the First Protocol to the ECHR : see Bexley London Borough Council v Secretary of State for the Environment, Transport and the Regions [2001] EWHC Admin 323 at [33]-[48]. Accordingly, there is no requirement to set out in a formulaic way the extent to which rights are interfered with. The inspector's report and the Secretary of State's decision letter should be read as a whole in order to determine whether the necessary balancing exercise has been properly carried out. I accept that submission as correct.'*

6.3.17.20 MK says he does not disagree that the policy requirement that: '*that a CPO will not be confirmed unless there is a compelling case in the public interest'* applies, but that is not the same as the *Prest* test which is a legal test and not a guidance (fact) test.

6.3.17.21 Since *Prest*, however, page 6 of the CPO Guidance (and Stage 2: paragraph 12) now also says (Emphasis added):

> *'When making and confirming an order, acquiring authorities and authorising authorities should be sure that the purposes for which the compulsory purchase order is made justify interfering with the human rights of those with an interest in the land affected. The officers' report seeking authorisation for the compulsory purchase order should address human rights issues. Further guidance on human rights issues can be found on the Equality and Human Rights Commission's website.'*

6.3.17.22 MK indicates that NH has not evidenced such a report before the making of its CPO and the onus remains on it to show the justification for making the CPO.

6.3.17.23 Further, whilst it remains correct that the phrase '*a CPO will not be confirmed unless there is a compelling case in the public interest'*, that guidance (i.e. fact) phrase cannot (in law) substitute for the legal and in relation to the scope and content of which *Prest* continues to apply and remains recently affirmed by the Supreme Court in the Sainsburys' case[292]. That is, the guidance summation of the legal tests cannot be a proxy for the legal test or its content.

6.3.17.24 MK also agrees that, in the context of *Pascoe*, there is no requirement on the way in which the Inspector must set out the evaluation of HRA considerations. That is, the two stage process of Lord Justice Dyson

[292] CD J.4.

referred to above does not need to be literally spelt out – but that is not the same as saying that it must not nevertheless be discernibly taken into account to evidence adherence to the correct test. Thus, so too in *Pascoe*, the Learned Judge accepted at paragraph 68(1) that the decision letter must be read as whole.

6.3.17.25 However, the 'key point' raised by the Defendant Secretary of State was that there 'was a wide margin of appreciation to … Article [8 and 1 of the First Protocol' and was recorded at paragraph 67 of the Judgment (paragraph 68 of the WLR Report):

> *'68. Mr Maurici's second key point was that there is a wide margin of appreciation in relation to both articles in terms of proportionality: see, for example, James v United Kingdom (1986) 8 EHRR 123 and Blecic v Croatia (2004) 41 EHRR 185 . Again, I agree with that submission.'*

6.3.17.26 Once again, MK does not disagree that the State enjoys a wide margin of appreciation but notes that NH is not the State and is a private company, and so too are Graham Construction and Sweco which are each private limited companies and who are charged under a private contract to produce a scheme to fulfil private contract obligations and are not in themselves emanations of the State, and who gave evidence on behalf the limited private company on behalf of the contracting company, NH. However, the principle that the Secretary of State enjoys a wide margin of appreciation as to 'proportionality' and the two Articles remains trite law and, of course, accepted, and he is the confirming authority in this CPO.

6.3.17.27 The Learned Judge then recorded the third point in paragraph 68 of the Judgment (paragraph 69 of the WLR Report):

> *'68 Mr Maurici's third key point was, as it seems to me, a crucial one in the context of this particular ground of challenge. It was Mr Maurici's submission that a measure can be proportionate even if it is not the least intrusive means possible. In order to make that point good, Mr Maurici referred to a number of European and domestic authorities, to the main ones of which I now turn before expressing my conclusion with regard to this particular point.*
>
> *69 James v United Kingdom 8 EHRR 123 is a case that concerned an alleged violation of article 1 of the First Protocol in the context of leasehold enfranchisement legislation. The European Court of Human Rights held that the state enjoys a wide margin of appreciation when deciding upon social and economic measures (see para 46). The applicant argued that the expropriation of property could only satisfy the requirements of article 1 of the First Protocol if there was no "other less drastic remedy" to resolve the problem at which the*

legislation was aimed. That argument was rejected by the court, at para 51:

"This amounts to reading a test of strict necessity into the article, an interpretation which the court does not find warranted. The availability of alternative solutions does not in itself render the leasehold reform legislation unjustified; it constitutes one factor, along with others, relevant for determining whether the means chosen could be regarded as reasonable and suited to achieving the legitimate aim being pursued, having regard to the need to strike a 'fair balance'. Provided the legislature remained within these bounds, it is not for the court to say whether the legislation represented the best solution for dealing with the problem or whether the legislative discretion should have been exercised in another way."

70 In Handyside v United Kingdom (1976) 1 EHHR 737, para 48 the court observed that, in the context of article 10(2) of the ECHR, "the adjective 'necessary' … is not synonymous with 'indispensable'". The court compared the position with that arising under article 6(1), where the words are "strictly necessary", and article 2(2), where the words are "absolutely necessary". As the Court of Appeal observed in R (Clays Lane Housing Co-operative Ltd) v The Housing Corpn [2005] 1 WLR 2229 : as to which, see below), it was these more rigorous tests that were rejected by the court in James's case in the context of article 1 of the First Protocol.

71 Handyside's case was cited and applied by the European Commission of Human Rights in X v United Kingdom (1982) 28 DR 177, 184 in the context of rejecting a complaint of an alleged violation of articles 8 and article 1 of the First Protocol by reason of a CPO of a house under the Housing Act 1957 . In Howard v United Kingdom (1985) 52 DR 198, the public interest (including the rights of future homeowners) was found to be capable of outweighing the interests of existing homeowners where the land was to be acquired for redevelopment.

72 In R (Fisher) v English Nature [2004] 1 WLR 503, para 46 Lightman J said that, in the light of James's case:

"The fact that there may be other even better methods of achieving the same ends does not necessarily mean that any particular measure is disproportionate under article 1 …"

Lightman J's formulation was cited with approval by the Court of Appeal in the Clays Lane Housing case [2005] 1 WLR 2229, para 13, and his judgment was upheld on appeal: see [2005] 1 WLR 147 .'

6.3.17.28 Thus, in the *Clays Lane* case, the Court of Appeal affirmed Lightman J formulation as follows, citing his judgment below: (Emphasis added)

`106. …

46. … It is well established that a reasonable

relationship of proportionality under article 1 does not import a test of strict necessity (as Mr Holgate has argued). The fact that there may be other even better methods of achieving the same ends does not necessarily mean that any particular measure is disproportionate under article 1: see James v United Kingdom (1986) 8 EHRR 123 and Tre Traktörer AB v Sweden (1989) 13 EHRR 309 .'

6.3.17.29 In this CPO Inquiry, therefore, and it remains MK's position in the context of Articles 8 and 1 of the First Protocol, that two situations emerge: a) were a case to qualify as a 'reasonably necessary' Category 2 case, then it remains self-evident that there is a requirement to *consider* less intrusive means of achieving increased capacity at the junction 8 gyratory than taking his land against his will; and also less intrusive ways of achieving acceptable resolution to perceived flood concerns by use of section 110(1) of the *Highways Act 1980* in relation to upsizing of the culvert upon and within the NH landholding in which the M27 mainline is situated; and then here is the rub; b) see below, where a case qualifies as a Category 1 case, then the *Samaroo* process applies and the evaluation is very different because, as in *Smith*, 'unless' less intrusive means are used, then the impairment will be excessive and disproportionate.

6.3.17.30 Thus MK says, in respect of (a) (Category 2), whilst in the sphere of human rights, the fact that there may be less intrusive means to achieve the same aim does 'not necessarily mean' that a particular other measure 'is disproportionate', the law is that the existence of less intrusive means can result to mean that a particular other measure is (in fact) disproportionate.

6.3.17.31 That is, that there may be lesser intrusive means of achieving the aim sought to be achieved 'does not necessarily mean' that any particular measure is disproportionate – but equally necessarily it does not mean that the existence in fact of less intrusive means does not mean the use of other means cannot be disproportionate.

6.3.17.32 Thus MK considers that, even in a Category 2 case basis, the correct test in law for HRA purposes remains that the Inspector in this CPO Inquiry (and the Secretary of State) is required in law to not exclude as irrelevant but to consider the least intrusive means of achieving the same aim and to do so in logically prior advance of then evaluating what the range of means is. After those means have been considered with other means, then the Inspector and the Secretary of State are required to consider whether the particular means may be 'disproportionate' i.e. from the range of all of the means considered (including the least or lesser intrusive means and the most intrusive means and the spectrum between those ends). It remains an *evaluative*

exercise for the Inspector (and then the Secretary of State) to evaluate whether or not the result of the range of various means 'on the table' means that some or all save the least intrusive means are disproportionate.

6.3.17.33 Further, MK indicates that the point made by his experts in their Proofs (either in a Category 1 or 2 case) as to 'least intrusive' (as in 'less intrusive' means) means is that nowhere in NH's Proofs of Evidence or in their material or before NH made its CPO and SRO has NH in fact considered least or least intrusive means of achieving the same aim and that failure to consider such factors is in legal error. This is because, as the James case at *Pascoe* Judgment paragraph 69 makes clear: lesser or least intrusive means are 'a relevant factor' (even in a Class 2 case) of a number '*for determining whether the means chosen could be regarded as reasonable and suited to achieving the legitimate aim being pursued*'. That is, NH has an ongoing gap in its evidence as to lesser means of achieving the same aim.

6.3.17.34 This is in direct contradistinction to the legal test (that there is only one CPO legal test) advanced by NH that means that in all CPO cases 'necessary' equates with 'reasonably necessary', and that the 'reasonably' part of 'necessary' in turn equates with a Wednesbury 'reasonable' decision by it, in the sense that if NH 'decides' that some means is 'necessary' then the consideration of lesser intrusive means of achieving the same aim is somehow 'ousted' by its (Wednesbury) reasonable decision as to what it considers is or is not necessary. But that NH test is in legal error.

6.3.17.35 MK submits that a decision to take land against an individual's will cannot, in law, be automatically 'compelling' simply because NH has decided to take the land. Rather, the decision to take land is legally discrete from their being a compelling case to take the land.

6.3.17.36 Returning to *Pascoe* again, the Learned Judge then set out in Judgment paragraph 73 the Secretary of State's submission on the 'intensity of review', being how intense the Court (not an Inspector) should consider the facts and relied on the case of *Lough v First Secretary of State* (2004) 1 WLR 2229. In so doing, the Judge set out the criteria for qualification within Category 2 (as had also been done in *Clays Lane* when the Court of Appeal sought to align the general application of *Samaroo* with a fact specific and case by case approach to its application) and without the satisfaction of which a case otherwise remains in Category 1 (as in the instant case and in *Smith*).

6.3.17.37 MK says his Counsel also acted for the Claimant in that case and is familiar with its thesis: that in the context of the TCPA 1990 on a planning appeal, HRA considerations are not required to be separately set out (i.e. in the formulaic way referred to above). Thus, the Learned

Judge in *Pascoe* records in Judgment paragraph: (Emphasis added)

> *'72. I accept Mr Maurici's submission that the intensity of review depends upon the particular context in question in a given case. I also agree that the Samaroo approach is not one of universal application . Thus, in the subsequent case of Lough v First Secretary of State [2004] 1 WLR 2557, the Court of Appeal made it clear that the Samaroo approach was not applicable in the context of decision making in the planning field. At para 55 of his judgment in that case, Keene LJ put the matter in this way:*
>
> > *"I agree with Pill LJ that the process outlined in the Samaroo case … while appropriate where there is direct interference with article 8 rights by a public body, cannot be applied without adaptation in a situation where the essential conflict is between two or more groups of private interests. In such a situation, a balancing exercise of the kind conducted in the present case by the inspector is sufficient to meet any requirement of proportionality."'*

6.3.17.38 It will be recalled that the 'process outlined' was referred to at paragraph 61 of the *Pascoe* Judgment is as follows and is the *Samaroo* process: (Emphasis added)

> *'61. In his judgment in Samaroo's case [2001] UKHRR 1150, paras 19–20, Dyson LJ put the matter in this way:*
>
> > *"19. … in deciding what proportionality requires in any particular case, the issue will have to be considered in two distinct stages. At the first stage, the question is: can the objective of the measure be achieved by means which are less interfering of an individual's rights?*
> >
> > *"20. At the second stage, it is assumed that the means employed to achieve the legitimate aim are necessary in the sense that they are the least intrusive of Convention rights that can be devised in order to achieve the aim. The question at this stage of the consideration is: does the measure have an excessive or disproportionate effect on the interests of affected persons?"'*

6.3.17.39 As the Learned Judge iterated at Judgment paragraph 4, the CPO 'will' 'directly affect' citizens by the making of such orders: (Emphasis added)

> *'4. The order in question is one in a series of compulsory purchase orders that the agency plans to make in deprived inner city areas.*

These areas are known as "pathfinder" areas. I am told that there are about 250 other pathfinder areas in the Midlands and the North of England and about 2.5 million people are and/or will be directly affected by the making of such orders.'

6.3.17.40 Therefore, having regard to and considering *Pascoe* Judgment paragraph 73 and the criteria of 'appropriateness', Lord Justice Dyson's 'process' is in law appropriate in a case that is: a) not in the planning field; and b) 'where the essential situation is [not] a conflict between two *or more groups* of *private* interests'. In respect of (b), NH confirmed on Day 14 that there were no other objectors than MK. MK says his interests and those of Foreman Homes align in relation to the same land parcel and so they cannot be said to be in different groups. In respect of (a) MK does not disagree with the applicability of paragraph 72 'in the planning field' but it has not escaped his own attention that NH is advancing its CPO and SRO not under the TCPA 1990 but in fact and law under the *Highways Act 1980*. Consequently, he considers it cannot be said that paragraph 73 of *Pascoe* can apply here because the Inspector is not in fact or law considering a situation 'in the planning field'. In his view, this fact and legal situation may have escaped NH.

6.3.17.41 MK says in this matter it remains self-evident that the CPO and SRO made were made by NH under the *Highways Act 1980* and not in fact or law under the TCPA 1990.

6.3.17.42 Further, it is equally self-evident in law and fact that under the TCPA 1990, section 55 in law excludes the following from the jurisdictional scope of that Act so that certain categories of development cannot (in law) qualify as 'development' inside of the controls of that Act for which planning permission is 'required' or can be granted. Thus, section 57(1) states:

'1) Subject to the following provisions of this section, planning permission is required for the carrying out of any development of land…'

6.3.17.43 Section 55 provides to exclude from the scope of 'development' requiring planning permission:

'1) Subject to the following provisions of this section, in this Act, except where the context otherwise requires, "development," means the carrying out of building, engineering, mining or other operations in, on, over or under land, or the making of any material change in the use of any buildings or other land. …'

'2) The following operations or uses of land shall not be taken for the purposes of this Act to involve development of the land —

b) the carrying out on land within the boundaries of a road by a highway authority of any works required for the maintenance or improvement of the road but, in the case of any such works which are not exclusively for the maintenance of the road, not including any works which may have significant adverse effects on the environment…'

6.3.17.44 Thus, in law and so fact, 'any works' (and 'any' is not limited by statute save by reference to the terms of (b)) of improvement to the highway are excluded from the Act and so cannot qualify as being within 'the planning field'.

6.3.17.45 Similarly, whilst the *Town and Country Planning (General Permitted Development)(England) Order 2015* (GPDO) under Article 3(1) grants permitted development rights in favour of the two categories of highway authority, it remains the case that under section 75(1) of the TCPA 1990:

'1) Without prejudice to the provisions of this Part as to the duration, revocation or modification of planning permission or permission in principle, any grant of planning permission or permission in principle to develop land shall (except in so far as the permission otherwise provides) enure for the benefit of the land and of all persons for the time being interested in it.'

6.3.17.46 MK indicates that it has not escaped his own attention that at the current time he is interested in fact in his land whereas NH has not an actual interest in his land (save a notional strong desire to take it). To consider that NH has today planning permission of any kind or that any of its works as at today qualify as 'development' requiring planning permission, would be ultra vires and also unlawful.

6.3.17.47 Nor can NH point in fact to any grant of planning permission as at Day 14 permitting in the general or wider public interest the development it envisages. It does not require planning permission for existing intra-highway boundary 'works' of 'any' kind that can qualify as 'maintenance' or 'improvement' and does not in fact at this date own Mr Keeling's land by which to benefit at this time (Day 14) from permitted development rights. This fact seems obvious to MK but not to NH.

6.3.17.48 Consequently, MK says, in fact and law at this time (Day 14 of the Inquiries) before the CPO and SRO's are considered, NH does not benefit from any planning permission granted under Article 3 in relation to MK's land.

6.3.17.49 MK considers it follows that on no rational basis, in fact or law, could NH

assert that the CPO and SRO are 'in the planning field'. If NH were to so suggest, and currently they appear to not, then Mr Keeling would submit that NH were then to be actively misleading the Secretary of State as to the facts and law of these Inquiries. This has been set out by MK in his Statement of Case and his Response to NH Statement of Case and is not new information. There is no planning permission at all in this CPO and SRO.

6.3.17.50 Furthermore, it follows, on the basis set out above, that applying the 'test' as to 'which test' (under *Pascoe* Judgment paragraph 73 and *Clays Lane* - '*naked deprivation*' or '*unobjectionable*' property transfer), the *Samaroo* approach remains 'appropriate' and falls to be applied because the instant situation cannot be said to be in the 'planning field', is not in that field, there are no more 'groups' of private interests at this time of the Inquiries objection process as at Day 14 than MK, and MK is or will be directly affected by the CPO.

6.3.17.51 On that basis, MK considers that the 'process' outlined in *Samaroo* does in law apply to this instant matter and requires of the Inspector and the Secretary of State the following:

> *'61. In his judgment in Samaroo's case [2001] UKHRR 1150, paras 19–20, Dyson LJ put the matter in this way:*
>
> > *"19. … in deciding what proportionality requires in any particular case, the issue will have to be considered in two distinct stages. At the first stage, the question is: can the objective of the measure be achieved by means which are less interfering of an individual's rights?*
> >
> > *"20. At the second stage, it is assumed that the means employed to achieve the legitimate aim are necessary in the sense that they are the least intrusive of Convention rights that can be devised in order to achieve the aim. The question at this stage of the consideration is: does the measure have an excessive or disproportionate effect on the interests of affected persons?"*

6.3.17.52 The *Samaroo* approach is not inconsistent with parts of the domestic law case of *Prest* (reaffirmed by the Supreme Court in *Sainsburys* [2011] 1 AC 437 and that post-dated *Pascoe* by some years) the Court of Appeal requires: (Emphasis added)

> *'The first is fundamental. To what extent is the Secretary of State entitled to use compulsory powers to acquire the land of a private individual? It is clear that no Minister or public authority can acquire any land compulsorily except the power to do so be given by*

Parliament: and Parliament only grants it, or should only grant it, when it is necessary in the public interest. In any case, therefore, where the scales are evenly balanced — for or against compulsory acquisition … the decision — by whomsoever it is made — should come down against compulsory acquisition. 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: and then only on the condition that proper compensation is paid, see Attorney-General v. De Keyser's Royal Hotel Ltd. (1920) A.C. 508 . If there is any reasonable doubt on the matter, the balance must be resolved in favour of the citizen. This principle was well applied by Mr. Justice Forbes in Brown v. Secretary of State for the Environment (1978) P. & C.R. 285, where there were alternative sites available to the local authority, including one owned by them. He said (at page 291):

> *"It seems to me that there is a very long and respectable tradition for the view that an authority that seeks to dispossess a citizen of his land must do so by showing that it is necessary … If, in fact, the acquiring authority is itself in possession of other suitable land other land that is wholly suitable for that purpose – then it seems to me that no reasonable Secretary of State faced with that fact could come to the conclusion that it was necessary for the authority to acquire other land compulsorily for precisely the same purpose."*

6.3.17.53 MK says what then about the *Pascoe* case itself, because the Learned Judge applied the *Lough* approach ('in the planning field') to that case. The self-evident answer in the *Pascoe* case remains that, notwithstanding the statutory basis of the CPO was the *Leasehold Reform, Housing and Urban Development Act 1993* and not the TCPA 1990, in fact the CPO in that case was premised on an underlying outline and a detailed planning permission for a road. Hence, the Learned Judge recorded at Judgment paragraph 26 and in direct contrast of fact with the current Inquiries situation before the Inspector that: (Emphasis added)

> *'431. The order is promoted to secure area-wide regeneration. The regeneration scheme comprises two interlinked elements: highway corridor improvements to Edge Lane West, which are part of a wider strategy for such improvements over the entire length of Edge Lane; and transformational redevelopment, with residential and commercial components flanking the highway improvements. The highway corridor works benefit from detailed planning permission. The wider regeneration scheme has outline planning permission.'*

6.3.17.54 Therefore, for the purposes of the case of *Lough* referred to at *Pascoe* Judgment paragraph 73, it could be lawfully considered that the *Pascoe* case qualified as within the scope of 'in the planning field'. Hence, the Learned Judge in *Pascoe* then went on to say this as he applied the '*Clays Lane/Lough*' Test 'in the particular circumstances of *that* case then before him and not the *Samaroo* approach/test:

> *73. Similarly, in the Clays Lane Housing case [2005] 1 WLR 2229 the Court of Appeal distinguished Samaroo's case and made it clear that the approach adopted in that case was not one of universal application. Like the present case, the Clays Lane Housing case involved the compulsory expropriation of property, i e the compulsory transfer of land from one registered social landlord to another in the light of mismanagement. I agree with Mr Maurici that all the relevant case law in this area is very fully analysed in the Clays Lane Housing case. After making it clear that it was now established that Samaroo approach was not one of universal application (see para 21), Maurice Kay LJ stated, at para 25:*
>
> > *"I conclude that the appropriate test of proportionality requires a balancing exercise and a decision which is justified on the basis of a compelling case in the public interest and as being reasonably necessary but not obligatorily the least intrusive of Convention rights. That accords with Strasbourg and domestic authority. It is also consistent with sensible and practical decision making in the public interest in this context. If 'strict necessity' were to compel the 'least intrusive' alternative, decisions which were distinctly second best or worse when tested against the performance of a regulator's statutory functions would become mandatory. A decision which was fraught with adverse consequences would have to prevail because it was, perhaps quite marginally, the least intrusive. Whilst one can readily see why that should be so in some Convention contexts, it would be a recipe for poor public administration in the context of cases such as Lough v First Secretary of State and the present case."*
>
> *75. I therefore reject Mr McCracken's submission that the means used to achieve the regeneration of the Edge Lane area must be the least intrusive of the claimant's convention rights. The Samaroo approach is not one of universal application and I approach the matter on the basis of the law as stated in the Clays Lane Housing case, in particular in para 25 quoted above.'*

6.3.17.55 MK considers therefore, that the following points arise:

a) The *Samaroo* approach at *Pascoe* Judgment paragraph 61 and *Clays Lane* is not of universal application, but that is not the same as saying that its approach (its 'process') is not applicable on a case by case assessment. *Clays Lane* established a case by case criteria. The cases show some cases fall into Category 1 (*Samaroo*) and others into Category 2 (Clays Lane). *Smith* is a Category 1 case; *Belfields* was a Category 2 case. This case of junction 8 is a Cateory 1 case to which *Samaroo* applies;

b) Whether the *Samaroo* process falls to be applied requires consideration of *Pascoe* Judgment paragraph 73 and the evaluation of facts as to whether the paragraph 73 criteria are satisfied in fact and law;

c) One of the criteria relied on by NH in relying on *Pascoe* as supporting its own (erroneous test of 'reasonable necessity') is whether the matter can be said in fact or law to qualify as being decision making 'in the planning field', for example, because it concerned a section 78 planning appeal under the TCPA 1990 as in Lough or because it concerned a CPO that benefitted from a prior grant of underlying planning permission (in outline or detail) granted under the TCPA 1990 so that the 'situation' (*Pascoe* Judgment paragraph 73) or '*the context of cases such as Lough and the present case*' (Judgment paragraph 74) is satisfied. Here, NH cannot in law or fact satisfy the Category 2 criteria and that lack of satisfaction remains fatal to their legal start point of their CPO and SRO;

d) The paragraph 25 *Clays Lane* approach has been referred to previously by Mr Keeling because NH relied on that case to sustain its approach to exclude 'lesser intrusive means' as irrelevant. On no view of the law are lesser intrusive means irrelevant.

6.3.17.56 In particular, in the *Clays Lane* case relied on by NH, at [2005] 1 WLR 2229, the Court of Appeal self-evidently identified two categories of case: a) where the 'least intrusive means' was required to be followed (as in *Samaroo* and *Baker*); and b) where the 'reasonable necessity' test applied. The distinction in *Pascoe* between the categories turned on whether the particular matter could be said to qualify as being within 'the planning field' and *Pascoe* was an example of a case by case evaluation in law and fact as to which of the two *Clays Lane* categories might apply.

6.3.17.57 As will be recalled from *Clays Lane* as referred to in *Pascoe*, in *Clays Lane* the Court of Appeal differentiate between: a) 'naked property deprivation' ; and b) where the statutory regulator, having *unobjectionably* decided upon a transfer, had to choose between alternative courses of action and in that context the appropriate test of

proportionality required a balancing exercise and a decision which was justified both on the basis of a compelling case in the public interest and as being reasonably necessary to accomplish the objective. See the Head Note of the judgement. Only in category (b) does the 'reasonably necessary' arise as a relevant test.

6.3.17.58 In particular, the Court of Appeal in *Clays Lane* did not hold that the *Samaroo* test was not of application in a compulsory purchase of land situation and *Clays Lane* was not itself a case about a compulsory purchase of land or an inquiry under the *Acquisition of Land Act 1981*. Indeed, the Court of Appeal endorsed that test as the correct approach in a '*naked deprivation of property*' case. Instead, the Court of Appeal carefully set out the factual basis of the case:

> 1*. Clays Lane Housing Co-operative Ltd ("CLHC") is a housing co-operative whose members are the residents of premises in Clays Lane, Stratford, East London. ..*
>
> *2. The Housing Corporation ("HC") is the regulatory body for registered social landlords. It has statutory powers under Schedule 1 to the 1996 Act. ..*
>
> *3. An inquiry pursuant to paragraph 20(1) took place in 2000. The ensuing report was submitted to HC in March 2001. It concluded that there had been mismanagement of CLHC's affairs in a number of areas including a complete lack of effectiveness in the work of the management committee, a lack of proper financial controls and a lack of proper day-to-day management and governance. It further concluded that CLHC was being mismanaged to such an extent that its assets and the welfare of its tenants were at risk unless urgent action was taken to address the failings of management and to bring good order to such fundamental tasks as collecting rent and controlling expenditure…*
>
> *4. The report was accepted by HC which was therefore satisfied that there had been mismanagement within the meaning of paragraph 27(1)(a). It considered that the appropriate course was to direct the transfer of CLHC's land to the Governors of the Peabody Trust ("Peabody"). Peabody is a large registered social landlord but it is not a co-operative …*
>
> *9. The judgment of Keith J considered challenges under three broad headings. First, it was submitted on behalf of CLHC that a compulsory transfer to Peabody amounted to an unlawful interference with CLHC's rights under article 1 of the First Protocol …*
>
> *10. Before considering the grounds of appeal, it is appropriate to set*

out the factual basis of the decision of 22 September 2002 upon which Keith J based his judgment. It is to be found [2004] EWHC 1084 (Admin) at [13]-[15]:

> *"13. The board's approach was to compare the relative merits of a compulsory transfer of [CLHC's] housing stock to Peabody with the voluntary transfer of [its] engagements to [TFHC]. Thus, it took into account its belief that (a) public funding would be more at risk if [CLHC's] engagements were transferred to [TFHC] because of the 'relative financial strengths' of [TFHC] and Peabody ... (b) Peabody would be more likely than [TFHC] to attract new public funding for the ... housing stock from the London Borough of Newham ... (c) tenants would have greater security as assured tenants of Peabody than as contractual tenants of a fully mutual co-operative ... and (d) Peabody provided the board with the necessary level of certainty which the board required that it would be able to discharge its regulatory responsibilities, in view of its 'long history of working in Inner London, its financial strength and its commitment to tenant participation at Clays Lane', whereas [TFHC's] proposals did not give the board that level of certainty ... The board recognised that a voluntary transfer of ... engagements to [TFHC] 'would ensure continuing mutuality', but it noted that Peabody's proposal 'would also provide the opportunity for tenant involvement in the management and development of the housing stock' ...*
>
> *"14. The board was aware of problems about cross-border regulation which a transfer of ... engagements to [TFHC] might raise, i e the transfer of housing stock in an area governed by one regulator [HC] to a body regulated by a different regulator (Communities Scotland). It noted that Communities Scotland had raised a number of regulatory concerns, 'in particular those relating to control, policy, planning, risk management, and a complex governance framework ... [and] about the potential impact on [TFHC] were its proposed transfer engagements to proceed' ... The board also noted that the London Borough of Newham did not support the proposed transfer of engagements to [TFHC], but did support the transfer of the housing stock to Peabody ...*
> *"15. Finally, the board had permitted counsel for [CLHC] to address it. It noted that he had submitted that it would be wrong for [HC] to consider the relative merits of the two proposals because the exercise was*

> *not a comparative one. The board did not agree ... and to the extent that a compulsory transfer of its housing stock to Peabody amounted to an interference with its property rights and its rights of association ... the board concluded that 'the public interest concerns in favour of a statutory transfer were sufficient to justify' any such interference ..."*

6.3.17.59 The Court of Appeal then identified the issue in the case before it: (Emphasis added)

> *11. The primary question arising under this issue relates to the test to be applied by the court when considering whether or not there has been a breach of article 1 of the First Protocol…*
>
> *It is common ground that the part of article 1 which is engaged in the present case is the second sentence. It is a "deprivation" case rather than a "peaceful enjoyment" or "use" case. The primary issue between the parties is as to the test which has to be applied when considering the justification for a deprivation…*
>
> *In a nutshell, the criticism which Mr Wolfe, on behalf of CLHC, makes of these passages is that they fail to apply a sufficiently rigorous test of proportionality, having regard to the decisions of the House of Lords in R (Daly) v Secretary of State for the Home Department [2001] 2 AC 532 and R v Shayler [2003] 1 AC 247 and the decision of the Court of Appeal in Samaroo v Secretary of State for the Home Department [2001] UKHRR 1150…*

6.3.17.60 The Court of Appeal then set out a number of cases: (Emphasis added)

> *'12. It is appropriate to begin with a consideration of the origin and development of the test of "a compelling case in the public interest". Even before the Human Rights Act 1998 the courts of this country were alert to the need to scrutinise compulsory purchase orders with rigour… After the enactment of the Human Rights Act 1998, but before it came into force on 2 October 2000, Sullivan J considered the implications of article 1 of the First Protocol in Tesco Stores Ltd v Secretary of State for the Environment, Transport and the Regions (2000) 80 P & CR 427 . He said, at p 429:*
>
> > *"In very broad terms, the Convention requires that a fair balance must be struck between the public interest, in the present case in securing much needed redevelopment of the western sector ... and an individual's right to the peaceful enjoyment of his possessions. Any interference with that right must be necessary and proportionate. Although the Human Rights Act 1998 does not come into force until 2*

> *October, I am satisfied that for present purposes the Secretary of State's policy, as set out in Circular 14 of 94 that a compulsory purchase order should not be made unless there is 'a compelling case in the public interest', fairly reflects that necessary element of balance."*

Soon after the coming into force of the Human Rights Act 1998 Harrison J expressly approved that approach in Bexley London Borough Council v Secretary of State for the Environment, Transport and the Regions [2001] EWHC Admin 323 at [46]…

16. In Samaroo's case [2001] UKHRR 1150 the issue related to impact of deportation upon Mr Samaroo's rights under article 8 of the Convention. Dyson LJ said, at paras 19-20:

> *"19. ... in deciding what proportionality requires in any particular case, the issue will usually have to be considered in two distinct stages. At the first stage, the question is: can the objective of the measure be achieved by means which are less interfering of an individual's rights?"*
>
> *"20. At the second stage, it is assumed that the means employed to achieve the legitimate aim are necessary in the sense that they are the least intrusive of Convention rights that can be devised in order to achieve the aim. The question at this stage of the consideration is: does the measure have an excessive or disproportionate effect on the interests of affected persons?"*

17. All this leads Mr Wolfe to submit that whilst there must be "a compelling case in the public interest" to justify a deprivation of property, that is a necessary but not a sufficient test. It must also be established that the chosen course of action is "the least interfering with human rights, having regard to the public benefit to be achieved and the different means of achieving it". That this applies as much in relation to article 1 of the First Protocol as it does to other Convention rights is illustrated by the observation of Dyson LJ in Samaroo's case [2001] UKHRR 1150, para 17, that "it is clear that what Lord Steyn said about proportionality"-in Daly's case-"was intended to be of general application". An illustration of this is to be found in the decision of Mr Nicholas Blake QC sitting as a deputy judge of the High Court in R (Baker) v First Secretary of State [2003] EWHC 2511 (Admin) . The latter was a case concerning compulsory acquisition of a house deemed to be statutorily unfit for habitation. The deputy judge said, at para 45:

> *"Proportionality is not simply whether at the end result the balance is fair, but whether, in getting there, it has been decided that the most appropriate course of conduct is also the least interfering with human rights, having regard to the public benefit to be achieved and the different means of achieving it." …*

Discussion

18. If I may begin with a statement of the obvious, this court is bound by decisions of the House of Lords and by previous decisions of this court. Accordingly, Daly's case [2001] 2 AC 532, Shayler's case [2003] 1 AC 247 and Samaroo's case [2001] UKHRR 1150 are binding upon us, provided that their rationes apply to the circumstances of the present case.'

6.3.17.61 MK considers it is immediately apparent that the *Clays Lane* Court of Appeal did not reject *Samaroo* but instead held that it was not of automatic application in *all* cases. But that is also not the same as holding that it is excluded from application in a qualifying case. *Baker* (a CPO case) and *Smith* (a CPO case) are examples of *Samaroo* applying.

6.3.17.62 Rather, in *Clays Lane*, the Court of Appeal held: (Emphasis added)

> *18. Thus, if the correct analysis is that Strasbourg jurisprudence applies a less rigorous test of proportionality in the context of article 1 of the First Protocol than it applies in the context of other Convention rights but the House of Lords and previous decisions of the Court of Appeal demand a more rigorous test and one which equiparates to that applicable in the context of other Convention rights, then we must apply the more rigorous test, over and above the Strasbourg test. It is no doubt on this basis that Mr Wolfe refers to the Strasbourg (James v United Kingdom) test as necessary but not sufficient in English law.*

6.3.17.63 Thus, the Court of Appeal was seeking to ascertain which test applied to (not 'necessity' but to 'proportionality') and recorded the submission of the defendant and by which it engendered a case by case approach to the evaluation of the type of test to be applied:

> *20. … Mr Stanley accepted in the course of his submissions that "necessity" is a requirement of proportionality in the present case. His point is that "necessity" is a more flexible concept than the "strict necessity" that was rejected in James v United Kingdom . In particular, he submits, it does not compel and is not to be equated with the least intrusive option. To this extent, he seeks to distinguish Samaroo's case [2001] UKHRR 1150, another article 8 case.*

21. That Samaroo's case is not of universal application has been accepted by this court in Lough v First Secretary of State [2004] 1 WLR 2557, which was concerned with the application of article 8 and article 1 of the First Protocol to a grant of planning permission. Pill LJ said, at para 49:

> *"The concept of proportionality is inherent in the approach to decision making in planning law. The procedure stated by Dyson LJ in Samaroo's case [2001] UKHRR 1150 ... is not wholly appropriate to decision making in the present context in that it does not take account of the right, recognised in the Convention, of a landowner to make use of his land, a right which is, however, to be weighed against the rights of others affected by the use of land and of the community in general. The first stage of the procedure stated by Dyson LJ does not require, nor was it intended to require that, before any development of land is permitted, it must be established that the objectives of the development cannot be achieved in some other way or on some other site. The effect of the proposal on adjoining owners and occupants must, however, be considered in the context of article 8, and a balancing of interests is necessary ... Dyson LJ stated, at para 26: "It is important to emphasise that the striking of a fair balance lies at the heart of proportionality.'"*
>
> *Keene LJ agreeing, said, at para 55: "the process outlined in Samaroo's case, while appropriate where there is direct interference with article 8 rights by a public body, cannot be applied without adaptation in a situation where the essential conflict is between two or more groups of private interests. In such a situation, a balancing exercise of the kind conducted in the present case by the inspector is sufficient to meet any requirement of proportionality."*

I interpret this as signifying that what is "necessary" is driven by the balancing exercise rather than by a "least intrusive" requirement.

22. There is nothing new about interpreting the word "necessary" in a less than absolute way. In Handyside v United Kingdom (1976) 1 EHRR 737, para 48, the European Court of Human Rights observed that, in the context of article 10(2), "the adjective 'necessary ' ... is not synonymous with 'indispensable'". It compared the position with that arising under article 6(1) where the words are "strictly necessary" and article 2(2) ("absolutely necessary"). It seems to me that it was these more rigorous tests that were rejected by the court

in James v United Kingdom 8 EHRR 123 in the context of article 1 of the First Protocol.

23. As the word adopted by Lord Steyn in Daly's case [2001] 2 AC 532 was "necessary" and not "strictly necessary", I conclude that there is no real inconsistency between Daly's case and James v United Kingdom . They both allow "necessary", where appropriate, to mean "reasonably", rather than "strictly" or "absolutely" necessary. Everything then depends on the context because, as Lord Steyn reminds us, at para 28: "In law context is everything." In the present context, I do not regard what Lord Hope said in Shayler's case [2003] 1 AC 247 as having been intended to go further than Lord Steyn had gone in Daly's case.

24. I therefore focus on the context in this case. It is not a case of naked property deprivation. It is common ground that the decision of 24 June 2002 that there should be a transfer by reason of mismanagement of CLHC is unassailable. The context is one wherein a statutory regulator, HC, having unobjectionably decided upon a transfer, then had to choose between two alternatives, Peabody or TFHC. It chose Peabody.

25. In my judgment, the task in which HC was engaged was wholly different from the task of the Secretary of State in Samaroo's case [2001] UKHRR 1150 . Having lawfully decided that there would have to be a transfer, the decision was then one between two proffered alternatives. Although not in every respect the same as a planning decision, it approximated to what Keene LJ was describing in Lough v First Secretary of State [2004] 1 WLR 2557, para 55, namely "a situation where the essential conflict is between two or more groups of private interests". I conclude that the appropriate test of proportionality requires a balancing exercise and a decision which is justified on the basis of a compelling case in the public interest and as being reasonably necessary but not obligatorily the least intrusive of Convention rights.

6.3.17.64 MK says it is apparent to him, at least, therefore, that:

a) Each case must be considered on its own facts;

b) In law, context is everything;

c) In *Clays Lane*, it was a feature of the choice of test that the decision made was 'unobjectionable' whereas by real contrast, the basis of the current Inquiries are because Mr Keeling has objected. It cannot be said that the decision by NH is here 'unobjectionable';

d) In the factual situation of *Clays Lane* (and of *Pascoe*), the term 'necessary' can be conditioned by the term 'reasonably' so as to imply flexibility. This flexibility arises *because*: i) there is a

logically prior decision that is not objected to and here MK has in fact objected to the Orders made and thereby necessarily to the NH decisions to make them; or ii) because the context is (as in *Lough*) the development of land being subject to the public interest by reason of the TCPA 1990. However, in these Inquiries in respect of junction 8, there is no legal or contextual situation engendering the right to own land as being subject to NH or to the development of non-highway land for development of highways. This is reinforced by section 55(2) of the TCPA 1990 excluding from the scope of the TCPA 1990 'any works' of maintenance or improvement that are inside of the highway boundary (not the carriageway boundary). Land development in England is not, unlike the TCPA 1990, subject to a right to develop highways across land.

6.3.17.65 In that context, *Clays Lane* unsurprisingly held as follows and also confined the scope of its holding carefully to 'the context of cases such as Lough' (Emphasis added):

> *25. … If "strict necessity" were to compel the "least intrusive" alternative, decisions which were distinctly second best or worse when tested against the performance of a regulator's statutory functions would become mandatory. A decision which was fraught with adverse consequences would have to prevail because it was, perhaps quite marginally, the least intrusive. Whilst one can readily see why that should be so in some Convention contexts, it would be a recipe for poor public administration in the context of cases such as Lough v First Secretary of State and the present case.*

6.3.17.66 MK indicates, as has been set out above, it is evident to him at least that the *Clays Lane* did not reject the *Samaroo* approach and its test (nor could it because that it also a Court of Appeal case) but instead the Court of Appeal created two categories of case:

a) A 'naked deprivation of property' category in which: ''*the process outlined in Samaroo's case, [is] appropriate where there is direct interference with article 8 rights by a public body'* ; and

b) A 'planning case' or an 'unobjectionable' case where, in essence: '*a situation where the essential conflict is between two or more groups of private interests'* per *Lough*.

6.3.18 ***Smith***[293]

6.3.18.1 The next case relied on is *Smith v Secretary of State for Trade and Industry and the London Development Agency* [2007] EWHC 1013

[293] INQ-91.3

(Admin); [2008] 1 WLR 394.

6.3.18.2 In that case, *Clays Lane*, *Lough* and *Samaroo* were considered.

6.3.18.3 NH rely on *Smith* in paragraph 4.4.24. NH 'presents' *Smith* as supporting the NH legal position but, in MK's view, in fact and law Smith holds the opposite and goes against NH and supports MK's legal position as to the correct legal test.

6.3.18.4 Hence MK says, as has been referred to above, *Smith* proceeded on the held basis as in *Samaroo* where at stage 2, less intrusive measures are assumed from stage 1 and carried forward to stage 2). Thus, in *Smith* (Emphasis added):

> *'42. … I stress, however, that the context is all important. …*
>
> *43. I am conscious, however, that an alternative view point is clearly arguable. It is for that reason that I proceed on the basis, contrary to my view, that a decision to confirm this compulsory purchase order will not be proportionate unless, on the particular facts of the case, it is the least intrusive measure open to the decision maker….*
>
> *44. Once a court has decided upon the necessary ingredients of the test of proportionality how should it approach the issue of whether the decision in the particular case is proportionate?...*
>
> *48. … Consequently, <u>it was the least intrusive measure open to the defendant to achieve the legitimate aim which was advanced as the justification for the interference</u>…*
>
> *50. All that said, I do not find that the defendant's decision to confirm the order was unjustified or disproportionate. In my judgment, it was the least intrusive measure available to him. <u>Realistically, the only way</u> of ensuring that a substantial proportion of the order lands (which included the sites) was under the control of the LDA by mid-2007 was to make the order. No other measure, in my judgment would have achieved that objective….'*

6.3.18.5 In respect of the facts and its context, *Smith* is a case about a caravan on Plot 6 of Clays Lane Caravan Site. In summary, the Agency had made a compulsory purchase order of traveller caravan sites that C occupied and that were required as part of the site for the 2012 Olympic and Paralympic Games. After a public Inquiry, a planning inspector concluded that, to prevent a breach of C's human rights, the order should not be confirmed until the Secretary of State was satisfied that alternative traveller caravan sites would be available to C. The Secretary of State confirmed the order although no alternative relocation sites were yet available to C.

6.3.18.6 The holding summarises the following:

> *'… where the issue of proportionality had to be judged against the background of all parties' acceptance that an overwhelming case justifying compulsory acquisition had been made out and arose only in relation to the time at which the order should be made, it was not necessary for the Secretary of State to demonstrate that the measure he proposed to take was the least intrusive of the claimants' article 8 rights …'*

6.3.18.7 Once again, these kinds of cases remain fact sensitive. The facts in this case were as follows:

> *5. On 16 November 2005 the London Development Agency ("LDA") made a compulsory purchase order under section 20(1) of the Regional Development Agencies Act 1998 . The order, as made, authorised the compulsory purchase of 339 hectares of land and it included the sites. The order was made for the purposes of*
>
> > *"securing the economic development and the regeneration of land, promoting business efficiency, investment and competitiveness, promoting employment, enhancing the development and applications of skills relevant to employment and contributing towards the achievement of sustainable development within its area and for the purposes incidental thereto, namely by the development of the land which will result in the significant regeneration of the area by the provision of the main facilities for the 2012 Olympic and Paralympic Games, the legacy facilities and the development of the Stratford Rail Lands."*
>
> *6. There were objections to the order. The claimants and other occupiers of the sites were among those who objected.*
>
> *7. An inspector was appointed to hold a local public inquiry. He heard objections on behalf of those persons who occupied plots at the sites. The thrust of the objection was to assert that no compulsory purchase order should be made unless and until alternative sites had been provided upon which the occupiers could pitch their caravans.*
>
> *8. The inspector, Mr Rose, reported to the defendant in a comprehensive document dated 16 October 2006. In respect of the objections by the occupiers of the sites his conclusion included the following expression of view.*
>
> > *"In my opinion, although the benefits of the order are very compelling, a small group should not be left to pay any excessive personal and social cost for those*

> *benefits to be achieved. It is also telling that the objectors do not want to stand in the way of the Olympics and legacy developments; they object merely to ensure that they continue to have a suitable place in which to live. Against this background, I consider that the order should not be confirmed until the Secretary of State is satisfied that suitable relocation sites will be available to meet the reasonable needs of the gypsies and the travellers that would be displaced."*

6.3.18.8 There is no record in *Smith* of the land on which the caravans were situated as benefitting from planning permission for the Olympics. Nor of the statutory provisions being the TCPA 1990.

6.3.18.9 MK indicates that it is immediately obvious to at least him that 'the objectors do not want to stand in the way of the Olympics and legacy developments' and consequently the question of the 'need' for the scheme and in particular for 'the scheme' (as opposed to 'a' scheme) was not in issue. Evidently, therefore, there was no actual need to test 'need' nor the 'need' for a particular scheme because it was not in issue.

6.3.18.10 MK considers that by contrast with the instant Inquiries, as has been made plain as a pike staff including by Mr Bedwell's evidence in cross-examination, whilst the 'need' for 'a' scheme has been accepted, the need for 'the' scheme[294] articulated by NH is not and remains strongly objected to by MK and his experts.

6.3.18.11 The Learned Judge in *Smith* continued with the facts:

> *'13. As I have said, the order as published encompasses some 339 hectares of land. This area is situated within the boundaries of four different local authorities, Newham, Hackney, Tower Hamlets and Waltham Forest. Geographically, the land is within an area known as the Lower Lea Valley…*
>
> *18. The sites are crucial areas of land within the areas the subject of the compulsory purchase order. Their approximate location is shown on a plan entitled "Permitted legacy masterplan with CPO boundary". The Clays Lane Caravan Site is within or adjacent to the area which will become the Olympic village. The Waterden Crescent Caravan Site*

[294] So far as NH has any kind of objectively rational scheme beyond an idea that objectively underlies the mere theoretical notional purpose of its CPO and SRO other than an inchoate scheme and that is not in draft in apparently nearly all respects (Highways Transport Modelling (the need for optimisation); Highways Design (the need for departures); Landscape (the need for some proposals to populate the white and unfilled space on current 'Draft' General Arrangement Plans relied on) and, Flood and Highways Model)

lies in close proximity to one of the stadia to be constructed. The inspector found that there was no question of the Olympics and legacy developments proceeding without the two sites…

23. Newham London Borough Council has resolved to grant planning permission for a caravan site at Major Road. This site is capable of providing 15 pitches and, therefore, it is capable of accommodating all of the residents currently occupying the Clays Lane Site. The only impediment to the provision of that site for the occupiers of Clays Lane appears to be the possibility of a challenge to the grant of planning permission by way of judicial review by a body of residents opposed to the grant…'

6.3.18.12 The Learned Judge summarised *Daly* and *Samaroo* and *Lough* at paragraphs 34, 35 and 38, and also *Clays Lane* at paragraph 39, as well as *Pascoe* at paragraph 40.

6.3.18.13 In particular, the Learned Judge set out *Samaroo*: (Emphasis added)

In Samaroo v Secretary of State for the Home Department [2001] UKHRR 1150, paras 19–20, the Court of Appeal concluded that the issue of proportionality:

> *"19. … will have to be considered in two distinct stages. At the first stage, the question is: <u>can</u> the objective of the measure be achieved by means which are <u>less interfering</u> of an individual's right?*
>
> *"20. At the second stage, it is assumed that the means employed to achieve the legitimate aim <u>are necessary in the sense that they are the least intrusive of Convention rights that can be devised</u> in order to achieve the aim<u>. The question at this stage of the consideration is: does the measure have an excessive or disproportionate effect on the interests of affected persons</u>?"*

6.3.18.14 So, MK indicates, it can be seen that the *Samaroo* test requires 'less' interfering and that the phrase 'least intrusive' is used in that sense. 'Least intrusive' is not used in *Samaroo* as being absolutist and nor does MK use it in that way.

6.3.18.15 Consequently, *Smith* is a case sensitive application of the test in *Clays Lane* (and as exampled also by *Pascoe*) by which a decision maker can establish which of the two categories of legal test to apply to a given CPO and to into which of the two categories does a given situation fall. In the event, it was a Category 1 (*Samaroo* case) and not a Category 2 (*Clays Lane* 'in the planning field' case). See below.

6.3.18.16 The Learned Judge in *Smith* said this in recognising the obiter dicta non-binding nature of *Pascoe* (for the reasons as set out above that Ground 2 was not necessary to determine) (Emphasis added):

> *'41. I appreciate that the decision in Pascoe's case is not strictly binding upon me. Forbes J's analysis of the issue of proportionality was obiter. None the less, I would not consider it appropriate to depart from his approach unless I was satisfied that it was clearly wrong.*
>
> *42. In fact, I agree with Forbes J that a decision to confirm a compulsory purchase order may be proportionate even though it does not amount to the least intrusive interference of the landowner's rights under article 8. In my judgment the analysis of the relevant lines of authority undertaken by Forbes J in Pascoe's case is highly persuasive. Nothing would be achieved by my attempting to reformulate his analysis in my own words. I stress, however, that the context is all important. In this case the issue of proportionality has to be judged against the background that everyone accepts that an overwhelming case has been made out for compulsory acquisition of the sites for the stated objectives and that compulsory purchase is justified. The issue of proportionality arises only in relation to whether the confirmation of the order should await the provision of alternative sites i e in relation to the point in time at which the compulsory purchase order should be made. In that context, in my judgment, it is unnecessary for the defendant to demonstrate that the measure he proposes to take is the least intrusive available.'*

6.3.18.17 MK indicates that read in context, the Learned Judge was summarising *Pascoe* as to being a category 2 case (like *Pascoe*) being able to qualify 'in the planning field'; and also a category 2 case (like *Clays Lane*) because the CPO was 'unobjectionable' and 'need' for 'the' scheme was not disputed but, in fact, 'everyone accepts' that an overwhelming case has been made out for compulsory purchase'; and so, on that basis of fact, there was no need to consider 'need' nor 'least intrusive measures'; and so the Learned Judge therefore agreed that the *interference* may 'not [have to] amount *to the least intrusive interference of the landowner's rights under article 8*' in the particular case context. This is because whilst 'need' was accepted by everyone and so the issue of least intrusive means did not arise, the next step of 'proportionality' remained to be considered by the decision maker.

6.3.18.18 In contrast with the approach of NH to its CPO and SRO that rely on cases under the TCPA 1990 and not under the *Highways Act 1980*, MK agrees with the Learned Judge in *Smith*:

> *'I stress, however, that the context is all important.'*

6.3.18.19 MK agrees. MK says in that important context, which he highlights to the Inspector and to the Secretary of State also, that the Learned Judge ajudged on the ground of challenge before him (and that reinforces Mr Keeling's case that this matter falls within *Clays Lane* category 1 – *'a naked deprivation of property case'*) that: (Emphasis added)

> *'43. I am conscious, however, that an alternative view point is clearly arguable. It is for that reason that I proceed on the basis, contrary to my view, that a decision to confirm this compulsory purchase order will not be proportionate unless, on the particular facts of the case, it is the least intrusive measure open to the decision maker.'*

6.3.18.20 MK says it remains no part of the NH case that it has to show *'the least intrusive measure open to the decision maker'*, nor has it advanced any evidence at all on that basis, and so it remains the case that NH has fundamentally gotten the legal test wrong in relation to promoting its own CPO and SRO on the basis of the case law that it itself has produced purportedly in support of its own case of 'reasonable necessity' but that when read reinforces MK's Objection and legal approach.

6.3.18.21 Thus, the Learned Judge continued in his particular contextual situation, and turned to address (not step 1, the need or whether a reasonable necessity or a least intrusive necessity but) step 2, Proportionality: (Emphasis added)

> *'44. Once a court has decided upon the necessary ingredients of the test of proportionality how should it approach the issue of whether the decision in the particular case is proportionate? Upon this aspect there is no dispute between the parties. Each of the parties accepted that the approach of the court is that which is set out in the speech of Lord Bingham of Cornhill in R (SB) v Governors of Denbigh High School [2007] 1 AC 100...*
>
> > *… it is clear that the court's approach to an issue of proportionality under the Convention must go beyond that traditionally adopted to judicial review in a domestic setting…'*

6.3.18.22 The Learned Judge considered the facts between paragraphs 45-49 and then held: (Emphasis added)

> *48. In support of his submission that this was indeed a proportionate interference with the claimant's rights Mr Drabble, on behalf of the defendant, points out that in relation to the objection by the claimants and other occupiers of the sites the issue before the defendant was whether or not as at December 2006 it was a*

proportionate or justified interference with their rights that the compulsory purchase order should be confirmed then. In reaching that decision, he submits, it was crucial for the defendant to consider not just the merits of the development as a whole but also the risk that the development would not be implemented if there was any significant delay in the making of the order. That was so, to repeat, since the acquisition of the caravan sites was crucial to implementation of the development. Both Mr Drabble and Mr Roots stress the concluding sentence of para 30 of the decision letter:

> *"However … the Secretary of State appreciates that there is a risk of failure on the relevant time scale that cannot be eliminated [to provide alternative sites] but having regard in particular to the clear and overwhelming importance of the order and the urgency of the timing issues already referred to considers it right to confirm the order now."*
>
> *They both submit that this is a key passage in the reasoning of the defendant. They do so because, they say, it demonstrates that the making of the order in December 2006 was the only course open to the defendant, in reality, if the purpose of the order were to be achieved. Consequently, it was the least intrusive measure open to the defendant to achieve the legitimate aim which was advanced as the justification for the interference.*

49. I am mindful of the fact, as pointed out by Mr Willers, that the interference with the claimants' rights is, on any view, substantial. I am also mindful of the fact that the sites in this case are lawful. As is pointed out in Chapman v United Kingdom 33 EHRR 399, para 102:

> *"If the home was lawfully established, this factor would self-evidently be something which would weigh against the legitimacy of requiring the individual to move."*

I accept that as at December 2006 there was a risk that the claimants might be evicted from the sites with no alternative lawful sites available and to which they might move. On any view that is an important consideration in an assessment of proportionality. I accept, without reservation, the evidence of the personal circumstances of the particular claimants.

50. All that said, I do not find that the defendant's decision to confirm the order was unjustified or disproportionate. In my judgment, it was the least intrusive measure available to him.

6.3.18.23 MK considers it is, therefore, evident that the Learned Judge was satisfied that the case before him was a *Clays Lane* category 1 case, and that he then applied *Samaroo* because, in testing what was done for legal error, the Learned Judge proceeded on the basis of stage 1 of that *Samaroo* process (‘means which are less interfering’) and then

applied stage 2 of that process that assumes that stage 1. Hence, the Learned Judge gauged 'proportionality' under paragraph 48 and 50 against the threshold of 'least intrusive measure' (being the Learned Judge's summary of the *Samaroo* test under stage 1 : 'can the objective of the measure be achieved by means which are less interfering of an individual's right?' and that he summarised as: 'least intrusive'. Hence, his conclusion in paragraph 50:

> *'50. … In my judgment, it was the least intrusive measure available to him. Realistically, the only way of ensuring that a substantial proportion of the order lands (which included the sites) was under the control of the LDA by mid-2007 was to make the order. No other measure, in my judgment would have achieved that objective.'*

6.3.19 **Belfields**[295]

6.3.19.1 The next case relied on by NH is *Belfields Ltd v Secretary of State for Communities and Local Government* [2008] JPL 954.

6.3.19.2 NH relies on this case at paragraph 4.4.25 and Footnote 38 above.

6.3.19.3 MK indicates that, contrary to paragraph 4.4.24, *Belfields* did not 'confirm' *Smith* because *Smith* was a Category 1 case (*Samaroo* process/test of lesser intrusive) on its facts whereas *Belfields* is a Category 2 case ('reasonably necessary').

6.3.19.4 As set out by the Court of Appeal in *Clays Lane* at paragraph 23: 'In law, context is everything' and each case is fact sensitive. *Belfields*' case concerned the making of a CPO '*under section 226(1) of the Town and Country Planning Act 1990*'. Hence, the Learned Judge recorded as follows:

> 1. *On May 30, 2007 the first defendant, the Secretary of State for Communities and Local Government, confirmed with one small modification a compulsory purchase order made by the second respondents, Sefton BC. The CPO, the Sefton MBC (Klonsdyke and Hawthorne Road) Compulsory Purchase Order 2005, was made under s.226(1) of the Town and Country Planning Act 1990 and related to 10.2ha of land consisting principally of disused industrial land and terraced housing in Bootle. An inspector held a public inquiry into objections to the CPO between July and November 2006. Three of the owners of land in the CPO who were among the objectors now apply under s.23 of the Acquisition of Land Act 1981 to quash the CPO as it*

[295] INQ-91.5

affects their ownerships…

2. *[There was an inquiry]*

3. *At the inquiry the cases advanced by Belfields and Nextdom were similar. They each accepted the need for the council's redevelopment proposals, but they contended that there was no need for the council to acquire their lands, which, they said, they could redevelop themselves. Mr Powell's case, advanced on his behalf by Ms M.J. Joyce, who also spoke for other small shopkeepers in the CPO area, was that the council had misunderstood the reason for the state of the terraced property within the CPO and that there was no need to demolish it and to redevelop the land.*

6.3.19.5 The Judge recorded the issue between the parties:

7. This ground of challenge is founded on the assumption that the potential relocation of the Mel Inn on the Penpoll site formed part of the reasons of the Secretary of State for confirming the CPO. If it did not, there could clearly be no error of unfairness on her part in this respect. It is in my judgment quite clear from the inspector's report that he did not regard this potential relocation of the Mel Inn as part of the justification for including the Penpoll site in the CPO. He did not mention it when recording the council's case on the Belfields objection. On this he said:

> *"91. Belfields accept that the area is in need of regeneration. The site is significant due to its size (2.2 hectares) and the number of dwellings it could accommodate. Belfields accept that its timely redevelopment is vital to transform the area. There is nothing between the parties as to the need for the development of the site, the nature of the redevelopment or the timescale. The dispute is how that can be delivered in line with the timescales that the Council has to meet under the Deed of Variation.*
>
> *92. Belfield's objection is that there is no need for the CPO, as they have their own proposals which have the benefit of planning permission. The Council would be content if the objector delivered the redevelopment of the Penpoll site within the timetable they have offered, subject to ensuring that the Council's aspirations are met. The difference between the objector and the Council is whether there should be any mechanism to ensure that development should take place in the event of default."*

8. At para.343 the inspector summarised the issue between the

parties:

> *"With this background, the issue between the parties is a narrow one, and focuses on the mechanism by which the development of the site can be guaranteed. The concern is whether there is sufficient assurance that development will actually take place, in the light of access to funding and expertise."*

6.3.19.6 MK says it is not lost on him that *Belfields* did not relate to a CPO or SRO under the *Highways Act 1980* but in fact and law related to a CPO made under section 226(1) of the TCPA 1990. Nor is it lost on him that the objecting parties accepted the 'need for development of the site, the nature of the redevelopment [and] the timescale'. By contrast, MK says he has strongly objected to the need for development of his land, the nature of the desired development of his land, and the timescale of the delivery (as the Local Plan provides for Key Proposals over the whole Plan Period).

6.3.19.7 MK considers therefore, that on the face of it, the *Belfields*' case qualifies straightforwardly within the second category of case that was referred to in *Clays Lane* and in *Pascoe* because *Belfields* per se was a case 'in the planning field', and also the proposals were 'unobjectionable' save as to the default mechanism for delivery. None of those situations arises in the instant Inquiries about junction 8:

a) No amount of asserted rhetoric or arm waving can convert in some way a CPO and SRO made under the *Highways Act 1980* into a CPO or SRO under the TCPA 1980;

b) No amount of asserted rhetoric or arm waving can in some way engender a requirement for planning permission for the development of land outside of the highway boundary;

c) No amount of asserted rhetoric or arm waving can in some way engender a current interest in land of Mr Keeling so as to engender a right to develop his land under the GPDO in advance of the actual establishment of an interest in his land. See Section 75(1) of the TCPA 1990 and Article 3 of the GPDO;

d) No amount of asserted rhetoric or arm waving can in some way obscure his having objected to, and to the need for, the NH proposals and CPO and SRO because the making of the objection engenders a statutory right to appear at an Inquiry and Mr Keeling has fielded experts to refine the inchoate and emerging NH scheme so as to ensure its exclusion from his land; in contrast with Belfields who wanted to develop their own land and had planning permission for that also.

6.3.19.8 MK says somewhat unsurprisingly, therefore, the Judge considered the somewhat summary submissions of the Claimant and applied *Clays*

Lane in light of the matter before him being self-evidently 'in the planning field': (Emphasis added)

> *'20. I do not accept that proportionality in a case such as this is to be determined by treating as a requirement that the CPO should be the "least intrusive" means of achieving the public benefit that is sought. Such a test was rejected by the Court of Appeal in R. (on the application of Clays Lane Housing Co-operative Ltd) v The Housing Corporation [2005] 1 W.L.R. 2229 (see para.[25] in the judgment of Maurice Kay L.J.) and by Forbes J. in Pascoe v First Secretary of State [2007] 1 W.L.R. 885 at paras [68]-[75], both of which were cases in which rights under Art.8, as well as under Art.1 of the First Protocol, were engaged. The policy requirement that a CPO will not be confirmed unless there is a compelling case in the public interest fairly reflects the necessary balance required under the Human Rights Act (see Bexley LBC v Secretary of State for the Environment, Transport and the Regions [2001] EWHC Admin 323 at [33]-[48]), and the Secretary of State must be satisfied of this: see Hall v First Secretary of State [2007] EWCA Civ 612, per Carnwath L.J. at [21].'*

6.3.19.9 MK considers this case, therefore, supports his case because it highlights the type of case where the test of 'reasonable necessity' does apply and, by contradistinction, where it cannot. In his situation, on no view can NH assert (without misleading the Secretary of State) that its CPO and SROs made under the *Highways Act 1980* have in fact been made under the *Town and Country Planning Act 1990*; nor that, in advance of the CPO and SRO's being confirmed, NH today benefits from permitted development rights to develop Mr Keeling's land today at Day 14 of the Inquiry (and that would certainly be news to him having never before been raised by NH nor is that able (he thinks) to be mischaracterised by NH in their now typical approach to their digestion of his Objection).

6.3.19.10 MK indicates therefore, *Belfields* is irrelevant because it is a *Clays Lane* Category 2 case.

6.3.20 **Grafton**[296]

6.3.20.1 The next case relied on by NH is *Grafton Group (UK) plc v Secretary of State for Transport* [2017] 1 WLR 373.

6.3.20.2 NH relies on this case at paragraph 4.4.2. See also paragraph 4.4.1. NH contends this:

'*The question before the Secretary of State is whether or not there is*

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sufficient justification for the CPO/SRO. The CPO/SRO seek authorisation for compulsory purchase of land for the purposes of the Scheme. The CPO/SRO do not seek authorisation for the Scheme itself. The CPO/SRO therefore require to be supported by sufficient justification to show there is a compelling case in the public interest to interfere with human rights, but do not require to be based on a completed version of the Scheme and do not require the Secretary of State to approve the detailed design of the Scheme. MK's team, however, have sought to test a different question: is the detailed design acceptable. NH does not have to demonstrate the same to justify the Orders. These questions are distinct.'

And NH contends that that:

20. MK's team have approached this Inquiry not asking whether the justification is sufficient but asking whether the particular (draft) design is acceptable in all material ways. That approach does not properly reflect the CPO tests laid down in the CPO Guidance nor the law.

6.3.20.3 MK indicates that whilst there is no obligation on an objector to test the evidence of justification advanced by the acquiring authority, and, as NH helpfully reminded the Inspector in handing up on Friday 10 June 2022 in the *Tesco* case (2000) 80 P&CR 427 at 438:

'It is perfectly true that the burden in a Compulsory Purchase Order inquiry lies on the acquiring authority to demonstrate a compelling case in the public interest.'

6.3.20.4 How the acquiring authority chooses to present or manifest its particular justification for its Orders is a choice for it and not for the objector. See for example, paragraph 13 of the CPO Guidance. Here, NH chose to advance General Arrangement plans in section 18 of its Reasons for Making the Order and updated plans subsequently in line with its Statement of Case placing reliance on the same.

6.3.20.5 For the first time in its closing submissions, and nowhere previously stated in its documents, its SoR for Making the Orders and in its Statement of Case, NH indicates to the Inspector and Secretary of State that neither can rely on any objective material to objectively sustain the Orders made by NH. That would be a surprising contention in light of *Grafton* that held (as below) that a CPO must be sustained in the Wednesbury rational sense by underlying objective material on which a judgement can be made about a scheme.

6.3.20.6 MK says further, it is self-evident that NH has in fact been relying on general arrangement plans (in non-draft and draft form) from the outset of seeking to objectively justify its Orders. That NH simultaneously advances an iteratively emerging scheme is a matter for

it because it bears the onus of showing lawful justification and a compelling case for land taking.

6.3.20.7 In particular, consistent with NH's SoR *for Making the Orders*, the Statement of Case expressly refers to a 'scheme' as part of the justification for making the Orders. In fact, as is set out also below by reference to Section 18 to the SoR for Making the Order, in its CPO NH expressly refers to 'scheme' under paragraphs 1(2) and 2 and in its SoR at paragraph 1.1.1. and in section 18, List of Related Document, (as below) NH includes specified general arrangement plans at CD A.9. EAR 2020[297] that describes at Figure 2.1 the Scheme Location and at paragraph 2.4 Project Description: (Emphasis added)

> *'… The proposed Scheme General Arrangement drawings are included in Appendix B.'*

6.3.20.8 MK indicates that in fact, as is not unknown to him (at least) and to NH, he has spent nearly two years challenging in fact the moving and *evolving* justification advanced by NH, and variously described as 'the PCF Stage 3 scheme', the 'PCF Stage 5 Scheme', and a mixed up enmeshed bit of both.

6.3.20.9 MK considers that the quoted statement of assertion by NH in its paragraph 4.4.6 that its advocate expressly asked to go to the Secretary of State, is misleading by NH, of the Inspector and of the Secretary of State because it mischievously asserts that MK challenged the wrong 'target' evidence i.e. he challenged a draft scheme and not the justification for the CPO and SRO, and thereby has in some way left the NH (so-called) justification unchallenged and untrammelled. Such an assertion is audacious, untrue and is refuted as a misleading statement of fact by NH; and notwithstanding that NH itself has advanced the general arrangement plans and details as justification for the CPO (as the objective basis for 'improvements' referred to in the CPO) and without which the Inspector and Secretary of State must form a view as to whether NH has acted irrationally (as in, without evidence).

6.3.20.10 But, in MK's view, even if so, that does not mean that he has challenged the 'wrong' target. This is because he has actively challenged such objective justification as is advanced and gaps in that justification howsoever (mis)described by NH.

6.3.20.11 Rather MK considers that NH is mischievously misleading the decision maker in order to seek to preserve some of kind of inchoate justification given that MK and his experts have spent considerable time and resources challenging the justification that is stated by NH in its own

[297] CD B1.

SoR for Making the Orders and in its *Statement of Case* for its Orders, namely, that the justification for the orders sought was its PCF Stage 3 'scheme' (as set out in its Section 18 of the *SoR*) and the PCF Stage 5 scheme (individually and in enmeshed) (as set out in its *Statement of Case*). NH has relied on in parallel and enmeshed resulting in significant inherent confusion and complexity in its own justification.

6.3.20.12 For example, as to how NH itself justifies its scheme, the NH Statement of Making the Orders includes:

1.1.1 'This Statement of Reasons relates to the M27 Southampton Junction 8 Improvement Scheme (the "Scheme")…'

'14.1.2 The Applicant reserves the right to expand or otherwise modify this Statement in the event of a public inquiry into the Orders being held and will produce its Statement of Case, as may be required, under the appropriate rules and at the appropriate time indicated under 'The Highways (Inquiries Procedure) Rules 1994 (S.I. 1994 No.3263) and 'The Compulsory Purchase (Inquiries Procedure) Rules 2007 (S.I. 2007 No.3617)'

'18. List of Related Documents:

(a) The Highways England Company Limited (M27 Southampton Junction 8

Improvement Scheme – M27 Junction 8 and Windhover Roundabout)

(Special Road) (Side Roads) Order 2021

(b) The Highways England Company Limited (M27 Southampton Junction 8

Improvement Scheme – M27 Junction 8 and Windhover Roundabout

Improvements) (Special Road) Compulsory Purchase Order 2021

(c) This Statement of Reasons

(d) General Arrangement Drawings –

Drawing Number	Drawing Title
HE551514-BAM-HGN-ZZ-DR-CH-0008	General Arrangement Drawing
HE551514-JAC-ELS-PCF3_SS1-DRLE-0009 & 0010	Environmental Masterplan Sheets 1 and 2

HE551514-BAM-EGN-ZZ-DR-LS-0001	Environmental Masterplan (Amended to suit Flood Compensation Areas)

(e) Environmental Impact Assessment – Notice of Determination (under Section 105 A (3) of the Highways Act 1980

(f) Environmental Assessment Report

(g) Preferred Route Announcement brochure

(h) Report on Public Consultation

For further example, see Appendices associated with this Statement of Case under A.6: "General Arrangement Engineering Drawing" and B.4: "Environmental Masterplan Sheets 1 and 2, and Amended to suit Flood Compensation areas)"; and B.8 "Outline Environmental Management Plan"'

6.3.20.13 By way of but one example of the misleading nature of NH's paragraph 4.4.6, see paragraphs 19.110 and 19.111 of NH's *Statement of Case* in support of a CPO in which NH must show that the land extent is 'required' in order to rationally sustain in law a CPO of land and its extent: (Emphasis added)

'*19.110. The extent of land required in plot 11b is required for flood attenuation as shown on the General Arrangement drawing (Appendix A.6) and the Environmental Masterplan (amended to suit Flood Compensation Areas) (Appendix B.4). The Flood Risk Assessment (Appendix B.5) identified the extent of land that may be required to deliver sufficient flood attenuation to mitigate the Scheme and ensure the improved junction remains free from flooding. The land identified on the plans is the extent of land that may be required for this.*

19.111. These designs continue to be developed as the project progresses into detailed design. The full extent of land take requirements will be confirmed once this detailed design has been completed. The design stages are a process which allows refinement of engineering. Therefore the land take requirements may change as a result of detailed design completion. This ensures that value engineering potential can be sought at as part of developing the

detailed design in order to minimise the footprint of the Scheme. The full extent of land required for flood attenuation will be confirmed at Stage 5, but the area identified in the CPO will enable the Scheme to be delivered without impediment …'

6.3.20.14 It remains the NH evidence in its *Statement of Case* and Inquiry Close at Day 14 and 15 that NH itself knows not the required extent of land take. Neither the Inspector nor the Secretary of State nor an Objector such as Mr Keeling can be in a better position than NH itself as to land extent 'required'. If NH cannot know, then neither can those others.

6.3.20.15 Mk indicates that the foregoing categorisation by NH of his case is positively misleading of the Secretary of State and of the Inspector. MK says he could not look at justification asserted other than that which NH advanced as its justification – here, being a meshed iteration of a PCF Stage 3 and PCF Stage 5 'scheme' as was stated in the NH *SoR* and in the NH *Statement of Case* that expressly stated in various paragraphs that it relied on the PCF Stage 5 scheme.

6.3.20.16 More particularly, the *Grafton* case about the scope of the power of the Court under section 24(2) of the *Acquisition of Land Act 1981*. In summary, the Port of London Authority made a compulsory purchase order in relation to a disused wharf, but planning permission to develop the site was refused by the local planning authority. Following an Inquiry, at which it had been common ground that if the planning appeal were dismissed the compulsory purchase order would not be confirmed, the Inspector recommended the planning appeal be dismissed but that the compulsory purchase order be confirmed on the basis that there was a sufficient probability of an alternative scheme being proposed for which planning permission would be granted. Those recommendations were accepted by the relevant Secretaries of State. The landowners applied under section 23 of the *Acquisition of Land Act 1981* to quash the Secretary of State's confirmation of the compulsory purchase order.

6.3.20.17 In dismissing an appeal against the quashing of the order by the High Court, the Court of Appeal interpreted section 24(2) of the *Acquisition of Land Act 1981*. In essence, the Court of Appeal held that the question of whether there was sufficient evidence underpinning a CPO was a matter of planning judgement for the relevant decision maker. The Head Note says this[298]: (Emphasis added)

'*…2) dismissing the appeals, that since the compulsory purchase order had been confirmed on a basis other than that which had been promoted throughout the inquiry, that decision had been unfair to the landowners who had not had an opportunity to deal with it on*

[298] INQ-91.2.

that basis; and that, accordingly, the judge had been right to hold that the compulsory purchase order had been unlawfully confirmed (post, paras 41–43, 45, 46).

'…3) on a true construction the term "compulsory purchase order" in section 24(2) of the Acquisition of Land Act 1981 meant the order as made and confirmed and did not refer only to the order after confirmation and publication; that the effect of quashing was to render the instrument in question as if it had never been; the section 24(2) therefore did not empower the court to quash merely the confirmation decision; that there was no inherent power to grant a different remedy, lesser or otherwise; and that, accordingly, the only remedy available upon a challenge to a compulsory purchase order was to quash the order as made and confirmed (paras 18, 19, 20, 24, 45, 46).

6.3.20.18 The Court of Appeal set out the facts – the context – including as follows:

'3. Grafton brought these proceedings to challenge the CPO decision. Ouseley J upheld the claim on two seemingly interlinked grounds: (1) the Secretary of State confirmed the CPO on a different basis from that upon which it had been promoted throughout the inquiry, and did so without legally sufficient evidence (first judgment [2015] EWHC 1083 at [117]); (2) in the circumstances that was unfair to Grafton, who did not have "a fair crack of the whip": para 156. These conclusions are challenged in this court by the PLA, with the support of the Secretary of State, under what have been called grounds 2 and 3; these are the grounds for which Lewison LJ gave permission. In his second judgment [2015] EWHC 1889, Ouseley J held that in consequence of his substantive decision, by force of section 24 of the 1981 Act the CPO had to be quashed in its entirety: it was not open to the court to quash only the Secretary of State's confirmation of the CPO and leave the Order as made by the PLA intact—which would, as in effect the judge acknowledged (para 10), have sufficed for the justice of the case. This conclusion is challenged in ground 1, for which the judge gave permission and on which the Secretary of State has carried the burden of the argument.'

6.3.20.19 MK says it will be immediately apparent that this case concerned an appeal against the quashing of a CPO on the basis that it was premised on a different basis to that that had been evaluated at an Inquiry. This case seems to address a stage in the current Inquiry that has not been reached yet – the confirmation of a CPO and an SRO. It is difficult to see how this case can in law be relevant to the M27 junction 8 Inquiries.

6.3.20.20 The case seems to concern the degree of nexus required between use of CPO (and SRO) powers and the objective justification underpinning the use of such powers; and the case appears to proceed on its being

accepted by the Court of Appeal that there must be some objective basis in fact to sustain the exercise of CPO powers since without that basis there could be no lawful exercise of CPO powers and a CPO would inevitably be irrational (in the sense of no underlying evidence).

6.3.20.21 The Court gave short shrift to submissions to not quash the CPO that had been confirmed and the scope of the power to quash the Order:

'18. In my judgment these submissions on the construction of the statute are unsustainable…'

'24. In my judgment the only remedy available upon a challenge to a CPO is that given by section 24 as I would construe it. There is no inherent power to grant a different remedy, lesser or otherwise.'

6.3.20.22 Under Ground 2, the Court of Appeal considered the question of 'unfairness':

'25. This ground is closely linked to ground 3 (unfairness). So much is clear from Ouseley J's compendious summary of his conclusions as to "the consequence of the dismissal of the planning appeal" (the heading to para 105 of his judgment) [2015] EWHC 1083 at [117]…

… The Secretary of State did not give Grafton a fair opportunity to deal with his basis for confirming the CPO, changed as it was from that presented at the inquiry. Had he followed the suggestion of the inspector about a 'minded to confirm' letter, these problems could have been avoided." ..

29. It is not suggested that the judge was wrong to hold in para 117 that in principle the CPO might be confirmed despite the dismissal of the planning appeal…

> *"Confirmation of a CPO is not in law or policy necessarily tied to any particular scheme for which planning permission is simultaneously sought. So the refusal of planning permission for a particular scheme on grounds which the inspector thought remediable, rather than fatal in principle to the very purpose of the CPO, does not necessarily require non-confirmation of the CPO, and the starting of the whole process all over again with a different planning application. So there was no error in principle of itself in confirming the CPO while dismissing the planning appeal."*

The submission on ground 2 is only that the judge should not have concluded that there was no legally sufficient evidence to justify the confirmation of the CPO on the basis on which, pursuant to the inspector's recommendation, the Secretary of State confirmed it.'

6.3.20.23 The Court of Appeal then considered the way in which *evidence* underpinning the exercise of power to make and promote a CPO might be evaluated in the absence of an actual grant of planning permission and for some kind of scheme, in outline or in detail. It held thus:

> *30. The starting-point for consideration of ground 2 is the well-known dictum of Lord Hoffmann in Tesco Stores Ltd v Secretary of State for the Environment [1995] 1 WLR 759, 780: "If there is one principle of planning law more firmly settled than any other, it is that matters of planning judgment are within the exclusive province of the local planning authority or the Secretary of State." But this does not absolve the decision-maker of the need to act on evidence. If it did, planning cases would possess a characteristic unique in the public law sphere: they would be unconstrained by the discipline of the Wednesbury rule (Associated Provincial Picture Houses Ltd v Wednesbury Corpn [1948] 1 KB 223). Plainly that is not the case. There must be evidence to provide the factual materials upon which the planning decision-maker will form his conclusions. His view of the question whether the material before him is or is not adequate for that purpose lies within the scope of his planning judgment; and so—of course—does his conclusion as to the planning outcome or outcomes. To that extent the familiar concept of planning judgment may be said to involve two stages: sufficiency of the evidence and conclusion on the merits. No doubt they merge in practice. Lord Hoffmann's dictum applies to both, although its focus is especially directed at the latter stage, the planning outcome. Here, it is the first stage to which ground 2 invites scrutiny. Was there material on which a reasonable decision-maker could proceed to the second stage, and thus form a conclusion that "the same throughput might be achieved with no or but a slight change to the extent of the plant and storage, but better designed and laid out": inspector's report, para 12.59, cf 12.61?*

6.3.20.24 The Court then considered the evidence in the case before it (Emphasis added):

> *The evidence in this case*
>
> *'31. It is I think clear that the foundation of the inspector's decision to recommend that planning permission be refused for the development applied for lay in the scale and design of the proposed buildings. The whole of the inspector's conclusions on the planning appeal (paras 12.1–12.61 of the report) repay attention, but these short extracts will suffice to make the point:*
>
> > *"12.35 … There is no evidence that an alternative design of batching plant or cement silo is not available or that these could not be custom-built to deal with the*

> *specific constraints, including views. Similarly, there is no evidence that cement silos must be of a specific height …*
>
> *"12.36 There is little evidence that thought has gone into alternative layouts and arrangements of structures to take account of the site's environmental constraints or wider context …"*

And so the inspector proceeded to his conclusion on the planning appeal at 12.59–12.61: I have already cited the critical extracts. From 12.62 to 12.123 he addressed the PLA's application for confirmation of the CPO . I will cite just two passages:

> *"12.74 Moreover, there is no reason why a better layout and design would necessarily involve significantly greater costs than the elaborate timber treatment proposed …*
>
> *"12.121 … It is a matter of judgment as to whether or not a better design would be likely to come forward. The balance from the evidence is that it probably could and would. If followed, these recommendations do not require an unattainable goal, simply that good design skills are deployed to produce a scheme that properly considers how the necessary plant could be arranged and enclosed to minimise the harm to the environment."'*

'32. It is clear, and in my view important, that the inspector's reasons for recommending refusal of planning permission and for concluding nevertheless that "the same throughput might be achieved with no or but a slight change to the extent of the plant and storage, but better designed and laid out (para 12.59)" are closely intertwined. As is stated in Mr Harris' skeleton argument (para 22), the inspector had examined the appeal scheme before him and the criticisms of it in some detail. He was aware of the throughput of the proposal, its component parts and the benefits which would flow from the proposal, for example in terms of what is called "modal shift". These were the building blocks for his conclusions at paras 12.59–12.61.'

6.3.20.25 In rejecting the Judge's holding that there was no legally adequate evidence before the Inspector and Secretary of State, the Court of Appeal held that the adequacy of the objective foundation underpinning the exercise of CPO powers was a matter of planning judgement (Emphasis added):

'34. Thus the judge accepted that the inspector was entitled to conclude "that there was at least a reasonable prospect that a planning permission would be granted for the structures and buildings required for some level of aggregate and cement handling" (para 143), but not "that the throughput of this unknown scheme would not be significantly different from the appeal proposal": para 144. I do not accept that the lawful reach of the inspector's planning judgment was curtailed by such a dividing line…'

'36. It seems to me that the judge's reasoning at para 144 rests on the premise that the inspector could only lawfully arrive at the overall conclusion that a better design might come forward if chapter and verse of such a design had been presented to him in the evidence, or elaborated by him on the basis of evidence. I think the premise is false. Given his comprehensive appreciation of the details of the scheme on offer, his criticisms of its scale and design, his legitimate emphasis on the benefits of the wharf's reactivation, taken with his view (para 12.61) that "on balance, the proposals would be contrary to the development plan and the appeal should fail" (emphasis added), the inspector was in my view wholly entitled to decide that there was a sufficient probability of an alternative, adjusted scheme coming forward and that in those circumstances the CPO should be confirmed. This was quintessentially an exercise of planning judgment.'

6.3.20.26 Thus MK says, the evaluation of whether there was *some* objective evidential foundation to the CPO was a matter of planning judgement for the Inspector to evaluate by fact and degree whether the justification of a scheme is adequate to sustain the CPO or not. So too in the instant case.

6.3.20.27 Importantly, the Court of Appeal did not suggest that a CPO could lawfully be confirmed with no evidence underpinning it at all. Recognising that the instant Inquiry is not a 'planning decision' but that the *Wednesbury* principle obviously still applies to ensure that a CPO and an SRO cannot be made in an evidential vacuum, as the Court said in paragraph 30 (Emphasis added):

But this does not absolve the decision-maker of the need to act on evidence. If it did, planning cases would possess a characteristic unique in the public law sphere: they would be unconstrained by the discipline of the Wednesbury rule … Plainly that is not the case. There must be evidence to provide the factual materials upon which the planning decision-maker will form his conclusions… Here, it is the first stage to which ground 2 invites scrutiny. Was there material on which a reasonable decision-maker could proceed to the second stage, and thus form a conclusion that "the same throughput might be achieved with no or but a slight change to the extent of the plant

and storage, but better designed and laid out"

6.3.20.28 MK considers that in these Inquiries, there is only an emerging scheme comprised of a mix of PCF Stage 3 and 5, and numerous matters remain not completed nor before the Inspector.

6.3.20.29 MK indicates that the General Arrangement drawings in fact relied on are stated to be in 'Draft' and include, for example, areas on MK's land that are shown simply as 'white', and devoid of any content. The white areas contain no evidence of their content and provide *no base material* evidence on which to premise any planning judgement in respect of that most recent plan that is said to have superseded the prior PCF Stage 3 Plans and which Mr Black acknowledged awaited completion and was not in front of the Inquiries. It follows that those areas must be not confirmed as part of the CPO and SRO because it would be irrational (as in, there is no evidence) to sustain the same.

6.3.21 **Mount Cook**[299]

6.3.21.1 The next case relied on by NH is R(oao *Mount Cook Land Ltd) v Westminster City Council [2017] PTSR 1166; [2003] EWCA 1346.*

6.3.21.2 NH relies on *Mount Cook* in paragraph 4.4.29 where it says this:

> *'43. with regards alternatives, it is well established that vague and inchoate schemes cannot be given any material weight. In R (Mount Cook Land Limited) v Westminster City Council [2017] PTSR 1166 at [30], the Court of Appeal held that where alternatives might be relevant, vague or inchoate schemes, or those which have no real possibility of coming about, are either irrelevant, or where relevant, should be given little or no weight.'*

6.3.21.3 MK notes that that case was a case in the High Court about a planning permission. It is not relevant in these Inquiries under the *Highways Act 1980*. If it is theoretically relevant, then it operates in reverse against NH to exclude its own inchoate scheme as either irrelevant or having no weight by dint of the incomplete nature of the 'scheme'. In that context, it is untenable to assert that an objector showing refinements based on the state of the NH justification falls to be categorised as not relevant or of limited weight by dint of NH's own inchoate scheme.

6.3.21.4 Further, no amount of planning field case law on alternatives can undermine the legal relevance in law in the CPO field of less intrusive

[299] INQ-91.7

means as set out in *Clays Lane*.

6.3.21.5 The *Mount Cook* case is about a claim for judicial review of a grant of planning permission on the basis that the claimant had a scheme for an alternative scheme.

6.3.21.6 Mk says he is unaware of planning permission having been granted for any part of the scheme underlying the CPO and SRO made under the *Highways Act 1980*. He considers it difficult to see how this case – a planning case and that is about planning permission granted under the TCPA 1990 – can in law be relevant to the Inquiry that relates to orders sought to be confirmed under the *Highways Act 1980*.

6.3.21.7 The Court held: (Emphasis added)

> *30. Mr Corner, in the course of his submission, put forward the following general propositions which, with some slight additions, I accept as correct statements of the law and as a useful reminder and framework when considering issues such as this. They are: (1) in the context of planning control, a person may do what he wants with his land provided his use of it is acceptable in planning terms; (2) there may be a number of alternative uses from which he could choose, each of which would be acceptable in planning terms; (3) whether any proposed use is acceptable in planning terms depends on whether it would cause planning harm judged according to relevant planning policies where there are any; (4) in the absence of conflict with planning policy and/or other planning harm, the relative advantages of alternative uses on the application site or of the same use on alternative sites are normally irrelevant in planning terms; (5) where, as Mr Corner submitted is the case here, an application proposal does not conflict with policy, otherwise involves no planning harm and, as it happens, includes some enhancement, any alternative proposals would normally be irrelevant; (6) even, in exceptional circumstances where alternative proposals might be relevant, inchoate or vague schemes and/or those that are unlikely or have no real possibility of coming about would not be relevant or, if they were, should be given little or no weight.*

6.3.21.8 The reference to 'issues such as this' is the question of when and how an alternative scheme may be a material consideration in respect of an application for planning permission.

6.3.22 **Particular paragraphs**

6.3.22.1 MK says in light of the foregoing, he now responds to the NH's closing submissions on law and on misstatements of fact, without prejudice to his responding to each and every such misstatement or legal error.

6.3.22.2 MK considers that NH has asserted a large number of fundamental misstatements of fact or law in its closing submissions whose result appears to be to lead the Inspector and Secretary of State into error.

6.3.22.3 In paragraphs 4.4.7-8 NH asserts this:

> *'Paragraph 2 of the CPO Guidance provides that 'a compulsory purchase order should only be made where there is a compelling case in the public interest'.'*
>
> '*…This is the codification in Government guidance of what the Court of Appeal Prest v Secretary of State for Wales [1983] 1 EGLR 1714…'*

6.3.22.4 The assertion that *guidance* can 'codify' the law is audacious and misconceived. At most, it can be said that the Guidance provision 'reflects' the 'balance' in more recent cases.

6.3.22.5 In paragraph 4.4.9 NH asserts:

> *'The compelling case test means that compulsory purchase powers should be exercised only if "necessary". However, it is clear from the cases that this means "reasonably" necessary, rather than "strictly" or "absolutely" necessary (see further below in the context of least intrusive means).'*

6.3.22.6 The assertion that the Guidance test equates with what is stated in paragraph 4.4.9 is audacious and misconceived. It is clear from a correct analysis of the cases only first disclosed to the Inquiries in NH's closing submissions, and that have never before appeared in support of their case for acquisition, that NH has relied on a fundamentally incorrect legal test to promote its Orders. This is because, properly analysed, the Orders made under the *Highways Act 1980* fall into the *Samaroo* category of process identified as Category 1 in *Clays Lane* by the Court of Appeal; and cannot fall into the *Lough/Pascoe* Category 2 because the Orders have not been made 'in the planning field' but on the *Highways Act 1980* road. MK indicates that there is no evidence of planning permission being granted, nor at this time can it be, and nor can in law 'any works' by NH within the highway boundary qualifying within the TCPA 1990. See *Mr Keeling Response to NH's Statement of Case*[300] and his evidence.

6.3.22.7 MK indicates that, contrary to paragraph 4.4.10, the *de Rothschild* reference to the absence of a 'special rule' applies simply to the scope of consideration by the High Court when a CPO is challenged there.

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[300] CD H2.

There is no such challenge at this time.

6.3.22.8 Contrary to paragraph 4.4.10, as was made clear in *Samaroo*, the decision maker must use less interfering means (expressed in *Smith* and *Baker* as 'least intrusive').

6.3.22.9 Contrary to paragraphs 4.4.11-12, Mr Keeling does not advance 'alternatives' but refinements and that are: a) in line with *Samaroo* process (see below); or in the alternative, if incorrect, but which is not accepted, that require to be considered by the decision maker and then as factors relevant to the evaluation of proportionality.

6.3.22.10 Contrary to paragraph 4.4.13, the quote by NH is taken out of context, and actively misleads the Inspector and Secretary of State as to the law as a result.

> *'41. I appreciate that the decision in Pascoe's case is not strictly binding upon me. Forbes J's analysis of the issue of proportionality was obiter. None the less, I would not consider it appropriate to depart from his approach unless I was satisfied that it was clearly wrong…'*
>
> *'43. I am conscious, however, that an alternative view point is clearly arguable. It is for that reason that I proceed on the basis, contrary to my view, that a decision to confirm this compulsory purchase order will not be proportionate unless, on the particular facts of the case, it is the least intrusive measure open to the decision maker.'*

6.3.22.11 Contrary to paragraph 4.4.15, the law requires the Secretary of State to consider, as relevant factors at the very least, lesser intrusive means of achieving the aim. (Emphasis added to the *Pascoe* case provided by NH in their Closing Submissions)

> *68. … The availability of alternative solutions does not in itself render the leasehold reform legislation unjustified; it constitutes one factor, along with others, relevant for determining whether the means chosen could be regarded as reasonable and suited to achieving the legitimate aim being pursued, having regard to the need to strike a 'fair balance'.*

Or, applying the *Samaroo* process in a category 1 situation, as in paragraph 61:

> *'In his judgment in Samaroo's case [2001] UKHRR 1150, paras 19–20, Dyson LJ put the matter in this way:*
>
> > *19. … in deciding what proportionality requires in any particular case, the issue will have to be considered in two distinct stages. At the first stage, the question is: can the objective of the measure be achieved by*

> *means which are less interfering of an individual's rights?*
>
> *20. At the second stage, it is assumed that the means employed to achieve the legitimate aim are necessary in the sense that they are the least intrusive of Convention rights that can be devised in order to achieve the aim. The question at this stage of the consideration is: does the measure have an excessive or disproportionate effect on the interests of affected persons?'*

6.3.22.12 Contrary to paragraph 4.4.17, there is not in law a test of 'better' in this CPO context. The law is set out in *Samaroo*. See *Pascoe* at paragraph 61.

6.3.22.13 Contrary to paragraphs 4.4.19-20, in which NH asserts:

> *'MK's expert witnesses have been given legal advice to the effect that the correct approach to compulsory purchase is that the Scheme should reflect the least intrusive approach to its delivery. This was a theme in MK's closings.*
>
> *This advice has been a fundamental driver of MK's experts' approach* – Mr Moore*, in particular.* Mr Moore *states, for example, that NH should have approached the assessment of flood risk in such a way as to have made choices which minimise the size of the proposed FCA and, therefore, the land take required from MK. However, the advice given to* Mr Moore *and the approach underlying it does not properly reflect the law. There is no special rule that the "least intrusive" approach must be adopted where compulsory purchase powers are sought.'*

6.3.22.14 MK considers that in law, on the cases that NH has helpfully provided in support of its case for acquisition, albeit for the first time only in its closing submissions, the *Pascoe* case (affirmed in *Smith*) explains in some detail how the choice is made between a 'category 1 case' and a 'category 2 case' ('category 1' and 'category 2' are MK's phraseology for convenience).

6.3.22.15 MK says, as paragraph 73 of *Pascoe* describes, qualification as a category 2 case arises when the factors in that paragraph are satisfied; and otherwise, the matter is a category 1 case to which *Samaroo* process applies. See paragraph 61. This aligns with the same fact sensitive categorisation in *Clays Lane* as between '*naked deprivation*' on the one hand (category 1) and cases '*in the planning field*' or where there is no objection nor to the need for 'the' scheme (as opposed to 'a' scheme) in the other (category 2).

6.3.22.16 MK indicates that, contrary to paragraph 4.4.21, the CPO Guidance

requires each order to be justified on its merits and, only in the High Court would a question of Wednesbury reasonableness arise. It is misconceived to elide the decision to take a person's land against their will with a compelling case to take their land against their will. See paragraph 12 of the CPO Guidance.

6.3.22.17 Contrary to paragraph 4.4.22, NH has misconceived what *Clays Lane* held. It held no more than that the application of the *Samaroo* process is not of universal application but is fact sensitive. See, for example, *Pascoe* on the one hand (Category 2 case) as against *Smith* on the other (Category 1 case). In like reverse application, *Clays Lane* is also inherently not of universal application in the sense that not all cases are category 2. It is a fact sensitive question with each case.

6.3.22.18 Contrary to paragraph 4.4.24, in *Smith*, the Learned Judge held: (Emphasis added)

> *'43. I am conscious, however, that an alternative view point is clearly arguable. It is for that reason that I proceed on the basis, contrary to my view, that a decision to confirm this compulsory purchase order will not be proportionate unless, on the particular facts of the case, it is the least intrusive measure open to the decision maker.'*

6.3.22.19 Contrary to paragraph 4.4.25, the Belfield case was a Category 2 case.

6.3.22.20 Contrary to paragraph 4.4.26, the MOPAC decision is an up to date example in practice by a lawyer Inspector that that case was a category 1 case and so she refused to confirm a CPO for the freehold where a 15 and 30 year lease were evidenced as justified, but no longer than that. That is, the decision of that Secretary of State is an example where a lease (in our situation, the licence) was found to be the lesser intrusive. Or, as Smith describes ('least intrusive').

6.3.22.21 Contrary to paragraphs 42 and 43, Mr Keeling is not proposing 'alternatives' but is demonstrating 'less intrusive means' by which to achieve the aim of the scheme (as opposed to an 'alternative' per se). The term 'alternative' is generally understood to mean a different site location for the scheme or of the whole scheme on the same site as opposed to a mere refinement of a part of a scheme on the same 'site' but in a refined situation or plot. Hence, its description as a 'means' to secure a less intrusive result is a more appropriate characterisation of what Mr Keeling is seeking to secure. As was said in *Smith*:

> *'43. I am conscious, however, that an alternative view point is clearly arguable. It is for that reason that I proceed on the basis, contrary to my view, that a decision to confirm this compulsory purchase order will not be proportionate unless, on the particular facts of the case, it*

is the least intrusive measure open to the decision maker.'

6.3.22.22 Contrary to *Smith* paragraph 44, the Denbigh case (see 6.3.18.21) is not relevant. Rather, Samaroo remains the legal test. See Pascoe, paragraph 61:

In his judgment in Samaroo's case [2001] UKHRR 1150, paras 19–20, Dyson LJ put the matter in this way:

> *"19. … in deciding what proportionality requires in any particular case, the issue will have to be considered in two distinct stages. At the first stage, the question is: can the objective of the measure be achieved by means which are less interfering of an individual's rights?*
>
> *"20. At the second stage, it is assumed that the means employed to achieve the legitimate aim are necessary in the sense that they are the least intrusive of Convention rights that can be devised in order to achieve the aim. The question at this stage of the consideration is: does the measure have an excessive or disproportionate effect on the interests of affected persons?"*

6.3.22.23 *Samaroo* was a Court of Appeal case and so too was *Clays Lane*. Hence, the Court of Appeal had to, as they stated in that case, reconcile how to apply each of *Samaroo* and *Clays Lane*. The Court ensured this division in the lawful engagement of either test by spelling out the criteria by which a category 2 case fell to be subject to a different test of 'necessity' (that involves 'reasonable', as opposed to requiring a less (not 'least') intrusive means as was the case in *Samaroo*) (Where in *Smith*, the Judge used 'least' to summarise 'less intrusive'). As was said in *Clays Lane*: (Emphasis added)

'21. That Samaroo's case is not of universal application has been accepted by this court in Lough v First Secretary of State [2004] 1 WLR 2557, which was concerned with the application of article 8 and article 1 of the First Protocol to a grant of planning permission. Pill LJ said, at para 49:

> *'The concept of proportionality is inherent in the approach to decision making <u>in planning law</u>. <u>The procedure stated by Dyson LJ in Samaroo's case [2001] UKHRR 1150 ... is not wholly appropriate to decision making in the present context</u> in that it does not take account of the right, recognised in the Convention, of a landowner to make use of his land, a right which is, however, to be weighed against the rights of others affected by the use of land and of the community in general.''*

6.3.22.24 MK considers that it would be actively misleading by NH of the Inspector and Secretary of State to assert that the Orders made by NH under the *Highways Act 1980* were asserted to have been in fact made under the TCPA 1990 or (even) the *Planning Act 2008* (but this is not a Development Consent Order). Therefore, the Secretary of State cannot be making a decision 'in planning law' but can only be making a decision in Highways Law.

6.3.22.25 Contrary to paragraph 4.4.29, *Mount Cook* concerned a planning application and a claim for judicial review. Mr Keeling is unaware of any planning application that NH might have made and is also unaware of any claims for judicial review. The *Mount Cook* case is legally irrelevant.

6.3.22.26 Contrary to 4.4.83 applying the correct approach to interpretation set out by the Supreme Court in *Sainsbury's* and that must be applied in a CPO case to require the interpretation that favours the landowner, section 18(1)(f) of the *Highways Act 1980* – that is for the very first time in its closing submissions relied on by NH (and is nowhere to be identified in its *SoR* or in its *Statement of Case*). However, properly interpreted, 'other dealing' cannot include the term 'improvement' because that term is itself used in the same section under section 18(1)(c)(i). It follows that, if NH rely on section 18(1)(f) alone, then the Orders sought must be ultra vires the *Highways Act 1980*. That is, NH has never had the power to make such Order and they are, therefore, void for want of original jurisdiction.

6.3.22.27 Contrary to paragraph 4.4.85, see below for the proper approach to interpretation of sections 16 and 18 on the facts of the situation before the Inspector and Secretary of State. Given section 1 of the *Highways Act 1980*, on no view can NH be the current highway authority for the gyratories below the M27 mainline special road. Therefore, to effect any works, NH must become the highway authority in substitution for the County who are the current highway authority for the gyratories. See the terms of sections 16(5) and 18(1) and (2), as interpreted in light of the *Sainsbury's* case.

6.3.22.28 Contrary to paragraph 4.9.1.1, as Mr Keeling has previously set out in his documentation, properly interpreted, applying *Sainsbury's* presumption against the acquiring authority, section 16, 'General provision as to special roads', section 16 is not confined to section 16 but applies to special roads where an appropriation or a transfer occurs. This is understandable because the Act allocates the jurisdiction of the highway authority to a particular body. See section 1.

6.3.22.29 Under section 16(5): (Emphasis added)

> '5) A special road authorised <u>by a scheme</u> under this section may be provided—

a) by means of the appropriation under subsequent provisions in that behalf of this Part of this Act of a highway comprised in that route for which the special road authority are the highway authority;

b) by means of the transfer to the special road authority under subsequent provisions in that behalf of this Part of this Act of a highway comprised in that route for which they are not the highway authority.

8) Before making or confirming a scheme under this section, the Minister shall give due consideration to the requirements of local and national planning, including the requirements of agriculture.'

6.3.22.30 Section 18 is a 'subsequent provision'. Section 18 provides for: (Emphasis added)

1) 'Provision in relation to a special road may be made by an order under this section for any of the following purposes: —

a) for appropriating as, or as part of, the special road, as from such date as may be specified in the order, a highway which is comprised in the route prescribed by the scheme authorising the special road and which is a highway for which the special road authority are the highway authority;

b) for transferring to the special road authority, as from such date as may be specified in the order, a highway which is comprised in the route prescribed by the scheme authorising the special road and which is a highway for which they are not the highway authority;'

6.3.22.31 By section 1(1)(aa) and (1A)(a), NH is the Highway Authority at this time for (at most) the SRN but in fact and law the SRN cannot extend beyond the end of the slip road because section 1(2) deems all other highways the County to be the highway authority. i.e. for each gyratory. Consequently, at this time, only by transferring jurisdiction over the 'highway' from the County Council to NH can NH itself carry out improvements to highways that are otherwise the function of the County. That is the purpose of section 18(1)(a).

6.3.22.32 MK says consistent with that analysis, CD A.12-*Jurisdiction of highways* shows the 'Highway to be maintained by Hampshire County Council' after construction whereas the County is the exclusive highway authority at this time for the gyratories. Hence, section 16(5)(b) would apply, and thereby engage section 16(8). That is the situation evidenced by CD A.12.

6.3.22.33 Consistent with NH's SoR for Making the Orders, the Statement

expressly refers to a 'scheme'. But, if the Orders were exclusively under section 18, then there is no need for any reference to a 'scheme' because subsections (1)(c)-(f) make no reference to a 'scheme'. In fact, the CPO expressly refers to 'scheme' under paragraphs 1(2) and 2 and the *SoR* at paragraph 1.1.1. Section 18, '*List of Related Documents*', includes specified general arrangement plans at CD A.9 and CD B.1 describes at Figure 2.1 the Scheme Location and at paragraph 2.4 Project Description:

> *'… The proposed Scheme General Arrangement drawings are included in Appendix B.'*

6.3.22.34 MK indicates that, contrary to the partisan reporting in paragraph 4.9.1.1 above, Mr Bedwell's evidence was in fact not entirely predicated on the application of section 16(8) of the Highways Act 1980.

6.3.22.35 As he said in cross-examination, he said in fact, he had also applied the policies in a freestanding manner, as had Mrs Williams.

6.4 Factual framework on the main issues

6.4.1 Mr Keeling indicates that, without prejudice to the foregoing, the factual framework divides as follows:

a) Need for 'a' scheme and not for 'the' scheme;
b) The extent of the highway necessary adjacent to Mr Keeling's land;
c) Landscape and other matters;
d) Flood risk; and,
e) Section 110 of the Highways Act 1980 and culvert upsizing instead of an FCA.

6.4.2 Need

6.4.2.1 MK indicates that the policies at national and local level demonstrate the need for increased capacity of the gyratories by some means but no policy defines or determines how such capacity is to be, or is necessary to be, deployed.

6.4.2.2 Thus he says, there is no NN NPS nor otherwise support for (as so-called) 'the Scheme'. Nor is there any personalisation of the policy support to a scheme 'by' a particular party. NH is not identified as the exclusive party to whom the need must be allocated. Consequently, the need for 'a' scheme operates to also support Mr Keeling's refinements to the eastern edge of the capacity improvements so far as it also lends

support to wider aspects of 'a' scheme.

6.4.2.3 Similarly, when the critical need for improvements is identified, this same level of need also supports the refinements proposed by MK and to which NH has apparently agreed to – but still awaits to concretise that agreement into real drawings of that agreement. As opposed to mere words of intention. Whilst the PCF Stage 3 plans[301] are not marked as draft, the PCF Stage 5 plans[302] now relied on by NH are marked as draft.

6.4.2.4 He considers that, indeed, the NH scheme remains presently inchoate, uncertain in many important respects, such as safety, and un-concluded on numerous levels (landscaping, highway design, flood modelling and flood risk) so as to be in practical reality impossible to presently pin down in any real way.

6.4.2.5 The inchoate nature of the NH scheme weighs against its confirmation as uncertain.

6.4.2.6 Conversely MK says, the Local Plan expresses real long-term support also for the provision of a Link Road over MK's land as part of what is effectively a mini-bypass whose route runs parallel to the east side of the M27. It also protects that link through Policy HE4.

6.4.3 **Extent of highway**

6.4.3.1 MK considers that, contrary to the NH view, in the sphere of compulsory acquisition of land, as opposed to a mere decision to require *transfer* of an asset to a third party as in *Clays Lane*, the correct and orthodox legal test remains to ensure that the 'least intrusive means' necessary are advanced by NH as step one of the path to lawful justification of the compelled taking of MK's land. See, for example, *Clays Lane* at paragraphs 12, 15 – 16, and 17 at C: 'the least interfering'. The result may be no lawful taking is *necessary* and here is such. NH has not adhered to that test and acted as if it owns the red lined land, making subjective judgements without regard to other's ownership.

6.4.3.2 MK indicates that NH agrees, finally, that it has no need for a four lane part to the scheme along the edge of MK's land but it remains the case that it has not produced any actual drawings showing the same (except in draft). Modification remains the least intrusive means to give effect to that agreement. MK has produced the same.

[301] CD A.6
[302] CD A.9.

6.4.3.3 Furthermore, NH agrees, finally, that a 3-lane refinement of the current inchoate scheme advanced by Mr Moore is acceptable within the current highway. It is also 'best practice' as Mr Singh noted. There is no need for MK's land for highway improvements, but, actual non-draft drawings remain absent. Modification remains the least intrusive means to give effect to that agreement. Mr Keeling has produced the same.[303]

6.4.3.4 MK indicates that NH disagrees with a 2-lane refinement that maintains the status quo (but with traffic lights/signalisation at the junction of the slip road and gyratory). The Inspector has Mr Singh's evidence on this and is invited to accept that, because it does not adopt the 'build it bigger/predict and provide' approach endorsed by Mr Sim but rejected by the Secretary State in his NN NPS.

6.4.3.5 MK considers that Mr Singh's evidence shows that the NH 3-lane scheme is already 'broken' by dint of the evidence of it exceeding theoretical capacity; whereas no refinement by Mr Keeling exceeds 100% theoretical capacity and each of his two refinements is closer to the required threshold area of 90% DoS.

6.4.3.6 MK says a benefit of the 2-lane status quo would be to remove the need for gabion wall construction costs, and to ensure maintenance of the existing landscape along the Southbound slip road, with attendant biodiversity benefits. It would also avoid the creation of a dangerous state of affairs in circumstances where the decision of the Overseeing Organisation with respect to departures cannot be prejudged by the Secretary of State.

6.4.4 **Landscaping and other matters**

6.4.4.1 MK indicates that there is no *requirement or need* for landscaping of his land in law or policy. As Mr Black accepted, landscape is 'parasitic' on the asserted need for some flood compensation area on MK's land: "*where space permits"*. See the EAR 2020, page 96, paragraph 8.8.2, bullet 1. Indeed, NH no more than most strongly desires to change the vegetation on his land from pasture to tall trees. It is hard to imagine a less untenable rationale for taking a citizen's land against his will than changing the type of vegetation notwithstanding Mr Black's enthusiasm for grand scale planting and inability to think small.

6.4.4.2 MK considers that the local policy provides to protect the locality from being undermined in respect of its function to reinforce the local built settlement. The EAR 2020 accepts that the installation of embankments would here result to 'urbanise' the local vicinity of MK's land and introduce an 'uncharacteristic landform', being opinions with which

[303] INQ-14.

Mr Black agreed. See page 80, paragraph 7.9.2, and page 82, paragraph 7.9.3 of the EAR 2020. Mr Black accepted there would be a breach of the local policy, albeit a small breach, by such development. In such circumstances, the development policy does not permit development.

6.4.4.3 Similarly, the same EAR, at page 96, paragraph 8.8.2, provides for 'wildflower verges' to be created along footpaths and in MK's view there is no reason why the same could not be created on the limited areas between the edges of the 2 and 3-lane channel line and MK's land, in line with DMRB LA 113 applied to limited land take. If not able to be provided by Mr Black, then the experienced EAR author of that section, and who drafted the Environmental Masterplan referred to therein, no doubt could.

6.4.4.4 MK says there also remains no requirement to ensure a net Biodiversity gain at this point in time, as the new legislation does not bite on the *Highways Act 1980*. However, leaving the 2-lane slip lanes in situ would prevent the loss of biodiversity as a result of a 3-lane refinement to the eastern edge of the scheme.

6.4.4.5 MK indicates that whereas noise attenuation is intended, as with biodiversity, there remain no present guarantees in the Orders sought to ensure a framework inside of which details may be worked out, nor evidence before the Inspector and Secretary of State to enable them to evaluate the actual likely outcome from a range and ensure this. See *Smith v SoS for the Environment, Transport and Regions* [2003] EWCA Civ 262.[304]

6.4.4.6 MK considers that safety remains a key concern also. There is no statutory immunity from claims arising from the creation by a decision maker of a dangerous state of affairs (see *Kane)*. MK says that he would not want the Secretary of State to be put in a position of creating an unsafe state of affairs with respect to the entry path radius associated with NH's southbound off-slip road 3-lane proposal. NH now properly recognises that its contractor Graham/Sweco cannot adhere to 'key' safety determinants required to be adhered to in respect of Entry Path Curvature (EPC). Instead, Graham/Sweco assert that the outcome of the Overseeing Organisation to depart from that requirement can be pre-judged as a given. The evidence of NH's Safety, Engineering and Standards Division (SESD) shows that it cannot be taken as a given.[305] The SESD agreed with Mr Moore that adherence to such EPC criteria was required south of MK's land as well as to its west – but this remains unprovided. Modification of the scheme to ensure the status quo of the two lane slip road with simply traffic lights would remove the

[304] INQ-88.3
[305] INQ-61 Appendix B.

requirement for a revised curvature adjacent to MK's land because the highway would remain unchanged and also the EPC criteria from the slip road would not bite as the highway would remain as is. That is, safety and biodiversity are factors significantly favouring the 2-lane scheme on the south bound off-slip road.

6.4.4.7 MK indicates that similarly, the required sign off of the RSA1 remains required but outstanding. So far as anecdotal collision evidence indicates property damage, no doubt signage can alleviate and ultimately seek to negate the same in line with NH's 'safety' drive.

6.4.4.8 Conversely MK says, the assumption by the road contractor of securing from the Overseeing Organisation (or the County) a Departure from a 'key' safety standard is not a badge of an organisation actively relying on provision of a 'safe' driving environment. Particularly when the alternative 2-lane arrangement is safe in respect of that key curvature provision.

6.4.5 **The day 11 'flood alleviation note'**[306]

6.4.5.1 MK considers that the recent Note by NH produced at the end of Day 11 is tardy and misplaced in its thesis. In essence, the *Infrastructure Act 2015* places no absolute requirement on NH as regards flood or safety or their effects. Instead, it and the Licence terms require that NH 'have regard to' such factors and to effects of such factors. That is not a binding absolute requirement for safety and for the environment. Instead, as the Licence indicates, there is a range of factors falling to be balanced by NH.

6.4.5.2 Further, in MK's view there is no evidence before the Inspector that Graham/Sweco is in fact subject to the same obligation as the note asserts. If it is contractually so bound, the requirement remains no more than to have regard to such factors.

6.4.5.3 Similarly, the assertion by NH that it is 'unable' to proceed with the whole scheme if Plot 11b (alone) cannot be utilised for an FCA is a surprising assertion by a public authority and totally unsupported by evidence of such inability. The absence of supporting evidence (if different to the *Infrastructure Act 2015* provisions) gives the reality to the assertion as rhetoric and is in contrast with Mr Clark's oral evidence in cross-examination that the scheme 'could' be modified to remove Plot 11b even if 'difficult'.

[306] INQ-62.

6.4.6 **Flood risk**

6.4.6.1 MK says he has described the historic situation arising from the situation of the M27 across a pre-existing watercourse in 1975 and the provision then by NH of an appropriately sized concrete culvert of 450mm in diameter.[307]

6.4.6.2 More recently, and since about 2001, the *guidance* on notional flow calculation has changed with the result that the actual culvert is evaluated by NH as surcharging in certain notional conditions. That is under theoretical, rather than gauged conditions.

6.4.6.3 MK indicates that NH has invested in two FRAs by its subcontractor Jacobs, and by its contracting road builder, Graham/Sweco. NH has not invested in simple gauging of the watercourse by which to evaluate the actual flow position. This is notwithstanding the technical advice of the EA, referred to by NH at paragraph 4.5.5.34, that even two years of gauged flow can radically show the true position and would enable the potential reality of whether there is no notional surcharging to be revealed. NH's flood risk case may amount to an 'emperor's new clothes' scenario. That is, there has been no *identified surcharging* to date of the existing culvert notwithstanding (at most) some water has been observed on the southbound off-slip. There is no evidence before the Secretary of State, other than notional, showing a relationship of water from the culvert on the slip road.

6.4.6.4 MK says that a simple site inspection also reveals the situation of the existing culvert as being on NH's land. But this *fact* was not known by Graham/Sweco when it undertook the redesign of the drainage system to decouple the conveyance of water along the watercourse from highway drainage and to shift that coupling southwards whilst simply moving the 450mm throttle of culvert head to the southern vicinity of its land (near to Mr Keeling's land). CPO Plot 11b is not NH's land and NH misunderstood this from the start.[308]

6.4.6.5 MK considers that this is not a situation where, had previously NH applied its mind and actions to the facts, and to its professed 'safety' driver including as to perceived flood risk, NH could not have investigated the facts that are notionally of such now professed concern. So professed indeed, that NH asserts that the Secretary of State indemnify NH if the FCA is not provided on MK's land, and simultaneously hinges the whole of its current (inchoate) scheme on the provision of that FCA on Plot 11b.[309] No Statement of Case nor Reasons

[307] CD H.2 para 46
[308] NH 3/2 para 8.50
[309] INQ-62.

elevates Plot 11b to such supremacy and that prior absence evidence is the reality of what is no more than an assertion by NH upon its realisation that its (inchoate) scheme may be required to change by a modification to exclude MK's land. But the PCF Handbook[310] aligns to that position, as it requires PCF Stage 4 to be concluded before PCF Stage 5 proceeds, and so under the terms of the PCF handbook PCF Stage 5 has not yet been reached. Here, NH appears (if its unevidenced assertions are correct) to have jumped the PCF Stage 4 gun in breach of its own PCF obligations and so no indemnity is appropriate.

6.4.6.6 MK suggests however, since the local policy supports the provision of improvements to junction 8 over the Plan Period, that support would not go away if the currently formulated scheme falls to be refined in a number of ways. Further, as was put to Mr Clark, if there really is a need for the scheme, there can be no doubt that NH would find a way to make it work within any time constraints, even if 'difficult' as he candidly said. Indeed, even today the scheme remains incomplete in many respects including: highways design; landscaping; flood risk evaluation. So, the suggested 'delay' remains a mere assertion. NH is simply concerned at any change. But PCF Stage 3 and 4 recognise changes may occur and as part of the consent process. Hence PCF Stage 5 proceeds from 4 and not the other way around.

6.4.6.7 MK indicates that conversely, this is not a situation where NH has had no time to evaluate what may be necessary to be provided and to be done: the early technical documents show evaluation of existing drainage could have been done earlier, watercourses gauged, powers considered and exercised. Yet nowhere in any EAR is there any consideration of the subsisting power under section 110 of the *Highways Act 1980* under which, even if at least only 'desired', NH can resolve such flood risk matters that it perceives because it also currently owns the land that contains the mechanism for that perceived flood risk (the 450 mm diameter culvert). To instead lead him on a merry dance of CPO thus remains surprising to MK.

PCF Stage 1 – Technical Appraisal Report (November 2016)

6.4.6.8 The first document to evaluate drainage and water matters is the PCF Stage 1 – Technical Appraisal Report (November 2016)[311] that included:

> *'4.7 Drainage*
>
> *4.7.1 This Section of the report considers the existing carriageway drainage systems for each sub-scheme. A desk study has been*

[310] KEE/1/7/3 Appendix C-The Project Control Framework Handbook pages 9-13.
[311] CD C.3 page 53

undertaken using data collected from a site visit to identify the existing drainage for the scheme. No records relating to the existing drainage systems have been sourced at this stage.

4.7.2 The following judgement has been made based the information collated during the desk study to determine the drainage arrangements. As built and condition survey records will need to be obtained from Hampshire County Council and Southampton City Council at a future PCF Stage. If full information is not available a full inventory and condition survey will need to be undertaken at a future PCF Stage, as identified in paragraph 13.1.6 of this Technical Appraisal Report.

4.7.3 The existing surface water collection system consists of kerbs and gullies for all the sub schemes. The following observation were made of the drainage systems and their discharge:

- *Sub scheme 1:*
  - *M27 Junction 8 Roundabout - the gullies appear to discharge into a surface water sewer.'*

6.4.6.9 The PCF Stage 1 – Technical Appraisal Report (November 2016) further included[312]:

'*13.1.1. This section provides an overview of key issues that will need to be taken into account when the drainage design for the scheme is developed in future PCF203F 204 Stages.*

13.1.2 The principle objective of the drainage is to provide a surface and sub-surface water collection system, so the highway asset is not aged prematurely by a lack of a drainage provision.

13.1.3 Highway surface water runoff will require a positive drainage system; this could be kerbs and gullies, combined drainage kerb, filter drain or a surface water channel. Given the urban nature of much of the A3024 corridor, a surface water channel system seems unlikely to be feasible option for this scheme.

13.1.4 A sub-surface system is required to drain the formation layers, deeper groundwater falls outside this drainage scope, this could be a filter drain, ditch, narrow filter drain or fin drain.

13.1.5 At PCF Stage 1, it is considered that the drainage strategy for

[312] CD C.3 page 126

the scheme should include for:

- *The existing drainage systems to be re-used, where feasible;*
- *Attenuation to be included within each drainage network, where required to reduce the outfall rate to match the existing rate, if the discharge rates cannot be increased.'* Mr Keeling notes the reference to attenuation within, not without, each drainage network and considers that NH has known for 7 years that they could fix the culvert.

'13.1.6 The condition, capacity, outfall locations and ownership of all the existing surface water drainage should be assessed and confirmed.

13.1.7 Where possible the existing drainage should be re-used, and if no records are found to exist, a full asset detailed defect surveys should be conducted in accordance with clauses 2.4.3 of Interim Advice Note 147/12204F 205 of the DMRB205F 206. Drainage with moderate to severe structural and serviceability defects should be refurbished or renewed; these defects are classed as Cat 3 to 5 defects in HD43/04206F 207 of the DMRB.' Mr Keeling observes that the recommended full asset detailed defect survey has not been provided.

'13.1.8 Consultation with the Local Highway Authority (Hampshire County Council for sub scheme 1 and Southampton City Council for sub scheme 2, 3 and 5) should be undertaken to identify any existing drainage issues.

13.1.9 Consultation with the Lead Local Flood Authority (Hampshire County Council for sub scheme 1 and Southampton City Council for sub scheme 2, 3 and 5) and the Environment Agency should be undertaken to discuss the drainage strategy for the scheme and in particular discharge rates and attenuation…

19.2.15 Other potential opportunities to make maintenance easier include:

- *Utilising a mechanical system to sweep drainage channels and gullies, thereby eliminating the need for manual attendance…*

20.8.2 The most notable potential impact during operation comprises a potential increase in flood risk associated with surface water runoff from new areas of hard-standing (All Sub-schemes). It is anticipated that this will be mitigated through the provision of an appropriate drainage system that will be developed during the detailed design stage.'

The Environmental Assessment Report (2018)

6.4.6.10 Thereafter, the EAR (2018) included under Section 14, Road Drainage and Water Environment[313]:

'14.1.1 National Policy

National Planning Policy Framework

The National Planning policy framework (NPPF) sets out the Government's planning policies for England. Planning Practice Guidance 'Flood Risk and Coastal Change' has been published alongside the NPPF. These documents identify how new developments must take flood risk into account, including making allowance for climate change impacts, and ensure no increase in risk to people and property elsewhere. All applications in the following areas should be accompanied by a Flood Risk Assessment (FRA) – all projects in Flood Zones 2 and 3 (medium and high probability of river and tidal flooding); projects of 1ha or greater in Flood Zone 1 (low probability of river and tidal flooding); projects which may be at significant risk from other sources of flooding (local watercourses, surface water, groundwater or reservoirs); or where the Environment Agency (EA) has notified the local planning authority that there are critical drainage problems…'

6.4.6.11 Table 15.1, Row 1 included a description of Sub-scheme 1 and the 'watercourse' relating to it and then the Assessment Report said this:

14.2 Study area

… The need for a separate Flood Risk Assessment (FRA) will be determined and if required produced at PCF Stage 3 as part of the drainage strategy for the scheme to document the flood risk and any mitigation measures required. Flood risk impacts have been included in the baseline section of this report for information purposes but have not been included in the assessment…

14.3.1 Surface Water Features

There are several un-named watercourses that pass through the study area and some within the scheme extents. These are described from west to east in the following paragraphs and presented in Appendix 13.1, Error! Reference source not found. Drawing

[313] CD B.19 page 250

Reference HE551514 - WSP - GEN - M27 - FI - GIS – 0019)……

A number of ordinary watercourses are depicted on HADDMS (Highways Agency Drainage Data Management System) *within 500m of Windhover Roundabout and Junction 8 of the M27, Sub-scheme 1. One tributary is located approximately 300m south of Windhover Roundabout and is referred to as Watercourse F. There are a further two tributaries that pass through Junction 8 in culvert under the circulatory carriageway, slip roads and M27 mainline in a southerly direction. The two tributaries merge and become an open channel located to the east of the southbound on slip at Junction 8 and referred to as Watercourse G. This watercourse is joined by Watercourse F and flows southwards through Bursledon to discharge into the River Hamble to the east of the study area*.'

Therefore, while consideration was given to watercourses as early as 2016, Mr Keeling notes that the flows were not gauged by NH.

6.4.6.12 The Assessment continued:

14.3.6 Drainage Features

'The A3024 and M27 are served by drainage gullies located within the carriageway. Details of this system, including the size/alignment of the below ground system, provision of attenuation and treatment systems, and outfall to the receiving water environment, are unknown at this stage. A drainage survey will be undertaken at a later design stage to gain further information about the highway drainage system.

In the vicinity of Junction 8 the Priority outfalls register on HADDMS (which records outfalls on Highways England network) records a single outfall located to the south east of the circulatory carriageway where Watercourse G emerges from culvert. This outfall is currently categorised as Low risk (in terms of pollution risk to the receiving watercourse). This categorisation has been based upon regional datasets and has not been verified through the use of local data.

The next nearest outfalls to Sub-scheme 1 are located to the south of Junction 8. Where Watercourse G passes under the M27, parallel and on the north side of where Dodwell Lane also passes over the M27, there are a cluster of four outfalls on the upstream side of the culvert under the M27 and two located on the downstream side. All of these outfalls are categorised as "Risk addressed" meaning that any previous pollution risk to watercourses has been resolved…

14.3.7 Flood Risk

Review of the EA Flood Map for Planning (Rivers and Sea) indicates that most of the study area, including all of Sub-Schemes 1 and 5, is located within the low risk Flood Zone 1. Land within Flood Zone 1 is assessed to have an annual probability of flooding from fluvial or tidal sources of less than 1 in 1000 (<0.1%)…

The EA Risk of Flooding from Surface Water map identifies overland flow routes associated with the ordinary watercourses identified in earlier sections of this report. Flooding of the A3024 may occur if water within the channel of the identified watercourses exceeds the capacity of the channel and flows overland, although the risk is likely to be low. Of particular note is ponding of surface water at ground level adjacent to the Bitterne Rail Bridge, as well as ponding of surface water adjacent to the west and south of the road at Junction 8 of the M27. These areas are identified to be at high risk of surface water flooding, assessed as having a greater than 1 in 30 annual probability of flooding (>3.3%).'

Mr Keeling observes therefore, NH knew of the risk, insofar as there may be one, in 2016.

6.4.6.13 Section 110 of the Highways Act 1980 remained available at this time.

The Environmental Assessment Report (January 2020)

6.4.6.14 Thereafter, the EAR (January 2020)[314] included under page vi:

'Key environmental designations and features near the proposed Scheme include: …

- *Ordinary watercourse to the east of M27 junction 8 …*

Potential effects and mitigation: …

- *Increased traffic flows and an increase in impermeable area could impact the water quality of a minor ordinary watercourse east of M27 junction 8 (Watercourse B) due to an exceedance of the Environmental Quality Standard for soluble copper. This will be mitigated by including permanently wet sustainable drainage systems (SuDS) in the drainage design at PCF Stage 5.*

Overall, with the application of proposed mitigation, the proposed

[314] CD B.1

Scheme unlikely to result in significant effects.'

6.4.6.15 Table S.2: Summary of Effects included on page xi:

'*Surface water runoff will be generated at an increased rate and volume than occurs at present due to an increase in the areas of impermeable surfaces. Mitigation in the form of attenuation basins, underground storage tanks, swales and ditches will attenuate flows and ensure the flood risk downstream of the proposed Scheme is not increased. Development in areas at risk of flooding around M27 junction 8 could increase flood risk upstream of the Scheme and also to the carriageway. This will be mitigated through provision of a flood wall and flood compensation areas. The Scheme is likely to lead to an increase in traffic flow and an increase in impermeable area, which will increase the pollutant levels in highway drainage. This could impact water quality in an ordinary watercourse east of M27 junction 8 due to an exceedance of the Environmental Quality Standard for Copper. This will be mitigated by including permanently wet drainage ponds and ditches, which are proven to remove soluble copper. With this mitigation, all effects on water environment receptors are anticipated to be neutral*.'

6.4.6.16 The Table referred to 'climate change' but made no reference to flood risk as relating to climate change, a link that NH now relies on.

6.4.6.17 Page 8 summarised the following:

'2.4.4 Drainage

The proposed drainage system consists of a combination of new and existing highway drainage assets and incorporates Sustainable Drainage (SuDS) measures where possible. The surface water runoff entering the proposed drainage system at the M27 junction 8 roundabout (including the drainage from Bert Betts Way) will discharge to the existing ordinary watercourse east of M27 junction 8 (referred to as watercourse B throughout this report). The surface water runoff entering the proposed drainage system at and around Windhover Roundabout (which includes three different drainage catchments) will discharge to the existing drainage system along Providence Hill, Hamble Lane, and Bursledon Road.

The surface water runoff will be collected using either trapped gullies or combined kerb drains. Collected surface water runoff will be conveyed using filter drains (i.e. perforated carrier drains within granular filter media) and roadside ditches in most locations, and standard carrier drains will be used at other locations.

Attenuation will be provided by an underground geocellular storage system and attenuation ponds. This will restrict increased surface water runoff rates and volumes from the proposed scheme prior to discharge to existing watercourse/existing drainage systems.

The proposed drainage system will include SuDS measures in the form of filter drains, roadside ditches/swales and attenuation storage provided by means of an underground geocellular storage system and attenuation ponds. The incorporation of SuDS will increase the time it takes the surface water runoff to reach outfalls and will provide natural filtration for sediment and contaminants that may be conveyed by runoff.'

6.4.6.18 Page 9 set out the situation of the 'Scheme boundary':

'2.4.6 Scheme Boundary
The Scheme's red line boundary includes areas for environmental mitigation. This includes:

- *landscape planting along the M27 junction 8 south bound off-slip and Dodwell Lane to provide visual screening to properties north east of the junction*
- *…*
- *flood compensation areas to the north east, north west, and south west of M27 junction 8 to compensate for loss of flood storage in areas at high risk of surface water flooding.*

A Flood Risk Assessment (FRA) was undertaken after design fix 3. The conclusions of the FRA suggest changes to the flood compensation areas described above will be required to mitigate flood risk. The flood compensation areas shown on the PCF Stage 3 preliminary design drawings are therefore likely to change during the detailed design, which could affect the red line boundary. The recommended alterations are described in chapter 13, road drainage and the water environment.

Different design options for implementing the proposed Scheme have been considered during PCF Stage 3. This has included making alterations to the design to avoid or reduce environmental effects (embedded mitigation). These options, as well as their environmental considerations, are summarised in section 3.3. …

2.4.8 Land take requirements
Most of the proposed works would be within the existing highway boundary. There are areas where land take is required outside of the highway boundary. <u>This includes temporary land take for construction compounds</u>, and permanent land take for the design (e.g. drainage ditches and earthworks) or environmental mitigation (landscape planting and flood compensation). The temporary and permanent land requirements are provided below:

- *The Scheme will require 13.28 ha of permanent land take (of which 1.3 ha is required outside of the Highways boundary)*
- *In addition to the permanent land take, the Scheme will require 0.86 ha of temporary land take outside the highway boundary for construction compounds…'*

Therefore, MK considers that the scheme boundary was set by the EAR, before a Sequential Test was undertaken, and this is equivalent to a developer drawing a red line for a planning application in advance of undertaking the Sequential Test; a critical error. MK has tried to ascertain why NH is resistant to changing the red line boundary. He considers that there is no rational basis for resistance other than that NH has pre-let, in advance of PCF Stage 5, a contract for the construction which ties the red line down and leads to the call for an indemnity. The contract is not before the Secretary of State. Furthermore, MK says he was originally approached by NH on the basis that his land would be required temporarily for a construction compound, which he said yes to. NH then changed its mind, seeking permanent acquisition.

6.4.6.19 Section 110 of the *Highways Act 1980* remained available at this time as well.

The FRA (2020)

6.4.6.20 NH's then advisors, Jacobs, carried out an FRA[315] that underpinned the EAR 2020. The Executive Summary said this:

'… The assessment of flood risk from all sources is largely based on the results of a desk based study undertaken between August and October 2019. However, hydraulic modelling of an ordinary watercourse located at junction 8 has also been undertaken to assess the flood risk it poses to the scheme and the effect of the proposed Scheme on flood risk elsewhere.

All the proposed improvement works are to be undertaken within the existing highway boundary. [Mr Keeling considers this supports his view that NH assumed that the within the red line boundary was NH land; it is not] *Due to the spatial constraints of the scheme, the proposed drainage strategy will re-use as much of the existing drainage system as possible. The proposed Scheme has been designed to ensure the Scheme is safe for its lifetime as well as ensuring that the Scheme does not negatively impact flood risk elsewhere. As per DMRB guidelines, drainage has been designed to ensure that the following design standards are met: no surcharging*

[315] CD B.5

in the 100% (1 in 1) Annual Exceedance Probability (AEP) event; no flooding in the 20% (1 in 5) AEP event; and no surface water flooding extending beyond the highway boundary in the 1% (1 in 100) AEP event. The proposed drainage strategy has also been designed to provide a potential reduction to existing peak discharge rates for all events up to the 1% (1 in 100) AEP event including an increase in rainfall intensity of 20% due to climate change…

The impacts of all sources of flood risk to the development have been assessed…two tributaries of an ordinary watercourse (Bursledon Brook) are culverted beneath junction 8. The risk of flooding from these minor watercourses is not accounted for on the Flood Map for Planning. Therefore, hydraulic modelling of this watercourse was undertaken as part of this assessment. The results of this modelling indicate that flooding currently onsets during events greater than the 50% (1 in 2) AEP event when the culvert upstream of junction 8 surcharges, resulting in flow passing overland to the south before ponding on the roundabout of the A3024.

The design flood event for this scheme is the 1% AEP flood event including a 35% increase in flows to account for climate change during the 100 year life of the development. During this design event flood depths greater than 850mm are predicted on the existing carriageway and roundabout. Based on this, the existing fluvial flood risk to the scheme is considered high…

… To manage flows from the eastern tributary, a series of flood storage measures comprising a basin, an underground tank and a pond are proposed. Risk from the western tributary would be managed by a flood wall along the north-west corner of the roundabout to prevent water from flowing onto the carriageway, another storage area adjacent to this wall would then partially mitigate for the loss of floodplain storage on the carriageway…

The Environment Agency's surface water flood risk map identifies existing areas of high surface water flood risk (greater than 3.3% (1 in 30) AEP) at the site. At junction 8 the flooding shown on this map is attributed to both surface water runoff and flooding from the ordinary watercourse. These risks will be mitigated by proposed drainage and fluvial mitigation…

To manage flood risk and meet the NPPF requirements it is recommended that:

- *Further liaison should be undertaken with landowners to enable the expansion of flood storage areas to the north west of the scheme or to agree the increased level of flood risk to their land at the north-east corner of junction* 8 [Mr Keeling maintains that this liaison was not done]
- *Any changes to the proposed Scheme that impact on flood risk are re-assessed to ensure compliance with this FRA. These will be agreed with the LLFA at detailed design stage or as part of the ordinary watercourse consenting process*

- *A detailed maintenance and management plan should be produced at the detailed design stage to detail requirements for the on-going management of the proposed surface water drainage network, including the sustainable drainage (SuDS) features, for the lifetime of the development*
- *Information and data from the relevant council bodies and the Environment Agency is regularly reviewed throughout the planning process, as new information might be made available…*

It should also be noted that there may be an opportunity to rationalise the mitigation and drainage proposed if more detailed assessment were undertaken using an integrated hydraulic model incorporating both drainage and fluvial elements.

Subject to the recommendations being met, it is considered that the development would meet the requirements of the NPPF and would:

- *Remain operational and safe for users in times of flood*
- *Would not result in an increase in flood risk elsewhere…'*

Further on the report indicates:

2.1.2 Site-specific Flood Risk Assessment …

… Additionally, the FRA should demonstrate to the decision-maker how flood risk will be managed now and over the development's lifetime, taking climate change into account, and with regard to the vulnerability of its users. The FRA should establish: …

- *Whether a proposed development is likely to be affected by current or future flooding from any source;*
- *Whether it will increase flood risk elsewhere*

[Mr Keeling suggests if you increase flood risk on land owned by others within the red lined boundary, it amounts to increasing flood risk elsewhere]

- *Whether the measures proposed to deal with these effects and risks are appropriate*
- *The evidence for the local planning authority to apply (if necessary) the Sequential Test*
- *Whether the development will be safe and pass the Exception Test, if applicable…*

2.13 Design Manual for Roads and Bridges

The Design Manual for Roads and Bridges (DMRB) is a suite of documents containing requirements and advice for works on highways. It is required that the site drainage be designed in compliance with HD33/16 Design of Highway Drainage Systems (Ref 4).

The proposed design strategy must comply with the following design principals:

- *Removal of surface water from the carriageway as quickly as possible to provide safety and minimum nuisance to the travelling public*
- *…*
- *Minimisation of the impact of the runoff on the receiving environment in terms of flood risk and water quality'*

6.4.6.21 MK considers it is clear that NH had a number of reports identifying a flood risk associated with a watercourse, drainage and culverts, and that the source of the risk was on its own land[316]. Furthermore, it had section 110 of the *Highways Act 1980* available as a remedy at this time.

6.4.6.22 Section 2.3 of the FRA summarised the Sequential Test and 2.4 summarised the Exception Test:

'2.3 The Sequential Test

The PUSH SFRA (Partnership for Urban South Hampshire Strategic Flood Risk Assessment)*, in accordance with NPPF, sets out the requirements for applying the Sequential Test when locating the development. The Sequential Test aims to steer new development to areas with the lowest probability of flooding. The flood zones as refined in the Local Planning Authorities SFRA for the area provide the basis for applying the Test. The aim is to steer new development to Flood Zone 1 (areas with a low probability of river or sea flooding). Where there are no reasonably available sites in Flood Zone 1, local planning authorities in their decision-making should take into account the flood risk vulnerability of land uses and consider reasonably available sites in Flood Zone 2 (areas with a medium probability of river or sea flooding), applying the Exception Test if required. Only where there are no reasonably available sites in Flood Zones 1 or 2 should the suitability of sites in Flood Zone 3 (areas with a high probability of river or sea flooding) be considered, taking into account the flood risk vulnerability of land uses and applying the Exception Test if required.*

The NPPG (Ref 17) also adds that surface water and other sources of flooding should be considered consistently with river flooding in the assessment of vulnerability and application of the sequential test where information is available.

The Sequential Test is applied to the proposed Scheme in Section 4.3.1.'

'2.4 The Exception Test

If a development is proposed that is not 'appropriate', as defined in Table 3 of the NPPG, then the Exception Test is a method to

[316] NH 3/2 para 8.50

demonstrate and ensure that flood risk to people and property will be managed satisfactorily, while allowing necessary development to go ahead in situations where suitable sites at lower risk of flooding are not available.

The two parts to the Test require the proposed development to show that it will provide wider sustainability benefits to the community that outweigh flood risk, and that it will be safe for its lifetime, without increasing flood risk elsewhere and where possible reduce flood risk overall.

The Exception Test in relation to the proposed Scheme is discussed in Section 4.3.2.'

6.4.6.23 Section 3.1 of the FRA identified in Figure 3.1 the 'Scheme location' within a red line, so it was fixed by NH before the Sequential Test was done, and said this:

'The site is situated north of the village of Bursledon, Hampshire, under the authority of Eastleigh Borough Council. Junction 8 is located where the M27 meets Dodwell Lane, and links via Bert Betts Way (A3024) to Windhover Roundabout approximately 400m to the west. This link provides the main means of access to the parish of Bursledon. The A27 West End Road, the A3024 Bursledon Road and Hamble Lane also converge at this roundabout. The National Grid Reference for junction 8 is SU 48463 11219 and for Windhover Roundabout is SU 47975 10985. The Scheme location is shown on figure 3.1…'

'3.2.4 Watercourses

According to the EA Flood Map for Planning (Ref 8), the nearest main river to the proposed Scheme is a tributary associated with the River Hamble, approximately 600m north-east of junction 8.

There is an ordinary watercourse, Bursledon Brook, crossing the M27 junction 8 that is not recorded on the Flood Map for Planning but has been identified from the EA surface water flood risk map (Ref 9). It rises in the vicinity of the M27 / St. John's Road (B3033) crossroad and consists of two unnamed minor tributaries, defined in this document as the eastern tributary and the western tributary. The two minor tributaries are culverted separately before reaching the M27 junction 8. The culverts pass under the M27 junction 8 roundabout and discharge to an open channel to the south east of the roundabout. The open channel reach of the Bursledon Brook flows approximately 600m due south east, before crossing the M27 once again.'

'3.2.5 Existing site drainage

…The existing drainage system at and around M27 junction 8 (includes the drainage from Bert Betts Way) discharges to an existing ordinary watercourse south east of M27 junction 8. The existing drainage systems at and around Windhover Roundabout (including three different drainage catchments) discharge to existing drainage systems along Bursledon Road, Providence Hill and Hamble Lane. Existing surface water attenuation features such as attenuation storage ponds, underground attenuation storage tanks or pollution control measures are not present for the above-mentioned existing outfalls.

MicroDrainage modelling has been undertaken for the existing drainage system to establish existing peak discharge rates and existing flooded volumes for the 100% (1 in 1), 20% (1 in 5), 3.33% (1 in 30) and 1% (1 in 100) AEP events. The results of this analysis are presented in appendix A. The modelling results suggest that the existing system has capacity to accommodate the 100% (1 in 1) AEP event with some catchments having capacity to accommodate up to the 20% (1 in 5) AEP event.'

6.4.6.24 Section 110 remained available at this time.

6.4.6.25 Section 4 of the FRA said this about Modelling:

'… To further understand the risk associated with these watercourses, hydraulic modelling has been undertaken. This considered a range of flood events and included representations of the culverted sections of watercourse. The details of the hydraulic modelling undertaken can be found in the modelling report in Appendix C.

Analysis of the results of this modelling indicates that localised flooding occurs on the western tributary during events greater than the 50% (1 in 2) AEP event. The culvert which conveys the western tributary under Peewit Hill surcharges during the 3.33% AEP flood event resulting in out of bank flow which passes towards junction 8. The culvert that conveys the western tributary beneath junction 8 is even smaller and also surcharges during this flood event with water ponding at the north-west corner of the roundabout.

The eastern tributary also floods in events greater than 50% (1 in 2) AEP where the tributary is culverted at Peewit Hill Close. The excess floodwater flows onto the adjacent slip road north of the junction and continues down onto the roundabout. There is some pooling at the north-east corner of the roundabout at the mouth of the culvert that crosses Dodwell Lane. Flood extents on the eastern side of the roundabout are considerably less than to the west, however flooding on both sides contributes to flooding on the roundabout itself. In the 3.3% (1 in 30) AEP flood depths on the carriageway are predicted to reach a maximum of 620mm.

During the 1% AEP flood event, flood depths observed in the north-east and north-west corners of the junction are predicted to reach a maximum of 1.1m with shallower flooding up to 750mm deep extending onto the carriageway of the A3024.

During the 100 year design life of the proposed Scheme, fluvial flows are predicted to increase. Climate change is discussed in detail in section 4.2 but based on EA guidance, an uplift of fluvial flows of 35% has been modelled. During the 1% AEP event with 35% climate change allowance flood depths up to 1.5m are observed in the north-east and north-west corners of the junction and flooding up to 850mm deep is observed on the carriageway. A map showing the predicted flood depths during this flood event is presented in Figure 4.2.

The results of the modelling are confirmed by historical flood events with two flood events recorded on the Highways Agency Drainage Data Management System (HADDMS) (Ref 16) at the location where the open channel becomes culverted at Peewit Hill, which have both been attributed to issues with the culvert.

With flooding of the junction 8 roundabout predicted during the 1% AEP flood event, the baseline fluvial flood risk from ordinary watercourses in this location is considered to be high…'

However, Mr Pickering has indicated that modelling evaluated a summer storm, which was wrong and the storm duration was too short.

6.4.6.26 Section 4.2 considered climate change:

'It is important to understand the impacts of climate change on all sources of flooding in order for the development to be suitably resilient to changes throughout its design life. The assumed design life of this development is 100 years; the climate change assessment has therefore been based on this time period.

In February 2016 the Environment Agency (EA) published updated climate change allowance guidance (Ref 10) to support the NPPF which has been considered for this assessment. The EA's guidance details the level of technical assessment required to assess the impacts of climate change on flooding for new developments, this is dependent on the location (flood zones), design life and vulnerability classification (detailed in Table 2 of the NPPG) of the development.

The Allowance Category used is dependent on the vulnerability classification of the development and the Flood Zone it is located in. As explained in Section 4.3, the development is Essential Infrastructure located in fluvial Flood Zone 1.

Assuming a 100-year design life, a climate change uplift of 35%

should be used.'

6.4.6.27 Section 4.3, Vulnerability classification said this:

'Table 2 of the Flood Zone and Flood Risk Tables section of the NPPG classifies the flood risk vulnerability of all land uses. The proposed Scheme has been classified as 'Essential Infrastructure' in accordance with this Table, as the road should remain operational during times of flood.

4.3.1 The Sequential Test

The aim of the sequential test is to steer new development to areas with the lowest probability of flooding. As the works are an expansion of two existing roundabouts, relocating the Scheme is considered impractical. Road improvements at this junction are also identified as being required within the Eastleigh Borough Council's Local Plan. Therefore, the sequential test is assumed to be passed.

4.3.2 The Exception Test

Table 3 of the NPPF (substantially reproduced here as Table 4.3) defines appropriate land uses for each flood zone and helps guide development to areas of lower flood risk. The proposed Scheme, being classified as 'Essential Infrastructure' would be considered appropriate within Flood Zones 1 and 2 but would have to pass the Exception Test if they were located within Flood Zone 3 or are at risk of flooding from other sources. In this case the site is located within Flood Zone 1 according to the Environment Agency's 'Flood map for planning' but a high risk has been identified from ordinary watercourses.'

MK considers that there is no evidence to show that the proposed Order scheme is classified as Essential Infrastructure, which is an NN NPS phrase.

'Due to the magnitude of flood risk associated with the ordinary watercourse at junction 8, the Exception Test is assumed to be required. As such the proposed Scheme will need to be safe throughout its lifetime and not adversely impact the environment whilst also providing wider benefits to the community that outweigh the flood risk issues…'

[Table 4.3 provided the NPPG3 Table 3 and highlighted in yellow the Scheme as within Column 2 and Row 4)]

'The wider sustainability benefits of the proposed Scheme include improved road safety and the improved traffic flow. The need for these improvements is detailed in the Environmental Assessment Report for the proposed Scheme. Therefore, it is assumed that the wider benefits of the scheme have been established and that the exception test can be passed subject to the Scheme being shown to

be safe. Safe access and operation of the proposed Scheme is discussed in Section 6.1.'

6.4.6.28 Within the Conclusions and recommendations of Appendix C[317], the FRA described that:

'In order to support the development of a Flood Risk Assessment for the M27 Southampton Junction 8 Scheme, a hydraulic model was constructed to establish a baseline scenario for the flood risk along the Bursledon Brook that crosses the M27 Junction 8. A 2km long reach of the Bursledon Brook was represented along with the key structures.

A range of flood events from 50% to 0.1% AEP and climate change events were simulated using the model.

The baseline model was then adapted to represent the proposed scheme scenario in order to assess the impact of the proposed scheme on the flood risk. Where increases to flood risk were identified, mitigation measures were developed and incorporated into the proposed scheme and tested with hydraulic model simulations.

The assumptions and limitations associated with the hydraulic modelling are discussed in Section C.8 of this technical note, which should be considered for any future use of the hydraulic model.

Model results have been used to inform the Flood Risk Assessment and are presented in detail in the Flood Risk Assessment report.

The following is recommended if any of the flood mitigation options discussed in this report are progressed to detail design:

- *Finer representation of the storage areas and associated drainage features would be required in the model.*
- *A critical storm duration analysis would be required to estimate accurately the required capacity of the storage areas.*

Roughness sensitivity tests for all conduits in the model and blockage scenario for culverts inlets for both branches will provide better understanding of the robustness of the proposed mitigation measures under different maintenance conditions.'

6.4.6.29 Appendix D[318] set out the Flood estimation calculation record and was expressly approved by a Senior Hydrologist with extensive experience of flood estimation.

6.4.6.30 Within Appendix D, D.1, Method Statement, said this:

[317] CD B.5.
[318] CD B.5.

'*<u>Overview of requirements for flood estimate</u>*

This FEH calculation record reports on the hydrological analysis of a minor watercourse for the flood risk assessment as part of extension of Junction 8 on the M7 Motorway near Southampton (SU 48500 10300).'

For the estimation of design peak flow, the FEH Statistical method and ReFH2.2 methods were applied and the method resulting in the larger flood peaks was adopted. The ReFH2.2 method-based hydrograph shapes were used to derive the model inflows required for the numerical hydraulic modelling of the watercourse to be assessed for the potential flood risk.

Design peak flows were required for a range of AEPs, including the 50% AEP (2- year), 3.3% AEP (30-year), 1% AEP (100-year), 0.1% AEP (1000-year) events, with the 1% AEP (100-year) event flow including an allowance of 35% to cater for the future climate change (CC)…

<u>Overview of catchment</u>

The Bursledon Brook that crosses the M27 Junction 8 rises in the vicinity of the M27 / St. John's Road (B3033) cross road and consists of two unnamed minor tributaries, namely, the eastern tributary and the western tributary. The two minor tributaries are culverted separately before reaching the M27 Junction 8, and the culvert(s) pass under the M27 Junction 8 roundabout and discharge to an open channel as a single culvert just to the southeast of the roundabout.

The catchment area of the Bursledon Brook up to the M27 Junction 8 is approximately 0.54km^2 ; with the eastern tributary draining approximately 53% and the western tributary draining the remaining approximately 47% of the above catchment area. The open channel reach of the Bursledon Brook flows approximately 600m due southeast, before crossing the M27 once again. Approximately 300m further downstream of the M27 crossing, the Bursledon Brook crosses the Providence Hill Road (A27). The numerical hydraulic modelling extent of the Bursledon Brook spans between upstream of the M27 Junction 8 and downstream of the A27 culvert. The total catchment area of the Bursledon Brook up to the downstream modelling extent is approximately 1.3km^2 …

The catchment is classed as moderately urbanised by the FEH definition (the FEH CDs URBEXT2000=0.078 for the upper catchment and 0.112 for the overall catchment) and has no attenuation from reservoirs and lakes (FARL=1.0).

According to the Geology of Britain Viewer Online1 (British Geological Survey, 2019), the majority of the site comprises of the London Clay Formation of Clay, Silt and Sand Sedimentary Bedrock. No superficial deposits have been recorded for the area.

According to Cranfield Soil and AgriFood Institute (CSAI) Soilscapes Viewer2, the catchment soil composition consists of slowly

permeable, seasonally wet, slightly acid but base-rich loamy and clayey soils. The drainage is classed as impeded (BFIHOST = 0.321 for the upper catchment and 0.298 for the overall catchment; SPRHOST = 43.11% for the upper catchment and 44.02% for the overall catchment)…'

6.4.6.31 The initial choice of approach noted the following[319]:

'Outline conceptual model

...FEH statistical and ReFH2.2 methods are applicable to estimate peak flow…'

'Any unusual features to take into account

- Impermeable soil, BFIHOST= 0.321 (upper catchment) / 0.298 (overall modelled catchment)

- Moderately urbanised catchment URBEXT2000 = 0.078 (upper catchment) & 0.112 (overall modelled catchment)

- not affected by reservoirs (FARL= 1.0)

- negligible floodplain extent for the upper catchment (FPEXT = 0.0049) and minor floodplain extent (FEP = 0.0209) for the overall modelled catchment.'

'Initial choice of method(s)and reasons

Full hydrograph is required for model inflow. So, the peak flows are based on the conservative value from two method (FEH Statistical and ReFH2.2) whereas the hydrograph shape is adopted from ReFH2.2 method.

'Software to be used

FEH web service WinFAP-FEH 4 ReFH2 (v2.2) with FEH13 rainfall Peak flows data (NRFA) (WinFAP-FEH database) v7.'

6.4.6.32 Within D.4, the parameters for the Revitalised Hydrograph (ReFH2) method were set out:

Design events for ReFH2 method

Urban or rural	*Season of design event (summer or winter)*	*Storm duration (hours)*	*Storm area for ARF (if not catchment area)*
Urban	*Summer*	*3.5*	*Catchment Area used*

[319] CD B.5 Appendix D page 4.

6.4.6.33 Figure D1 and D2 set out the flows for the FEP1 and Res12 inflow hydrographs in m^3/s for a 3.5hr Critical Storm Duration (CSD) for 2yr, 30yr, 100yr and 1000yr design storm events using coloured lines to identify the volume of the inflow over time.

6.4.6.34 Figure D.3b: Flow estimation point and Model Inflow location showed the attribution of 46.9% of the FEP1 inflow to the location of the entrance to the existing culverted watercourse at Peewit Hill Close, notwithstanding that the same figure showed the contours of the land sloping farther southwards, indicating, according to Mr Moore's estimate, that runoff from around 18% of the area of FEP1 is likely to arise downstream of the entrance to the culvert.

6.4.6.35 MK indicates that the FRA Appendix E- Flood Maps[320] identified a series of maximum flood depth scenarios overlaid on the existing culverted watercourse and identifying surcharging of that culvert by use of red coloured pixels showing depths of water at about greater than 1m in that location and also on the southern extent of the gyratory under junction 8, and an extent of water traversing the south bound exit slip road on that gyratory.

Subsequent Rejection by NH of the FRA (Jacobs)

6.4.6.36 However, subsequently, on behalf of NH, Graham/Sweco said the following in *Details of Design Changes between PCF Stage 3 and Stage 5 HE551514-SWE-HGN-ZZ-RP-ZX-50001*[321], effectively rejecting the approach set out in the FRA:

> *'3.27 Outputs from the Stage 3 modelling included the need to complete a critical duration analysis (to determine the duration of a storm event which generates the greatest volume of water) at Stage 5 to confirm the storage volume requirements.*
>
> *3.28 To do this, the hydrological assessment needed to be repeated. When reviewing the Stage 3 hydrology assessment to ensure the same parameters were used, it was found that the designer had used a Summer Design event. This is incorrect for a rural catchment and therefore it was changed to Winter in line with flood estimation guidance. Following the critical duration assessment on a winter storm, the duration changed to a 6 hour event from a 3.5 hour event. The seasonality and duration changes required additional volume to be accounted for in the Stage 5 design.'*

[320] CD B.5 Appendix E.
[321] CD A.10

MK considers therefore, that NH accept that the FRA was incorrect and it relies on the FRAa produced by Sweco, notwithstanding reference to the catchment as rural not urban. The EA guidance characterises moderately urban as rural, so this appears to be the correct approach. If not it would amplify the flow.

'3.29 The Stage 3 model was very unstable which created significant concerns in confidence in the model. A decision was therefore made to rebuild the model in alternative software (Tuflow – Estry) which stabilised the model and as a consequence reduced the storage volume requirements…'

6.4.6.37 Section 110 remained available at this time.

Subsequent identification by NH of the causative contribution of the existing culvert

6.4.6.38 NH subsequently identified the cause of the surcharging of the culverted watercourse. In *Details of Design Changes between PCF Stage 3 and Stage 5 HE551514-SWE-HGN-ZZ-RP-ZX-50001*[322]:

'*3.30 The Peewit Hill culvert was identified as the source of the flood problems and therefore has been increased in size from a 450mm culvert to a 1.5m x 0.5m boxed culvert*.'

6.4.6.39 CD A.10 however, considered the following and without regard to section 110 of the *Highways Act 1980*:

'*3.31 The new boxed culvert has also been disconnected from the existing course of the culvert and by doing so has decoupled the highway drainage design from the watercourse/flood design. This has allowed the highways drainage to be designed to current (lower) standards than the flood compensation areas. By decoupling the watercourse and highway drainage the potential flooding from each system is dealt with independently with storage and flow rates controlled in the flood compensation area and highways pond respectively. This makes the systems less complex and allows highway run-off to be isolated in case of a pollution incident. By separating the systems, volumes of runoff from the highway do not impact the volume of storage in the flood compensation area and vice versa.*

3.32 The Stage 5 design of the flood compensation area off Dodwell Lane remains similar to the Linkconnex layout (further stage 3 documentation, this was completed following the initial Stage 3 feasibility design by the consultancy Linkconnex, it provided the

[322] CD A.10

basin layouts incorporating earthworks side slopes), it has been refined to incorporate a new length of open watercourse at the western extent which carries flow from the new boxed culvert into the flood compensation area. A new 450mm outlet culvert drains the basin into the new 900mm diameter culvert replacing the open ditch south of Dodwell Lane. The base level of the basin remains at 41m AOD as per the Stage 3 design.

Mr Keeling notes a shift in language, with the flood compensation area referred to above being re-badged as a flood alleviation or attenuation area in INQ-62.'

6.4.6.40 MK identifies that the effect of the above was shown in Figure 3-1 that was annotated to show in place of the Existing Culverted Watercourse:

'New 1.5 x 0.5m boxed culvert …

New 450 diameter outlet …

Flood compensation area (FCA) to the northeast of junction 8'

6.4.6.41 MK observes that this moved the point at which the existing 450mm diameter culvert throttles flows and surcharges further to the south of Peewit Hill Close. The practical effect of the above references and to Figure 3-1 was that NH, as developer of its land, allocated the flood risk from its land to land 'elsewhere', being the land of a third party, MK, and thereby, increased the flood risk on his land.

6.4.6.42 Section 110 remained available at this time.

6.4.6.43 However, this increase of flood risk elsewhere was in breach of the NPPF:

'159. … Where development is necessary in such areas, the development should be made safe for its lifetime without increasing flood risk elsewhere…

164. The application of the exception test should be informed by a strategic or site specific flood risk assessment, depending on whether it is being applied during plan production or at the application stage. To pass the exception test it should be demonstrated that:

a) the development would provide wider sustainability benefits to the community that outweigh the flood risk; and

b) the development will be safe for its lifetime taking account of the vulnerability of its users, without increasing flood risk elsewhere, and, where possible, will reduce flood risk overall.

165. Both elements of the exception test should be satisfied for development to be allocated or permitted.'

6.4.6.44 MK says properly interpreted, it is clear that the Exception Test contains a free standing criteria under (b) that requires the development to be safe for its lifetime 'without increasing flood risk elsewhere'. This criteria expressly prevents the allocation to third party land of risk to a developer's own site even if the developer is making its own site 'safe'. That is, no matter that the developer's own site is made safe – as the Exception Test requires – the Exception Test precludes the price of that safety (the proposed FCA) to be the transfer of the risk to 'elsewhere'. Both elements must be satisfied. Mr Pickering accepted that the scheme would be a breach of paragraph 164b)[323] and it follows it would breach the current NPPF.

6.4.6.45 In this case:

a) the PCF Stage 5 proposal shown in Figure 3-1 evidences the allocation by NH of the increased flood risk 'elsewhere'

b) onto Mr Keeling's land. Mr Keeling's objection[324], Schedule 1 shows his land.

6.4.6.46 MK considers that the NPPF bears directly on that situation to preclude, in the national planning policy interest, that allocation by NH of its risk 'elsewhere' to his land.

6.4.6.47 MK considers that the NH PCF Stage 5 scheme would result in a breach of paragraph 164(b). He says this was accepted by Mr Pickering in his cross-examination.[325]

6.4.6.48 MK indicates that properly interpreted, the breach of that paragraph (as could only be accepted by Graham/Sweco on behalf of NH by Mr Pickering) results in a breach of *National Guidance* on Flood Risk. That breach in itself carries significant weight. See, for example, the INQ-8.1 appeal decision. It involved mixed development and whilst the residential element had been allocated following a Strategic Flood Risk Assessment, the health facility element had not. In relation to the latter, the Sequential Test was not complied with and, notwithstanding the public benefits associated with the scheme, planning permission was refused. In the current case no evidence of a site search has been provided at all and so the Sequential Test cannot be undertaken.

6.4.6.49 MK says indeed, NPPF paragraph 167 requires a local planning authority

[323] Inspector's note: Mr Pickering did not concede the same. Mr Pickering acknowledged that MK's land as it is now would be subject to increased flood risk but only in circumstances where it had become NH's land and formed part of the Order scheme (see para 4.5.5.64).
[324] CD H.1
[325] Inspector's note: Mr Pickering did not concede the same. Mr Pickering acknowledged that MK's land as it is now would be subject to increased flood risk but only in circumstances where it had become NH's land and formed part of the Order scheme (see para 4.5.5.64).

to ensure that '*flood risk is not increased elsewhere*'. Whilst paragraph 167 provides for development to only be allowed in specific situations, the criteria remain conjunctive ('and'), whilst d) requires 'any residual risk can be safely managed' but NH has led no evidence on the content of that residual risk either; and, (e) requires there to be an 'agreed emergency escape plan' but there is none here notwithstanding that NH asserts 'safety' as a key consideration for it. There is a gap in the evidence.

6.4.6.50 Similarly, the NN NPS also bears on the development by NH to preclude the transfer by NH, as developer, of the increased flood risk 'elsewhere', being in this case, to MK's land. Thus, NN NPS provides:

> '*5.91 The National Planning Policy Framework (paragraphs 100 to 104) makes clear that inappropriate development in areas at risk of flooding should be avoided by directing development away from areas at highest risk. But where development is necessary, it should be made safe without increasing flood risk elsewhere.'*

MK considers that this is an important provision, as 'need' in paragraph 5.91 deriving from the NN NPS may be very great. However, the NN NPS nevertheless acknowledges that whilst development may be necessary, it must be ensured that flood risk is not increased elsewhere, even if the need is classified as 'critical'. A 'critical' need is consumed by 'necessary' in paragraph 5.91, but without increasing flood risk elsewhere. This indicates the weight attributed to flood risk policy by the Government.

6.4.6.51 As Parliament has endorsed since 2014 under the *Planning Act 2008*, under paragraph 5.91, even 'essential transport infrastructure' 'is … subject to the requirements of the Exception Test':

> *'… But where development is necessary, it should be made safe without increasing flood risk elsewhere. The guidance supporting the National Planning Policy Framework explains that essential transport infrastructure (including mass evacuation routes), which has to cross the area at risk, is permissible in areas of high flood risk, subject to the requirements of the Exception Test.'*

MK says that Mr Pickering accepted that paragraph 164b) of the NPPF would be breached.[326] MK indicates that this is a high barrier to the scheme, which he considers to be insurmountable in this case due to a

[326] Inspector's note: Mr Pickering did not concede the same. Mr Pickering acknowledged that MK's land as it is now would be subject to increased flood risk but only in circumstances where it had become NH's land and formed part of the Order scheme (see para 4.5.5.64).

lack of evidence.

6.4.6.52 MK considers that the NH 'safety case', howsoever framed, or absolutely applied by NH, cannot subvert or change the clear terms of the Secretary of State's policy, endorsed by Parliament, in paragraph 5.108: whilst increasing safety on one's own site may be encouraged, it cannot be, and is not expressed to be, at the expense of shifting the burden of that risk to a third party *also* 'elsewhere'. The result of that shifting is merely to 'pass the buck' to a third party 'elsewhere' without managing the risk inside of the land of the landowner. And paragraph 5.93 reinforces that even at true NSIP level projects remain required to manage their own flood risk:

'5.39 This should identify and assess the risks of all forms of flooding to and from the project and demonstrate how these flood risks will be managed, taking climate change into account.'

6.4.6.53 The NN NPS Exception Test itself reflects the actual clear terms of the current NPPF (2021) as regards '*without increasing flood risk elsewhere*' and provides:

5.108 Both elements of the test will have to be passed for development to be consented. For the Exception Test to be passed:

- *it must be demonstrated that the project provides wider sustainability benefits to the community that outweigh flood risk; and*
- *a FRA must demonstrate that the project will be safe for its lifetime, without increasing flood risk elsewhere and, where possible, will reduce flood risk overall*.'

6.4.6.54 Further, paragraph 5.107 reinforces that the NN NPS Exception Test requirement has been drawn in recognition of the 'need' for even 'national networks infrastructure' and that that 'need' cannot outweigh the requirement (not weight) of the Exception Test. Hence:

'*5.107 The Exception Test is only appropriate for use where the Sequential Test alone cannot deliver an acceptable site, taking into account the need for national networks infrastructure to remain operational during floods*.'

6.4.6.55 Furthermore, paragraph 5.98 reinforces the importance of the Exception Test:

'*Where flood risk is a factor in determining an application for development consent, the Secretary of State should be satisfied that,*

where relevant:

- *the application is supported by an appropriate FRA;*
- *the Sequential Test (see the National Planning Policy Framework) has been applied as part of site selection and, if required, the Exception Test (see the National Planning Policy Framework).'*

MK notes that this is in the context of linear infrastructure.

6.4.6.56 MK says that in this case, NH properly accepts that the Exception Test is required to be satisfied[327]:

'The proposed Scheme, being classified as 'Essential Infrastructure' would be considered appropriate within Flood Zones 1 and 2 but would have to pass the Exception Test if they were located within Flood Zone 3 or are at risk of flooding from other sources. In this case the site is located within Flood Zone 1 according to the Environment Agency's 'Flood map for planning' but a high risk has been identified from ordinary watercourses.

Due to the magnitude of flood risk associated with the ordinary watercourse at junction 8, the Exception Test is assumed to be required. As such the proposed Scheme will need to be safe throughout its lifetime and not adversely impact the environment whilst also providing wider benefits to the community that outweigh the flood risk issues.'

6.4.6.57 But in the first FRA, NH failed to show that its development would not increase flood risk elsewhere (i.e. on Mr Keeling's land).

6.4.6.58 And in the (second) FRAa the same point applies[328], at:

'1.*3.1 The Proposed Scheme is considered to be 'essential infrastructure' as part of the Environment Agency (EA) flood risk vulnerability classification (EA, 2021a). This classification means that the proposed development would be considered acceptable for construction within Flood Zones 1 and 2 but would require an Exception Test to show acceptable risk from fluvial flooding within Flood Zone 3a or 3b (Ministry of Housing, Communities and Local Government, 2021)…'*

'1.7 Exception Test

1.7.1 Table 3 of the Environment Agency guidance

(https://www.gov.uk/guidance/flood-risk-and-coastal-change#Table-2-FloodRisk-Vulnerability-Classification), derived from NPPF (Annex

[327] CD B.5 paras 2.12, bullet 5; 2.4; 4.3.2
[328] CD B.17 para 1.3.1

3) (substantially reproduced here as Table 1-3 defines appropriate land uses for each flood zone and helps guide development to areas of lower flood risk. The proposed Scheme, being classified as 'Essential Infrastructure' would be considered appropriate within Flood Zones 1 and 2 but would have to pass the Exception Test if they were located within Flood Zone 3 or are at risk of flooding from other sources.

1.7.2. In this case the site is located within Flood Zone 1 according to the Environment Agency's 'Flood map for planning' but a high risk has been identified from ordinary watercourses.

1.7.3. Due to the magnitude of flood risk associated with the ordinary watercourse at Junction 8, the Exception Test is assumed to be required. As such the proposed Scheme will need to be safe throughout its lifetime and not adversely impact the environment whilst also providing wider benefits to the community that outweigh the flood risk issues.

1.7.4. The wider sustainability benefits of the Proposed Scheme include improved road safety and the improved traffic flow. The need for these improvements is detailed in the Stage 3 Environmental Assessment Report for the Proposed Scheme. Therefore, it is assumed that the wider benefits of the scheme have been established and that the exception test can be passed subject to the Proposed Scheme being shown to be safe.

1.7.5. The NPPF states that development should not increase flood risk elsewhere and that development should only be considered appropriate in areas at risk of flooding where it can be demonstrated that the most vulnerable development is located in areas of lowest flood risk. The development must also make provision for safe access and escape during times of flood.

1.7.6. As presented in the following sections and in Appendix A, the design of the Proposed Scheme will enable it to remain operational during a 1% AEP + 35% climate change flood event with safe access provided during this event.'

6.4.6.59 MK indicates that, as with the first FRA, the FRAa does not begin to grapple with the requirement of the NN NPS paragraph 5.108, bullet 2. Properly interpreted, no amount of satisfaction of other elements of the Exception Test, nor assertions as to the aim of the Test as it relates to the vulnerability classification of the development, can operate to bypass the clear and express terms of that bullet 2 criteria: '*without increasing flood risk elsewhere*'. You cannot put a pond on someone else's land without breaching the test.

6.4.6.60 MK says, with reference to paragraph 6.4.6.45 above, in this case the evidence shows a breach of paragraph 5.108, bullet 2, by NH in relation to its development.

6.4.6.61 As with the most recent guidance of the NPPF, the Exception Test of the NN NPS has been drawn expressly to take account of the 'need' in the NN NPS for an NSIP – and yet even then the NN NPS does not admit of being interpreted to allow for the Exception Test to be bypassed by even a 'critical' or other 'need' for an NSIP (emphasis added):

> *'5.91 The National Planning Policy Framework (paragraphs 100 to 104) makes clear that inappropriate development in areas at risk of flooding should be avoided by directing development away from areas at highest risk. But where development is necessary, it should be made safe without increasing flood risk elsewhere. The guidance supporting the National Planning Policy Framework explains that essential transport infrastructure (including mass evacuation routes), which has to cross the area at risk, is permissible in areas of high flood risk, subject to the requirements of the Exception Test…'*

6.4.6.62 MK considers that it is also no answer to assert that a CPO be used to bypass the requirements of the Exception Test either under the NPPF(2021) or the NN NPS. This is because a CPO is required to be made in the public interest and only where the land is 'required' in that interest. Self-evidently, the express public interest in the NN NPS and in the NPPF is to make development safe but 'without increasing flood risk elsewhere', and in circumstances where the public interest in not increasing risk elsewhere would be subverted if a CPO fell to be confirmed in the face of that clear guidance the argument is circular.

6.4.6.63 He says it is also no answer to assert that the conditional planning permission, reference F/17/81809[329], granted expressly 'subject to' specified drawings alone that included the plan reference revision P3[330] and thereby, properly interpreted, could not result in any other drawings not in Condition 2 being elevated above the requirement that all other plans were 'subject to' those specified in Condition 2. The red line drawing for that planning permission was not confined to the Link Road itself but extended to the land boundary of land *owned* by MK and encompassed the same. There is no evidence of a CPO being required as part of that application for development. Instead, the application form will have required him to be served with notice. Since the particular planning application red line encompassed his land, flood risk could be increased 'elsewhere' because it was on his land and with his consent. The flood risk engendered by the development of part of his land for an impermeable road surface would result to increase flood risk and so that was required to be attenuated by 2 Ponds to ensure, via baffles, that the 'risk' of increased flow was simply regulated by means of holding ponds coupled with flow regulating baffles the conveyance of water from the 'development' of the Link Road part of the land into the

[329] CD G.11, INQ-45, INQ-40 and INQ-50.
[330] INQ-45 and 41

watercourse. Conversely, water being conveyed 'through' the land – even with a CCA added in – is provided for to continue through that land and along the watercourse. This is because, unlike the development of the land impeding water drainage within the land holding, water conveyed through a site can be simply conveyed through it without more *because* naturally occurring water conveyed along a water course cannot be properly described as a flood risk able to be 'captured' to one landowner so as to be able to qualify as being able to be increased 'elsewhere'. If it were otherwise, the highest landowner upstream would invariably *stop up* natural springs on their land to *ensure* compliance with the NPPF(2021) that *he* not increase flood risk elsewhere; and other owners would embank their land to ensure that no water could flow 'elsewhere' since flood risk would invariable 'increase' 'elsewhere' if they did not embank it.

6.4.6.64 Rather, as Mr Moore described in evidence in chief, the Link Road planning permission *illustrates* how different types of flood risk fall to be *managed* in compliance with the NPPF:

a) the risk *engendered by the development itself,* that results to change the ability of the ground to contain water falling on to and into it and is within the control of the landowner, is managed by the developer the attenuation of flow that will otherwise be conveyed off-site differently to the pre-existing situation and managed so as to not increase flood risk elsewhere (here, by use of hydrobrakes to ensure slowed percolation of temporarily impounded water *on site* into the water course where the same water would otherwise have already flowed as part of the rainwater run-off from the undeveloped land); whereas
b) the risk of the water conveyed by the water course water as the water course passes 'through' the site remains unchanged because it is already an off-site (or 'elsewhere') risk (not being a risk that can qualify as 'elsewhere') enabled to be conveyed through the site by use of a culvert of appropriate size (including a CCA) rather than *impeding* that natural water course flow conveyance by choking or throttling that natural flow 'through' the developed land.

6.4.6.65 MK says it is also no answer that 'climate change' results to require the allocation of that increased flood risk to third party land. Indeed, paragraph 5.90 provides for climate change – but not as a proxy to avoid not increasing flood risk 'elsewhere' (emphasis added):

'5.90 Climate change over the next few decades is likely to mean milder wetter winters and hotter drier summers in the UK, while sea levels will continue to rise. Within the lifetime of nationally significant infrastructure projects, these factors will lead to increased flood risks in areas susceptible to flooding, and to an increased risk of flooding

in some areas which are not currently thought of as being at risk. The applicant, the Examining Authority and the Secretary of State (in taking decisions) should take account of the policy on climate change adaptation in paragraphs 4.36 to 4.47.'

6.4.6.66 Nevertheless, in MK's view the Exception Test does not include as an express saving, the ability to rely on climate change as a proxy to avoid adherence with the Exception Test. If climate change were intended to be such a proxy, then the Exception Test (including in the NPPF(2021) would have said so. But neither does. Rather, the clear terms of that Test reinforce that climate change risks (including an increased risk of flooding) be absorbed by the existing landowner and 'without increasing flood risk elsewhere'). Nor has the NPPF(2021) been redrafted to allow for such a saving. Indeed, were that to be otherwise, then the requirement to include in a flood risk assessment a percentage for climate change could only result to ensure satisfaction of the Exception Test 'without increasing flood risk elsewhere' even for off-site watercourse conveyed water. But, for the reasons given above, that would be a nonsense of the Exception Test and strip it of any utility.

6.4.6.67 It is also no answer to seek to subvert the Exception Test by recourse to paragraph 159 ('Inappropriate development in areas at risk of flooding should be avoided by directing development away from areas at highest risk (whether existing or future)') and seek to create a new category of development that can avoid the strictures of the Exception Tests. This is because that paragraph also requires that such development, even if 'necessary' must nevertheless 'be made safe for its lifetime without increasing flood risk elsewhere.' 'Elsewhere' means 'elsewhere' and is not conditioned. Indeed, the clear language of 'inappropriate' development is also to be read in the context of Table 3 that concerns certain vulnerability categories of development as 'appropriate'; whereas the Exception Test also refers in (b) to 'vulnerability'. So the flood risk guidance is coherent and cannot bypass the Sequential or Exception Tests.

6.4.6.68 Consequently, MK considers that there is no route by which NH can avoid its clear breach of the NN NPS and the NPPF(2021) 'Exception Test' nor the discrete cumulative weight of its breach of no less than *two* national policy tests against its seeking to do precisely what the policy requires that it not do: not increase flood risk elsewhere.

6.4.7 The Sequential Test

6.4.7.1 MK indicates that the foregoing accepted breach(es) by NH renders extensive consideration of other parts of the flood risk guidance unnecessary to consider in much detail. However, so considered, the development breaches the Sequential Test for reasons including as follows.

6.4.7.2 The NN NPS makes clear the need for both an FRA and for the correct and rational application of the Sequential Test:

'5.92 Applications for projects in the following locations should be accompanied by a flood risk assessment (FRA):

- *…projects which may be subject to other sources of flooding (local watercourses, surface water, …)...'*

'5.93 This should identify and assess the risks of all forms of flooding to and from the project and demonstrate how these flood risks will be managed, taking climate change into account.

5.94 In preparing an FRA the applicant should:

- *consider the risk of all forms of flooding arising from the project (including in adjacent parts of the United Kingdom), in addition to the risk of flooding to the project, and demonstrate how these risks will be managed and, where relevant, mitigated, so that the development remains safe throughout its lifetime*
- *take the impacts of climate change into account, clearly stating the development lifetime over which the assessment has been made;*
- *consider the vulnerability of those using the infrastructure including arrangements for safe access and exit;*
- *include the assessment of the remaining (known as 'residual') risk after risk reduction measures have been taken into account and demonstrate that this is acceptable for the particular project;*
- *consider if there is a need to remain operational during a worst case flood event over the development's lifetime;*
- *provide the evidence for the Secretary of State to apply the Sequential Test and Exception Test, as appropriate.*

5.95 Further guidance can be found in the Government's planning guidance supporting the National Planning Policy Framework issued by the Government….

5.97 Surface water flood issues need to be understood and then account of these issues can be taken, for example flow routes should be clearly identified and managed…'

6.4.7.3 '*…As appropriate…*' ensures that the relevant evidence is provided to enable the satisfaction of the two tests to be discretely evaluated by the Secretary of State. But neither the FRA (Jacobs) nor the FRAa include any evidence to enable the Secretary of State to himself apply the Sequential Test nor to apply the Exception Test. There is a gap in the

NH evidence provided by it to the Secretary of State notwithstanding the clear terms of the NN NPS (and on which policy NH itself relies). NH also relies on a national level need for the improvements, but ignores the Sequential Test.

6.4.7.4 The NN NPS explains in clear terms what kind of evidence is required to be included and the standard of the Sequential Test:

> *'5.105 Preference should be given to locating projects in Flood Zone 1. If there is no reasonably available site in Flood Zone 1, then projects can be located in Flood Zone 2. If there is no reasonably available site in Flood Zones 1 or 2, then national networks infrastructure projects can be located in Flood Zone 3, subject to the Exception Test.'*

6.4.7.5 NN NPS Footnote 94 provides:

> '*Guidance on interpreting the term 'reasonably available site' in this test can be found in Flood Risk & Coastal Change PPG or its successor document. The applicant should justify with evidence to the Examining Authority what area of search has been used in examining whether there are reasonably available sites. This will allow the Examining Authority to consider whether the sequential test has been made as part of site selection.'*

6.4.7.6 The 20 August 2021 updated iteration of the NPPG on Flood Risk and coastal change[331] includes guidance on the Sequential Test and is referred to in Footnote 94. Paragraph 019 remains clear and applied and applies to both FRA and the FRAa: (Emphasis added)

> *'What is the aim of the Sequential Test for the location of development?*
>
> *The Sequential Test ensures that a sequential approach is followed to steer new development to areas with the lowest probability of flooding. The flood zones as refined in the Strategic Flood Risk Assessment for the area provide the basis for applying the Test. The aim is to steer new development to Flood Zone 1 (areas with a low probability of river or sea flooding). Where there are no reasonably available sites in Flood Zone 1, local planning authorities in their decision making should take into account the flood risk vulnerability of land uses and consider reasonably available sites in Flood Zone 2 (areas with a medium probability of river or sea flooding), applying the Exception Test if required. Only where there are no reasonably*

[331] CD F.15.

available sites in Flood Zones 1 or 2 should the suitability of sites in Flood Zone 3 (areas with a high probability of river or sea flooding) be considered, taking into account the flood risk vulnerability of land uses and applying the Exception Test if required.'

6.4.7.7 As paragraph 034 continues to state: (Emphasis added)

'… *The developer should justify with evidence to the local planning authority what area of search has been used when making the application. Ultimately the local planning authority needs to be satisfied in all cases that the proposed development would be safe and not lead to increased flood risk elsewhere*.'

6.4.7.8 So an evident purpose of the Sequential Test is to preclude (without a logically prior search based on evidence of the locations considered) the increase in flood risk engendered on MK's owned land by NH transferring that risk onto his land even if the Order scheme makes the highway a little bit drier. You can't just draw a red line around the site. The red line is not fixed and could extend further north or south.

6.4.7.9 MK considers that here, examples of a site search could have included agreement with the Lead Local Flood Authority (as an example only) how far North or South along the M27 mainline within the landownership of NH would qualify as a reasonable area of site search. Since NH has control over the mainline and over its own landownership, there is no practical bar or otherwise to prevent it considering any location along the length of the M27 along which water might be conveyed to a different place. Contrary to Mr Pickering's facile attempt to distort Mr Bedwell's suggested search to a linear area to convey water into an unsuccessful linear fish farm, there is nothing to suggest that the Sequential Test requires a site search to be for more than the relevant development: here, the situation of pipes and conduits to enable water to be moved southwards. There is no requirement for such conveyances to be linked to the existing watercourse but they might (if sites had been considered) simply run in parallel for a considerable length and no fish need enter such pipes. Indeed, NH also proposes to add underground attenuation tanks within the gyratory.

6.4.7.10 He says thus, consideration of the Exception Test cannot rationally *arise* absent the logically prior ruling out, on the basis of *evidence* of locations other than the site of the development, of other sites in an area of lowest probability. There is no saving in the NN NPS or the NPPF nor the NPPG for 'essential infrastructure' to avoid the evaluation of the logically prior Sequential Test. In the NN NPS it is clear that the Secretary of State has drafted, and Parliament has endorsed, that guidance on Sequential and Exception Tests with the 'linear' nature of infrastructure and nevertheless still requires development of highways infrastructure to satisfy the Sequential Test – and to provide the

Secretary of State with that evidence so that the Secretary of State can satisfy himself on that evidence that the developer NH has in fact undertaken the Sequential Test.

6.4.7.11 The Government's advice on the kind of considerations relevant to the Sequential Test do not reflect those of NH or Mr Pickering's aquatic pre-dispositions. Instead, as paragraph 033 has made clear since before the NH FRAs were drafted: (Emphasis added)

> *'… For individual planning applications where there has been no sequential testing of the allocations in the development plan, or where the use of the site being proposed is not in accordance with the development plan, the area to apply the Sequential Test across will be defined by local circumstances relating to the catchment area for the type of development proposed… When applying the Sequential Test, a pragmatic approach on the availability of alternatives should be taken. For example, in considering planning applications for extensions to existing business premises it might be impractical to suggest that there are more suitable alternative locations for that development elsewhere. For nationally or regionally important infrastructure the area of search to which the Sequential Test could be applied will be wider than the local planning authority boundary…'*

MK indicates that there is no evidence of testing of the junction 8 proposals in the Development Plan. Furthermore, given the reliance placed by NH on the NN NPS as support for the need for the Order scheme, a long length of the M27 may be suitable for search.

6.4.7.12 MK considers that an obvious area of candidate search in this matter is indicated in:

a) CD B.5 by Figure 3.1 overlaid on Figure C.1, being the relevant 'catchment area' of the watercourse. That would no doubt have enabled evidence of NH landownership along the mainline of the M27 (north and south) to identify land parcels in which to situate flood compensation development. These elements could have been in linear form and need not have intersected the watercourse otherwise than where it may have been appropriate. Evidence could have, but did not, include land areas in lower risk areas than the junction 8 and Mr Keeling's land. But this was not included by NH;
b) CD B.5 by Figure 1-2 overlaid on Figure 3-2, being the relevant 'catchment area' of the watercourse. The like evidence in (a) could have, but was not, included in the FRAa[332] so that the

[332] CD B.17.

Secretary of State (not Mr Pickering) could have himself evaluated and applied the Sequential Test required to be applied in each of the NN NPS and the NPPF by the decision maker and not by the developer (here, NH). The purpose of this guidance is clear: to preclude the Sequential Test being applied by a self-serving developer and to ensure its independent evaluation. This applies as much to NH as any other developer.

6.4.7.13 MK considers that the shape of the candidate search area could simply have included an extension of the 'red line' northwards and southwards along the red line of the NH landownership boundary to an extent agreed with the relevant party (for example, the Lead Local Flood Authority). That could have recognised the partly fixed situation of junction 8 simultaneously with ensuring rational consideration of not transferring the flood risk from NH land to third party land (including that of neighbours such as MK). There is no obvious bar to simply extending the red line of the scheme along the farther north and south parts of the mainline or its embanked areas, and then requesting confirmation from the flood authority as to whether that distance is sufficient. But that confirmation is not a matter for the developer: it remains for the relevant third party to assess so that the Test cannot become self-serving.

6.4.7.14 Instead, here, the 'red line' appears to have been pre-determined in the Environmental Assessment Report (2020)[333]:

'2.4.6 Scheme boundary
The Scheme's red line boundary includes areas for environmental mitigation. This includes:

- *landscape planting along the M27 junction 8 south bound off-slip and Dodwell Lane to provide visual screening to properties north east of the junction*
- *landscape planting to the south of A3024 Bert Betts Way (south east of Windhover Roundabout) to provide visual screening to property along Windmill Lane, and to compensate for loss of vegetation around the scheme extents*
- *flood compensation areas to the north east, north west, and south west of M27 junction 8 to compensate for loss of flood storage in areas at high risk of surface water flooding.*
- *A Flood Risk Assessment (FRA) was undertaken after design fix 3. The conclusions of the FRA suggest changes to the flood compensation areas described above will be required to mitigate flood risk. The flood compensation areas shown on the PCF Stage 3 preliminary design drawings are therefore likely to change during the detailed design, which could affect the red*

[333] CD B.1.

line boundary. The recommended alterations are described in chapter 13, road drainage and the water environment.

Different design options for implementing the proposed Scheme have been considered during PCF Stage 3. This has included making alterations to the design to avoid or reduce environmental effects (embedded mitigation). These options, as well as their environmental considerations, are summarised in section 3.3…'

'2.4.8 Land take requirements
Most of the proposed works would be within the existing highway boundary. There are areas where land take is required outside of the highway boundary. This includes temporary land take for construction compounds, and permanent land take for the design (e.g. drainage ditches and earthworks) or environmental mitigation (landscape planting and flood compensation). The temporary and permanent land requirements are provided below:

- *The Scheme will require 13.28 ha of permanent land take (of which 1.3 ha is required outside of the Highways boundary)*
- *In addition to the permanent land take, the Scheme will require 0.86 ha of temporary land take outside the highway boundary for construction compounds'.*

6.4.7.15 If one goes to the 'options', and to Table 3.3, one finds no more than consideration inside of the red line of detailed design 'options' (none appear outside of the red line boundary) within the already fixed area for the development – the Order scheme.

6.4.7.16 MK considers that NH has fallen into the error to which many developers succumb – they start with their development location and then try to avoid undertaking a lawful Sequential Test and providing evidence to enable its proper evaluation by the decision maker, the Secretary of State; independent evaluation is key. Indeed, the NPPG[334] recognises the extensions to existing development at paragraph 033. The NPPG Sequential Test for Applicants also only excuses development from not doing a Sequential Test in circumstances where it is minor development; involves only a particular type of change of use; or it is in Flood Zone 1 and there are not flooding issues in the area of the development. Here, the FRAs indicate flood issues in the area of the envisaged development. There is no saving in any guidance for development envisaged to be on land *not in fact* owned or controlled by the developer (here NH). Nor could there be because, ultimately, the Government's policy (even if not adhered to by NH and ignored by NH) remains to not increase flood risk 'elsewhere' and to develop a neighbour's land to accommodate water increases the flood risk of that

[334] CD F.15.

neighbour's land.

6.4.7.17 Indeed, NPPF provides (emphasis added):

> *'168. Applications for some minor development and changes of use should not be subject to the sequential or exception tests <u>but should still meet the requirements for site-specific flood risk assessments set out in footnote 55</u>.'*

So the net for flood risk evaluation is wide.

6.4.7.18 MK indicates that here, there is no evidence of a site search at all for Sequential Test purposes having been undertaken before or after that 'design fix' determined the red line of the development scheme; nor of any evidence in the FRAs to enable the Secretary of State to himself apply the Sequential Test. There is a gap in the evidence and the Secretary of State cannot know the outcome.

6.4.7.19 He says here, the FRA[335] and FRAa[336] are also simply silent as to any *evidence* in the FRAs (or otherwise even) to enable a *rational* site search by the Secretary of State (capriciousness is referred to in the *de Rothschild* case[337]). Instead, these documents assert why such a Test can be bypassed in this case. But the NPSS NN recognises the nature of linear infrastructure and still requires such 'projects' to be subject to the Sequential Test and to provide evidence of the same for the purpose of enabling the Secretary of State to himself apply the test. No National Guidance endorses or supports a self-serving approach to the Sequential Test. There remains a gap in the evidence advanced by NH to support its CPO and case. The Secretary of State cannot act capriciously and without such evidence. He cannot be in a position to know what the outcome may be absent that evidence.

6.4.7.20 Save for an allocation that has itself already been subject to the Sequential Test (see NPPF paragraph 166), there is no special dispensation, under the NPPF or the NN NPS, for NH to avoid, like any other developer, the rigors of the evidence to enable the Secretary of State to himself apply the Sequential Test.

6.4.7.21 Each breach by NH of the obligations under each of the NN NPS and the NPPF to lawfully provide the evidence in the FRAs so as to enable the Secretary of State to himself evaluate the Sequential Test bears significant weight under each of the NN NPS and the NPPF(2019) (FRA (Jacobs)) and the NPPF(2021) (FRAa). Indeed, this seems to be a case

[335] CD B.5.
[336] CD B.17.
[337] CD J.2.

of serial breach of national flood risk policy by NH. No amount of NH arm waving or rhetoric can avoid that breach or its consequences.

6.4.7.22 MK says a consequence is that, strictly, the subsequent question of the Exception Test does not arise. This is because NN NPS provides (emphasis added):

> *'5.106 <u>If, following</u> application of the Sequential Test, …'*

But NH has not applied, nor provided evidence in the FRAs for the Secretary of State to apply the Sequential Test.

6.4.7.23 Similarly, the NPPF provides:

> *'163. <u>If it is not possible for</u> development to be located in areas with a lower risk of flooding (taking into account wider sustainable development objectives), the exception test may have to be applied….'*

6.4.7.24 MK indicates that there is no evidence at all, nor none that can suggest that the development of his land for embankments cannot be located in an area with a lower risk for flooding.

6.4.7.25 This approach is consistent with the Secretary of State's decision applying the NPPF in appeal decision Ref. APP/R5510/W/21/3279371, in MK's view.[338] That decision concerned 'whether a health centre could be provided on a sequentially preferable site in relation to flood risk'. [Decision letter paragraph (DL) 2]. Part of that site was 'at risk from surface water flooding' [DL/7]. DL/9 shows the summary of the Sequential Test purpose – its 'aim'. The decision concerned residential 'enabling' on site NHS Healthcare development and the development was looked at as a whole because of that linkage [DL/11]. There was an accepted need for new health centre 'to meet the primary healthcare needs of the population of Yiewsley' [DL/13], so not a small health care centre. In that appeal, some evidence was provided by which to enable the Secretary of State to apply the Sequential Test [DL/14, 25 & 27]. He then found at DL/33 that the development 'failed the Sequential Test' and 'notwithstanding that there may be opportunities to mitigate the risk to future occupants and uses through other means'. The Secretary of State placed '*very significant weight on the failure to meet the sequential test*' [DL/33]. This is a model of the weight to be applied to failure where there is evidence. That weight was not outweighed even by '*current and future primary health care needs in Yiewsley*' [DL/34] nor by the '*particularly pressing need*' need for affordable

[338] INQ-8.1.

housing in London' [DL/35]. In DL/40, the Secretary of State accepted that that scheme might take longer to deliver but that extended period of development did not result to preclude the identified available sites. In the current case the need arises from traffic delays, not health care, and that cannot justify avoiding the Sequential Test.

6.4.7.26 In that decision, the prior Sequential Testing under the Local Plan of the residential development meant that that part of the development was not required to be subject to the Sequential Test whereas the healthcare part of the development was still required to be so subject. In this matter, the highway improvements are not an 'allocation'. So far as the identification of the junction 8 as a key element is considered to be equivalent to some kind of allocation (and it does not appear in the allocations part of the Local Plan), the development comprised of the embankments and earthworks desired to be situated on Mr Keeling's land has not been 'allocated'. As in the Appeal Decision above, that part (and other such parts of the Order scheme) also fall to be evaluated under the Sequential Test. But NH has not done that nor provided evidence of areas at 'lower risk' than Mr Keeling's land on which to situate its FCA development. Furthermore, there is no evidence that the key element has been subject to Strategic Flood Risk Assessment as part of the Local Plan process.

6.4.7.27 MK indicates that in this matter, NH has not provided the logically prior evidence to enable the Secretary of State to be able to apply the Sequential Test (both under the NN NPS and under the NPPF. The Secretary of State is not in a position to be able to know the outcome of such a search in the absence of NH having previously provided evidence of locations at 'lower risk' for development. As in DL/33, the NPPF is clear: development should not be permitted, notwithstanding 'opportunities'. This makes sense because otherwise 'opportunities' for risk mitigation might be utilized to bypass the rigors of the prior Sequential Test. Bypassing has happened here.

6.4.7.28 As in the Appeal Decision at DL/41, '*the important planning objective of minimizing the risk of flooding to new development*' was not overridden even by the 'significant benefits' offered by that proposal. So too, the evidenced based evaluation of the Sequential Test (and of the Exception Test) as the first step of the 'important planning objective of minimising the risk of flooding to new development'.

6.4.7.29 MK considers that there is no need for he himself to show an 'alternative' site for situating NH's development envisaged by NH to be on his land. This matter arises in the CPO sphere and the 'onus' remains squarely on NH at all times and guidance cannot reverse that legal burden. Nor does the NN NPS or the NPPF provide for a developer, here NH, to avoid the obligation to itself provide evidence of sites at 'lower risk' of flooding. Here, Mr Moore has helpfully described a site south of

the scheme site that has been for sale recently and remains undeveloped. It is also sequentially preferable in terms of flood risk by comparison with NH's desired development.

6.4.7.30 NH has also led no evidence at all on areas at 'lower risk' (than the hypothetical situating of development on Mr Keeling's land) within its own landholding along the mainline. It has simply asserted, in an understandable but ultimately self-serving manner, that there are no such areas. Absent evidence, it is simply not possible for the Secretary of State to apply the Sequential Test so that he may conclude the situation. Consequently, the 'mitigation' question does not here arise. NH keep jumping the gun to avoid the Sequential Test.

6.4.7.31 MK says but what is the risk here? Is there any at all? It is a notional risk, based exclusively on theoretical analysis and modelling and without anything as real or basic as gauged flows from site.

6.4.8 The FRAa and the reality of the Flood Risk

6.4.8.1 MK considers that the FRAa is fundamentally flawed and remains in draft and incomplete. It is unreliable as evidence of flood risk and has no probative value, containing 'error'.

6.4.8.2 He indicates that somewhat late in the day, on Day 12, Graham/Sweco on behalf of NH was driven by the Inspector correctly most carefully scrutinising the 'evidence' of NH, in support of its case for acquisition of Mr Keeling's land for development comprised of embankments and highways on that land, to admit the mismatch in fact as between the 'rebuilt' model asserted as supporting the FRAa and the FRAa.

6.4.8.3 MK says the fact of the mismatch had not been voluntarily disclosed by NH to MK at any time from the rebuilding of the model by Graham/Sweco on behalf of NH in August 2020 or the publication by it in October 2021 of the FRAa. It was, in essence, hidden from view by NH and notwithstanding that the onus of proving its CPO case remains in law squarely on it. It was hidden because only by means of a computer and the software package could a computer operator with relevant experience have discerned from looking at the model and at the FRAa the actual difference between the flow rate and catchment area flow total as between the model inputs and outputs and the hard copy printed FRAa inputs and outputs purported to have resulted from that same model. Without that computer knowledge, a member of the public or any third party was simply not in a position to know that that difference even existed.

6.4.8.4 MK indicates that the two hidden facts are as follows. Firstly, in 'error' the figure of '1.66 m^3/s' for peak flow has been chosen to be written

into the Final Results table on page 22 of Appendix A to the FRAa notwithstanding that that figure in fact must be '1.19 m^3/s' because '1.19 m^3/s' is the figure used in the model from which the '1.66 m^3/s' proxy derives. The Table entitled 'Final Results', on page 22 of Appendix A to the FRAa ('Hydrology Assessment Record') dated 11 August 2021) described as 'supporting documents to the [EA's] flood estimation guidelines' and that 'provides a record of the calculations and decision made during flood estimation', includes under the Site Code Row for FEP '01' and in the Column of the Comparison of New under the '100 +35%' column a figure of '1.66 m^3/s' whereas, in fact, the underling model uses the figure of '1.19 m^3/s'. See INQ-64 in which on page 8, flood risk experts JBA record their identification on the model:

> *'2. Inflows to the model …*
>
> *FEH Statistical inflows*
>
> *The FEH Statistical inflows to the model are:*
>
> • *Upstream end of Bursledon Brook east branch : 0.56 m^3/s*
>
> • *Upstream end of Bursledon Brook east branch : 0.63 m^3/s*
>
> • *Lateral inflow in the intervening catchment : 2.71 m^3/s*
>
> *Therefore, the total of the eastern branch and western branch FEH Statistical inflows to the model is 0.56 + 0.63 = 1.19 m^3/s [modelled]*
>
> *This is less than the 1.66m3 /s FEH Statistical flood estimate at FEP1 (1.19 m^3/s is ~72% of 1.66 m^3/s) [quoted in the FRA Addendum]*
>
> *Similarly, the FEH Statistical lateral inflow of 2.71 m^3/s for Res12 is greater than the difference between the FEP1 and FEP2 flood estimates (1.68 m^3/s in Table 1-1).*
>
> *There is probably a rational explanation for why Graham/SWECO went from a FEH Statistical flood estimate of 1.66 m^3/s at FEP1 to a total inflow of 1.19 m^3/s from the two branches of Bursledon Brook but this is not explained their report. This makes it difficult to understand the inflows to the model and adds uncertainty to comparison of different configuration/scenarios*.'

6.4.8.5 MK considers that in fact, the difficulty in understanding operates in reverse to the situation stated because the FRAa proceeds from the model. The 'explanation' given to the Inspector to his own enquiry after that of Mr Keeling was met with a denial on behalf of NH that the '1.66 m^3/s' should be '1.19 m^3/s' was that the difference was an 'error' in the FRAa. And it is a critical error in assessment of flood risk as well as misrepresenting the model basis (as being 1.66 m^3/s instead of 1.19 m^3/s) underpinning the FRAa assessment of flood risk.

6.4.8.6 MK says it follows from the above that he correctly contended that Graham/Sweco on behalf of NH had in fact amplified the peak flows

engendering any flood risk from the surcharging of the NH culvert because a 1.19 m^3/s peak is evidently somewhat lower than the 1.66 m^3/s peak stated in the hard copy of the FRAa. As JBA concluded at paragraph 2.3, the result is *critical* to the lawful and *correct* evaluation of flood risk as:

> *'The 1.19 m^3/s engender lower flows than 1.66m3 /s. If the latter had been used then intuitively, a greater impact would be expected than is seen with the former.'*

6.4.8.7 The Figure 4-2 to the JBA Review[339] helpfully explains in graphic terms the differences between the inputs by Graham/Sweco on behalf of NH to the rebuilt model and the different inputs recorded by Graham/Sweco on behalf of NH in the printed form of the FRAa that purports to correctly represent the prior computer model inputs and results, but, in fact does not.

6.4.8.8 On behalf of NH, Graham/Sweco's Mr Pickering explained when pressed by the Inspector on behalf of the Secretary of State that the Table on page 22 of the FRAa Appendix A should, in fact, state '1.19' and not '1.66' as published, and that the FRAa is in 'error' in so (mis)stating the 'Final Results' of the assessment derived from the model.

6.4.8.9 MK indicates that the second hidden fact, b), is the size of the FEP1 and Res12 catchment area flow because the model records this as '3.9 m^3/s' (being 1.19 (FEP 1) + 2.71 (Res12)) whereas the FRAa on page 22 in the 'Final Results' Table (mis)describes the FEP1 flow as '1.66 m^3/s' and the Res12 flow as '3.34 m^3/s' (i.e. 5). Therefore, the Res12 catchment area flow of the study area is different to the inputs to the model to the size of the catchment area flows typed into and printed in the FRAa. The total catchment area flow of FEP1 and Res12 in the model is 3.9 m^3/s whereas those published in the FRAa are 3.34 + 1.66 = 5 m^3/s.

6.4.8.10 As JBA identified in INQ-64:

> *'2 Inflows to the model*
>
> *2.1 FEH Statistical inflows*
>
> *The FEH Statistical inflows to the model are:*
>
> • *Upstream end of Bursledon Brook east branch : 0.56* m^3/s
>
> • *Upstream end of Bursledon Brook east branch : 0.63* m^3/s
>
> • *Lateral inflow in the intervening catchment : 2.71* m^3/s

[339] INQ-64.

[3.9 m^3/s*]*

Therefore, the total of the eastern branch and western branch FEH Statistical inflows to the model is 0.56 + 0.63 = 1.19 m^3/s *[i.e. FEP 1] …*

A reminder that the difference (between) *the FEH Statistical flood estimates at FEP1 and FEP2 is 3.34-1.66=1.68* m^3/s *…'*

6.4.8.11 Indeed, the FEG[340] advises at page 77 on the '*General Assumptions'* that are not useful as including that '*the flow data are recorded accurately*' and here the FRAa has not done that nor has it provided any gauged data at all.

6.4.8.12 MK says nor has NH evaluated the FRAa against the EA's Technical Guidance on reducing uncertainty in section (g) of NH's INQ-32. The table extract in paragraph 1.33 refers to a figure of '1.43' for a 6 donor site for a return period of 100 years and paragraph 1.36 and 1.37 refers to figures in graphs. But, for example, different parameters apply to rural and to urban catchments but the FRAa appears to have been tested using rural and not urban catchments. See Tables 4 (in which '1.43' can be identified under 'Six Donors' Column and '100' year return period) and 5 (which does not contain '1.43' but contains '1.71' for the same box corresponding to that in Table 4), for ungauged sites, on page 81, a different parameter of a moderate urban catchment. In this respect, the FRAa, pages 18-19 of Appendix A has applied (for example,) an 'urban catchment factor' and page 10 describes the 'catchment' as 'moderately urbanized'. Table 5 applies to 'moderately urbanized catchment' and uses different parameters against which to gauge uncertainty than Table 4. Yet Graham/Sweco on behalf of NH has used non-authorised guidance published by a third party (Wallingford) and has used graphs based on a proxy of Table 4 and not for Table 5. Consequently, the NH assessment of uncertainty is itself inherently unreliable and cannot be relied on.

6.4.8.13 MK indicates again, the onus in the CPO sphere lies squarely with NH and not on MK. It is for NH to show that it has adhered to relevant guidance and not for MK to show it might make a difference if different parameters were used. If it were the latter, then that would reverse the 'onus' that the Court of Appeal places on the acquiring authority squarely in the Inquiry context. It is sufficient to note that NH has simply not applied the Government's guidance on assessment of uncertainty and NH cannot show it would make no difference and nor can the Secretary of State evaluate the uncertainty in the absence of evidence applying the correct parameters, as Mr Pickering's graphs are based on a proxy that use the wrong table.

[340] CD F.25.

6.4.8.14 MK considers it follows that the FRAa is inherently unreliable and has not reduced uncertainty in line with the FEG.

6.4.9 **Best estimate**

6.4.9.1 The Government's lead advisor on flood risk, the EA, has published the *FEG* that predate the rebuilt model and FRAa as well as the making of the CPO Order in March 2021. MK indicates that this guidance has not been applied or followed by Graham/Sweco on behalf of NH. This remains surprising because a national entity can be expected to adhere to national guidance, particularly from the Government's lead flood advisor.

6.4.9.2 The *FEG* includes the correct test by which to evaluate the flood estimation, recognising that such estimation is 'inherently' uncertain (emphasis added):

> [page 6] *'By its very nature, flood estimation is an uncertain business and this uncertainty is probably greater than many hydrologists realise…*
>
> [page 76] *While it is obvious to most hydrologists that their flood estimates are uncertain, there may be some who don't have a good idea of how large that uncertainty can be. There's also still a tendency among non-specialists to treat results of complicated procedures as the final truth, particularly if they are quoted to several decimal places…*
>
> *Uncertainty in flood estimates is often important during the subsequent process of making decisions.*
>
> *Sensitivity analysis can be used to test the effects of uncertainty on the subsequent modelled water levels (or whatever quantity is of interest). If this shows that the results are too uncertain, then it might be an incentive to improve the flood estimate. However, often the only way to give a substantial improvement is to install a flow logger and wait until it has recorded enough data. These tests often show that modelled water levels are more sensitive to uncertainty in the design flows than in hydraulic model parameters, indicating that it's worthwhile spending time and effort on improving the design flows.*
>
> *In development control, when there is too much uncertainty in a flood estimate, it may be wise to recommend that a proposed development is refused permission, because there's not enough information on its consequences, or at the very least, recommend that the uncertainty is managed by setting floor levels with an*

adequate freeboard. This is in line with the precautionary principle.'

6.4.9.3 Page 106 advises (contrary to NH's assertions about a minimal level of gauge data)(emphasis added):

'*Urbanisation has a widespread and significant effect on flood frequency. The type of influence is affected not just by the amount of urban area in the catchment, but also by factors such as the pre-urban runoff rate (i.e. the soil type), the type of development, the way in which it is drained (including the extent of any SuDS measures), the location, and the spatial concentration of the urbanisation.*

Because of this wide variety of factors, you cannot expect to get a very reliable estimate of the flood frequency curve using generalised methods, i.e. those derived using data from other catchments. There is no substitute for obtaining local data. With a little advance planning, you can sometimes achieve this without incurring large delays or expense. Even two years of flood peak data recorded, for example, using a temporary ultrasonic flow meter, can be expected to give a more certain estimate of QMED than the FEH equation based on catchment descriptors.'

6.4.9.4 Item 5 on page 14, the Government's Lead Flood Advisor advises: (Emphasis added)

'*5. Temporary flow loggers such as portable ultrasonic meters are worth installing for some studies, particularly if they can be installed at least two years in advance. This provides a long enough flood peak record to give an estimate of QMED that is more reliable than that obtainable from catchment descriptors (3 2.2). On 95% of typical catchments, you can expect catchment descriptors to give an estimate of QMED within about a factor of 2.0 of the real value. With just 2 years of flow data available, this uncertainty reduces to within about a factor of 1.7 of the real value (3 13.8.2). With 5 years of data, the factor drops to 1.4. So installing a temporary flow monitor could make a large difference to the outcome of a study, such as the number of people thought to be at risk of flooding or the level to which a flood defence should be constructed. On unusual catchments such as highly permeable or urban ones, an even shorter period of flow data may provide a more reliable estimate of flood frequency in comparison to catchment descriptors. This may be due to the influence of local hydrological features that are not well represented in generalised methods. In some unusual catchments you may have to accept a huge uncertainty in design flood estimates unless you obtain some flow data.'*

The reason for referring to the 2016 technical reports associated with

the Order scheme is to make the point that 7 years have passed since this issue first came to light. Rather than gauging, instead Mr Pickering has accepted huge uncertainty in design flood estimates.

6.4.9.5 Further, the correct test advised by the EA to evaluate flood estimation is 'best estimate' and not highest or lowest flows. See page 6 (emphasis added):

> *'Analysts should aim for the best estimate at each stage in the flood estimation process. This is better than making successive decisions that are biased on the conservative side that could result in a final answer that lies a long way above the best estimate.'*

6.4.9.6 Furthermore, the EA's advice is that (emphasis added):

> *'The FEH software enables rapid estimation of design floods from catchment descriptors. However, these are rarely likely to be the best estimates.'*

6.4.9.7 By contrast, the FRAa[341] makes no reference at all to the correct test advised by the EA of '*best* estimate' and instead refers to test of 'more conservative', that is, the highest.[342]. But the FEG advice is to not rely on highest or lowest results[343]:

> '*The FEH discourages users from choosing a method based on reasons such as:*
>
> - *it gives the highest or lowest flow (3 Box 7.1);*
> - *or it gives results that match those from a previous study (1 5.8).'*

6.4.9.8 In respect of the 'best estimate', JBA has previously evaluated the rebuilt model of Graham/Sweco as correctly built. Figures 2 and 3 of INQ-37 show the JBA print outs from that model:

a) Figure 2 – DO MINIMUM (*excluding* the 18%)

b) Figure 3 – DO MINIMUM VARIANT (*including* 18%)

6.4.9.9 These Figures show the extent of flood risk using the correct description of Manning's 'n' that matches the material of the existing culvert on NH's land ('0.15') and properly excludes some 18% of the catchment that cannot actually enter the culvert so as to contribute to its

[341] CD B.17.
[342] CD B.17 Appendix A-Hydrology Assessment Record pages 15 and 21, Appendix B-M27 Junction 8 Model Final Review-Technical Note page 1.
[343] CD F.25 page 35 item 4.

surcharging in a 1 in 100 year +35% climate change event.

6.4.9.10 The Figures also use correctly the UK updated Hazard Rating whereby <0.75 is attributed a 'Very Low Hazard'.

6.4.9.11 MK suggests that the difference between Figures 2 and 3 using the rebuilt model alone illustrates the significant difference that properly excluding the 18% from the entering the culvert mouth (and in line with the laws of physics) engenders: there is a lot less green on the gyratory and less yellow and orange also. That is, there is a reduced 'hazard' in Figure 2 when one does not amplify artificially, as NH does, the flood risk by modelling gravity defying water as a contributor to culvert surcharging.

6.4.10 **The Proper Interpretation of NPPF, paragraph 158**

6.4.10.1 In NH/3/2 paragraph 5.11, Mr Pickering on behalf of the contractor, Graham/Sweco on behalf of NH asserts this (Emphasis added):

> '*5.11 A new 0.45m culvert runs under Dodwell Lane and discharges into a new 900mm diameter culvert south of the Dodwell Lane (Figure 5-4). The new 0.45m culvert under Dodwell Lane is needed to limit discharge from the new watercourse to existing rates currently at Peewit Hill Close, thereby maintaining existing flow conditions in Bursledon Brook downstream of Junction 8 and meeting requirements of NPPF [CD.F.1 paragraph 158] and DMRB LA 113 [CD.F.9a paragraph 3.68, page 23].*'

6.4.10.2 MK considers that this is the heart of the matter; NH's strong desire to maintain existing flow conditions. However, the NPPF paragraph 158 makes no mention of a requirement to 'maintain existing flow conditions'. Nor does paragraph 168. The phrase in paragraph 159 – 'without increasing *flood risk* elsewhere' is different to '*maintain existing flow conditions'*. This is because the FEG is based on flood risk and not on maintenance of the *status quo flow* conditions. The gauge of 'flood *risk'* admits of increases and decreases in flow conditions because the relevant gauge is 'risk' not 'flow'. Consequently, Graham/Sweco on behalf of NH has erred in law in applying the incorrect test gauge to the application of the NPPF (and, to the NN NPS).

6.4.10.3 MK says as has been summarised above, it would be a nonsense to suggest that a landowner would blockade a water course to prevent water coming onto his land; or that the NPPF requires the same of that landowner.

6.4.11 Section 110: What can be done about the identified notional 'hazard'?

6.4.11.1 Section 110 remains available at this time.

6.4.11.2 MK indicates that notwithstanding Graham/Sweco's assertion, in NH/3/2, paragraph 5.1, on behalf of NH that the existing culvert is situated on land in Plot 11b of MK, this has never been the situation:

> *'5.1 … Modelling found that by installing a new watercourse through Plot 11b to convey flow to a new boxed culvert below Dodwell Lane, flow could be conveyed south of the Scheme area and flood attenuation provided…'*
>
> *'5.10 The new box culvert runs south discharging into a new open section of watercourse which drains to a new culvert inlet headwall at the southern extent of Plot 11b*.'

6.4.11.3 In fact, as MK's objection states in Schedule 1, he owns Plot 11b and there is no watercourse or culvert on it at the moment.

6.4.11.4 The FRA[344] (dated 16 January 2020) identified in 2019 some kind of flood risk from existing culvert surcharging on NH's own land and resulting in a risk of flood to its land on the gyratory at junction 8 in a 1 in 100 year event + 35% climate change.

6.4.11.5 The EAR 2020, paragraph A.2.1 provided from the 27 January 2020:

> '*Since it has been concluded that the development does not fall within the ambit of the 2008 Planning Act and a Development Consent Order is not required, there is no requirement to consider the scheme against the National Networks National Policy Statement which otherwise would be a key document for all conforming infrastructure developments.*
>
> *The National Planning Policy Framework and National Transport Strategies are therefore the key national planning considerations in the assessment of the proposed works, along with environmental strategies and plans which are set out further below*.'

6.4.11.6 MK considers therefore, that since at least 27 January 2020, and over a year before it made its CPO in March 2021, NH has known that it will not be applying for a Development Consent Order under the *Planning Act 2008* and also of the potential risk of flood from surcharging of the

[344] CD B5.

existing culvert.

6.4.11.7 The FRAa[345] Appendix A, page 1 of 22, records that the model was rebuilt around 11 August 2021.

6.4.11.8 Concurrently, the Secretary of State (and since April 2015 under its licence, NH) has had available since 1980 a power under section 110 of the *Highways Act 1980* on the following terms:

> '*1) Subject to the provisions of this section, a highway authority may divert any part of a watercourse, other than a navigable watercourse, or carry out any other works on any part of a watercourse, including a navigable watercourse, if, in the opinion of that authority, the carrying out of the works is necessary or desirable in connection with —*
>
> a) *the construction, improvement or alteration of a highway; …*'

6.4.11.9 The potential for subsection (1A) to engage, which disapplies that, fell away on the 27 January 2020 when the EAR determined no Development Consent Order would be required.

6.4.11.10 The threshold for the power is no more than that NH considers that the carrying out of the works '*is necessary or desirable'*. This is a low threshold, even if you disagree with NH's evidence, if NH says it is it can satisfy section 110. The evidence of the FRA (Jacobs) shows that threshold was surpassed from the 16 January 2020.

6.4.11.11 MK considers it follows that thenceforth and today there subsists a power for NH – as was put squarely to Mr Clark on behalf of NH – to itself carry out "any works on any part of a watercourse". If NH believes its own evidence on flood risk, then it can exercise its power under section 110 without further ado, taking account of climate change in so doing because the culvert size would reflect the 1 in 100 year + 35% climate change event also. Why would it not?

6.4.11.12 In this respect, NH's *Details of Design Changes between PCF Stage 3 and Stage 5* document[346] describes on page 4, row one:

> *'Replace Peewit Hill 450mm culvert with 1.5m x 0.5m box culvert.'*

6.4.11.13 And on paragraph 3.30:

[345] CD B.17.
[346] CD A.10.

'*The Peewit Hill culvert was identified as the source of the flood problems and therefore has been increased in size from a 450mm culvert to a 1.5m x 0.5m boxed culvert*.'

6.4.11.14 Section 110 remains available at this time.

6.4.11.15 In addition, Graham/Sweco on behalf of NH described in [NH/3.2/Pickering]: (Emphasis added)

'*5.1 … Modelling found that by installing a new watercourse through Plot 11b to convey flow to a new boxed culvert below Dodwell Lane, flow could be conveyed south of the Scheme area and flood attenuation provided however, environmental constraints make the location of flood compensation within this area technically difficult and expensive to implement.*

8.37 I agree that the solution is to increase the capacity of the Peewit Hill Close culvert, the proposed Stage 5 scheme will increase the capacity of the Peewit Hill Close culvert through replacing the 450mm pipe with a 1.5m by 0.5m boxed culvert to ensure no overland flow floods onto the highway…

8.49 The area to the north-east of the M27 J8 roundabout is susceptible to fluvial flooding, due to a watercourse tributary that passes beneath the junction in an existing 450mm diameter culvert. The watercourse tributary runs in a southerly direction along the M27 southbound off slip and into a culvert under the junction as it becomes Dodwell Lane. During the design event (1 in 100 year plus 35% climate change), the capacity of the culvert is exceeded and fluvial flow floods the carriageway…

8.50 The fluvial flooding mechanism which creates risk to the highway is attached to the 450mm diameter culvert underneath Peewit Hill Close at the northern extent of Plot 11b. When the capacity of the culvert is exceeded, flood water spills over the parapet and joins the M27 southbound slip road, leading to flooding of the Junction 8 gyratory. To address the predicted flood risk, a mitigation solution needs to be implemented at or upstream of the 450mm diameter culvert.'

MK says therefore, that NH should exercise its section 110 powers rather than putting him to enormous cost unnecessarily.

6.4.11.16 MK says it remains noted that 'options' were only considered at Stage 5 after the event of the red line being fixed at PCF Stage 3 under the EAR 2020 as a PCF Stage 3 'design fix', and inside of that red line development area.

6.4.11.17 Whether or not NH's FRA 'information' can pass muster (and it cannot

for the reasons given above), MK considers that it remains a complete answer to paragraph 8.50 (see paragraph 6.4.11.15 above) to, as Mr Moore's Figure 5 of INQ-37 shows, simply upsize the existing culvert to 675mm so as to align the actual pre-existing watercourse situation with the updated notional guidance on climate change for a 1 in 100 + 35% for climate change. That is not increasing flood risk from the watercourse but is maintaining existing flood risk along that watercourse, having regard to current (not 1970s) FEG. Conversely, upsizing the existing culvert prevents a risk land 'elsewhere' upstream by ensuring no throttling of flow in the assessment condition.

6.4.11.18 DMRB CD 529-*Design of Outfalls and Culvert Details*, requires, under paragraph 1.1 adherence to CIRIA c.786 and under paragraph 2.2 to Chapter 12 of CIRIA on hydraulic design.

6.4.11.19 The existing culvert presence and probable size was not determined early in PCF Stage 3 or at all.

> '*3.2 Where a culvert conveys a public watercourse, the design shall be determined in consultation with the environmental protection agency*.'

6.4.11.20 There is no evidence of such consultation between NH and the EA or Lead Local Flood Authority in relation to the design and upsizing the existing culvert on NH's land.

6.4.11.21 An upsizing approach as in Figure 5 aligns with CIRIA c.789-Culvert, screen and outfall manual[347], whilst not in Chapter 12, paragraphs 11.4.1 and 11.4.2 explain generally:

> '*11.4.1 A culvert … should be capable of conveying the design discharge or flow without causing flooding of property or infrastructure. It should also be able to convey an extreme flood without causing property damage … The design discharge should be agreed with the authority responsible for environmental permitting, licensing or consent … Note the design standard for a culvert … on a watercourse (typically up to 0.5 per cent or 1:200 AEP) tends to be higher than for a drainage outfall (typically up to 3.33 per cent or 1: 30)…'*
>
> '*11.4.2 Afflux and flood risk*
>
> *A culvert… should not increase flood risk up stream or downstream …Consider the impacts of a replacement structure on flood risk. A replacement culvert which is inadvertently undersized, acts as a throttle and increases headwater elevation upstream, potentially*

[347] INQ-38.

leading to flooding, embankment overflowing and geotechnical failure. Conversely, a replacement culvert that is oversized may create a new problem by passing on the peak discharge which was formerly attenuated.

The afflux due to a structure should not exceed the value allowed by the regulatory authorities. This may range from 0mm to, for example, 200mm depending on the location of the structure and its proximity to flood risk areas. Consider the impact of afflux on overall flood risk, for example, a small afflux may be a reasonable trade-off to achieve a small increase in velocity through the culvert…'

6.4.11.22 MK indicates that upsizing the existing culvert from 450mm diameter to 675mm diameter would enable the conveyance of an extreme flood event along the existing culverted water course, in line with updated Climate Change and CIRIA Guidance, and there is no evidence of that new alignment with guidance resulting to increase or decrease flood risk to property up or downstream. This is because the culvert itself does not generate flow. Rather, the catchment is the genesis of the flow as referred to above. Hence the distinction between passing flow 'through' land as opposed to impeding flow engendered by a change in the land, as Mr Moore made clear and the Link Road planning permission illustrates neatly. There is a difference between needing to impede flow arising from rainfall runoff from developer laid tarmac as opposed to water flowing through land from a catchment.

6.4.11.23 MK considers that in upsizing the existing culvert to 675mm, (as indeed NH itself desires to so do), NH would undoubtedly comply with its asserted climate change obligations by dint of taking them into account in the sizing of the replacement culvert (in the same way that it contends that it would do in paragraph 8.37 above[348]). So where it says work to 1 in 100 plus 35%, that applies to the culvert size as well and meets NH's climate change obligation.

6.4.11.24 In the same way as NH asserts that NN NPS paragraph 5.94, bullet 2 requires, the replacement of the existing culvert on NH's own land (not as Mr Pickering thought and evidenced at paragraph 5 of NH/3/2, on Mr Keeling's land), would give effect to that bullet because it requires no more than to take impacts into account: (Emphasis added)

'• take the impacts of climate change into account, clearly stating the development lifetime over which the assessment has been made; …'

MK says that this is not an absolute requirement as NH asserts, nor does it dictate the *manner* of *how* climate change in fact be taken into account. There is no requirement that climate change can only be dealt

[348] Para 6.4.11.15.

with by a basin; it could be accounted for by providing a bigger culvert.

6.4.12 **Other Means and the absence of Last Resort**

6.4.12.1 MK considers that the law requires, in the CPO sphere, the least intrusive means to be used. Here, those means subsist under the subsisting power of section 110(1) of the *Highways Act 1980* and based on NH's own evidence that it believes to be sound that power can be used today even. It is evidently irrational for NH to simultaneously have that power today available and to also seek to assert the use of CPO powers as a 'last resort' and to assert that without Plot 11b the whole scheme would collapse.

6.4.12.2 He indicates that it would be also incorrect and unlawful to characterise the replacement of an upsized culvert as an 'alternative' required to be proven by the Objector, MK, and to which NH may simply disagree in a self-serving manner. NH has to rule out section 110 powers as available; it cannot do so. The law exists and case law refers to the 'least intrusive means'. Only if NH is blind to that can it acquire Plot 11b.

6.4.12.3 MK says it is correct that the NN NPS provides in paragraphs 4.26-4.27 for 'Alternatives'. However, the High Court in July 2021 clarified the scope of paragraph 4.26 and 4.27. (See Stonehenge[349]). In this matter, NH appears to have focused on paragraph 4.27 by its optioneering and under 4.26 by considering Environmental Impact Assessment (EIA) matters. But, the scope of 4.26 is not confined to EIA and admits under 'legal requirements' of alignment of the NN NPS with the legal obligations set out in *Prest*.

6.4.12.4 As in *Prest* (where an alternative site was given as an example of an alternative way to acquisition of a different site), the Court of Appeal held: (Principles underlined)

> '*It is clear that no Minister or public authority can acquire any land compulsorily except the power to do so be given by Parliament: and Parliament only grants it, or should only grant it, when it is necessary in the public interest. In any case, therefore, where the scales are evenly balanced — for or against compulsory acquisition with the decision — by whomsoever it is made — should come down <u>against</u> compulsory acquisition. 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 <u>decisively</u> so demands: and then only on the condition that proper compensation is paid, see Attorney-*

[349] INQ-88.4.

General v. De Keyser's Royal Hotel Ltd. (1920) A.C. 508 . If there is any reasonable doubt on the matter, the balance must be resolved in favour of the citizen. This principle was well applied by Mr. Justice Forbes in Brown v. Secretary of State for the Environment (1978) P. & C.R. 285, where there were alternative sites available to the local authority, including one owned by them. He said (at page 291):

It seems to me that there is a very long and respectable tradition for the view that an authority that seeks to dispossess a citizen of his land must do so by showing that it is necessary … If, in fact, the acquiring authority is itself in possession of other suitable land other land that is wholly suitable for that purpose – then it seems to me that no reasonable Secretary of State faced with that fact could come to the conclusion that it was necessary for the authority to acquire other land compulsorily for precisely the same purpose.

…[and in respect of consideration of an alternative site]'

'It is the duty of the Minister to have regard to the public interest. For instance, in order to acquire the land the acquiring authority has to use the taxpayers' money or the ratepayers' money. The Minister ought to see that they are not made to pay too much for the land – especially where there is an alternative site which can be acquired at a much less price. So also with the planning and development of this land. It is the public at large who are concerned. If planning considerations point to the alternative site rather than to the site proposed by the Authority, the Minister should take them into account …

… [P]ut a little more fully by Lord Diplock in Education Secretary v. Tameside (1977) A.C. 1014 at page 1065:

'Or, put more compendiously, the question for the court is, did the Secretary of State ask himself the right question and take reasonable steps to acquaint himself with the relevant information to enable him to answer it correctly?'…

'In the sphere of compulsory land acquisition, the onus of showing that a CPO has been properly confirmed rests squarely on the acquiring authority and if he seeks to support his own decision, on the Secretary of State. The taking of a person's land against his will is a serious invasion of his proprietary rights. The use of statutory authority for the destruction of those rights requires to be most carefully scrutinised. The courts must be vigilant to see to it that that authority is not abused. It must not be used unless it is clear that the Secretary of State has allowed those rights to be violated by a decision based upon the right legal principles, adequate evidence and proper consideration of the factor which sways his mind into confirmation of the order sought…'

6.4.12.5 So too in *Sainsbury's*: (Emphasis added)

> *'11. …*
>
> *40. Private property rights, although subject to compulsory acquisition by statute, have long been hedged about by the common law with protections. These protections are not absolute but take the form of interpretative approaches where statutes are said to affect such rights.*
>
> *42. The attribution by Blackstone, of caution to the legislature in exercising its power over private property, is reflected in what has been called a presumption, in the interpretation of statutes, against an intention to interfere with vested property rights …*
>
> *43. The terminology of 'presumption' is linked to that of 'legislative intention'. As a practical matter it means that, where a statute is capable of more than one construction, that construction will be chosen which interferes least with private property rights*.'

6.4.13 **Reply submissions of Mr Keeling on …misstatements of fact**

6.4.13.1 MK says that contrary to paragraph 4.5.5.12, JBA are not Royalty nor Danish but are expert hydrologists. It is misleading for the Inspector and Secretary of State in fact for NH to state to the Secretary of State that:

> '*…JBA Consulting have not provided evidence, they have provided merely model outturns based on* Mr Moore*'s assumptions.'*

6.4.13.2 MK indicates that in fact, JBA gave detailed technical evidence to the Inquiries in the form of written representations and reviews of each of the hydrological models and the FRA by Jacobs and most recently in a Technical Briefing Note attached to Mr Moore's Proof of Evidence and, most recently, at INQ-64 (mis-dated May 2021 instead of 2022) where they identified the use of 1.19 m^3/s had been used in the model rebuilt by Mr Pickering but that was different to the FRAa figure of 1.66 m^3/s simultaneously asserted by Mr Pickering to have derived from his rebuilt model. JBA also critiqued the FRA (Jacobs) model as being too generalized (in addition to Mr Pickering describing the FRA as having used the incorrect flow assessment of summer (instead of winter) and of an incorrect and too short a period (3.5 hrs instead of the 6 hours he surmised was correct).

6.4.13.3 Contrary to paragraph 4.5.5.13 where NH assert:

> *'It is telling that MK has gone to the expense of instructing experts on hydrology and hydraulic modelling but has declined to call them to give evidence and has not gained any support from JBA Consulting*

for the assumptions put forward by Mr Moore*.'*

There was no need to call JBA to speak to their damning evidence of the Pickering hydrological model and FRA mismatch because the empiric facts speak for themselves.

6.4.13.4 MK considers that contrary to paragraph 4.5.5.14, Mr Moore was responding in cross-examination no more to NH than as Sullivan J held in *Tesco* that the burden of proving its case lies with NH:

'It is perfectly true that the burden in a Compulsory Purchase Order inquiry lies on the acquiring authority to demonstrate a compelling case in the public interest.'

6.4.13.5 Contrary to paragraph 4.5.5.14, Mr Moore is not a 'non-expert'. Mr Moore is, like the Inspector, a Chartered Civil Engineer. As Mr Pickering accepted in his Proof of Evidence, the cause of the flood risk is an engineering concern resulting from the existing diameter of the NH culvert being today too small at 450mm to convey water along an ordinary watercourse culverted by NH in about 1975 on its land.

6.4.13.6 Contrary to paragraph 4.5.5.14, the Secretary of State cannot be bound by an expert's view. The Inspector is experienced in water matters and Mr Moore has experience of culvert design as his CV makes clear.

6.4.13.7 Contrary to the allegation in paragraph 4.5.5.18 that NH refused to withdraw, Mr Keeling did not in fact state that Mr Pickering had 'intentionally' hidden a figure of 1.19 m^3/s behind a figure of 1.66 but that the result of only recording a figure of 1.66 m^3/s whereas in fact a figure of 1.19 m^3/s was required to be recorded resulted in the hiding of 1.19 m^3/s from the face of the FRA from a person who did not have access the rebuilt model on which the FRA (and all flood risk maps before the Inquiries) was predicated. The extracts in Blake Morgan File Note records of Mr Pickering's cross-examination on the 1.19 m^3/s and 1.66 m^3/s is in Appendix A of INQ-92.

6.4.13.8 In MK's view therefore, it is a non-sequitur for NH to assert in paragraph 4.5.5.18 that it 'is wholly inappropriate and is addressed in NH's response to MK's Costs Application'. The content of paragraph 106 is but one example of NH's misdescription of the facts before the Inspector and Secretary of State that results to cloud the issues and not shed light on them reinforced by NH witness obfuscation.

6.4.13.9 Contrary to paragraph 4.5.5.21, as the JBA Note in INQ-64 identifies, the rebuilt model flows for the *catchment areas* totalled 3.34 m^3/s and were not, as *modelled* 3.9 m^3/s.

6.4.13.10 Contrary to paragraph 4.5.5.27, as JBA evidenced in INQ-64, there were in fact no ReFH2 numbers provided by NH in the model underpinning the FRA by Sweco:

> *2.2 …*
>
> *… Graham/SWECO derived ReFH flood estimates but did not model ReFH inflows, it is not known what model inflows they might have or would have used. Therefore, to derive ReFH inflows for the model runs that we have done, we looked at the ReFH flood estimates and adjusted them in the same proportions as Graham/SWECO did for the FEH Statistical flood estimates at FEP1, FEP2 and* Res12 *to obtain the FEH Statistical model inflows.*

6.4.13.11 Contrary to paragraph 4.5.5.28 and footnote 159, Mr Pickering gave no evidence as is asserted in that footnote. The footnote content is mere assertion and untested in cross-examination. It is mere advocate rhetoric.

6.4.13.12 Contrary to paragraph 4.5.5.31, Mr Pickering was not the only expert in the room. Both Mr Moore and the Inspector are also experts in water design, and JBA also gave hydrological evidence by means of written representations including in INQ-64.

6.4.13.13 Contrary to paragraph 4.5.5.41 and footnote 179, there was no evidence of an error in the model being 'found' that was before the Inquiries. Footnote 179 must be deleted because Mr Keeling had no opportunity to cross-examine Mr Pickering on this newly disclosed fact.[350]

6.4.13.14 Contrary to paragraph 4.5.5.41, there is no agreement that there is a flood risk to the highway at the design event.

6.4.13.15 Contrary to paragraph 4.5.5.66(e), the upsizing of the culvert on NH's land and in its land could not increase flood risk elsewhere because: a) the risk could remain within NH's land; b) remains a pre-existing risk from a natural and not a manmade situation.

6.4.13.16 Contrary to paragraph 4.5.5.70, the section 110(1) *Highways Act 1980* power is not on its face limited by the NN NPS nor the NPPF guidance.

6.4.13.17 Contrary to paragraph 4.5.5.73, it is a complete answer that section 110(1) can be relied on and there is no requirement in law for an

[350] Inspector's note: It was open to MK to cross-examine Mr Pickering each time he appeared.

objector to demonstrate a (so-called) 'viable' alternative.

6.4.13.18 As Sullivan J. held in Tesco in 2000:

> *'It is perfectly true that the burden in a Compulsory Purchase Order inquiry lies on the acquiring authority to demonstrate a compelling case in the public interest.'*

6.4.13.19 As the Lord Justice Watkins said in *Prest*:

> *'In the sphere of compulsory land acquisition, the onus of showing that a CPO has been properly confirmed rests squarely on the acquiring authority and if he seeks to support his own decision, on the Secretary of State. The taking of a person's land against his will is a serious invasion of his proprietary rights. The use of statutory authority for the destruction of those rights requires to be most carefully scrutinised. The courts must be vigilant to see to it that that authority is not abused. It must not be used unless it is clear that the Secretary of State has allowed those rights to be violated by a decision based upon the right legal principles, adequate evidence and proper consideration of the factor which sways his mind into confirmation of the order sought.'*

6.4.13.20 MK says that there is no requirement, as NH asserts in paragraph 4.5.5.73, for him to demonstrate an alternative. If it were otherwise, then NH would reverse the burden of proof that rests exclusively on the acquiring authority in the sphere of CPO (as opposed to the field of planning). As Mr Keeling notes, this CPO and SRO are not made under the TCPA 1990 or the *Planning Act 2008* but under the *Highways Act 1980*. The Inquiries are not in the planning field but are in the highways sphere.

6.4.13.21 Contrary to paragraph 4.5.5.73, and noting that NH accepts in fact that reliance 'could' be placed on section 110(1) of the *Highways Act 1980*, as in *Prest* there remains no more for Mr Keeling to demonstrate. Applying *Prest*, faced with that fact, no reasonable Secretary of State could lawfully confirm a CPO: (Emphasis added)

> *To what extent is the Secretary of State <u>entitled to use</u> compulsory powers to acquire the land of a private individual? It is clear that no Minister or public authority can acquire any land compulsorily except the power to do so be given by Parliament: and Parliament only grants it, or should only grant it, when it is necessary in the public interest. In any case, therefore, where the scales are evenly balanced — for or against compulsory acquisition the decision — by whomsoever it is made — should come down against compulsory acquisition. 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: and then only on the condition that proper compensation is paid, see Attorney-General v. De Keyser's Royal Hotel Ltd. (1920) A.C. 508 . If there is any reasonable doubt on the matter, the balance must be resolved in favour of the citizen. This principle was well applied by Mr. Justice Forbes in Brown v. Secretary of State for the Environment (1978) P. & C.R. 285, where there were alternative sites available to the local authority, including one owned by them. He said (at page 291):

> *"It seems to me that there is a very long and respectable tradition for the view that an authority that seeks to dispossess a citizen of his land must do so by showing that it is necessary … If, in fact, the acquiring authority is itself in possession of other suitable land other land that is wholly suitable for that purpose – then it seems to me that no reasonable Secretary of State faced with that fact could come to the conclusion that it was necessary for the authority to acquire other land compulsorily for precisely the same purpose."*

6.4.13.22 Contrary to paragraph 4.5.5.75, the culvert is wholly in the control of NH as it is on NH land and NH has an express statutory power to carry out works to the culvert if it desires so to do and in connection with road improvements. These are the facts.

6.4.13.23 Contrary to paragraph 4.5.5.76g) there is no evidence that the ordinary watercourse is 'private' and no evidence to that effect was given by NH in Proofs of Evidence or orally.

6.5 Conclusion

6.4.1 MK respectfully submits the CPO be modified to remove his land from its compass or not confirmed to like effect.

7 THE CASES FOR OTHER OBJECTORS

The gist of the material points made by those objectors who did not appear at the Inquiries in their written submissions were:

7.1 **OBJ/6-Foreman Homes limited** (FHL)

7.1.1 FHL has an interest in Plots 11, 11a, 11b, 11c and 11d of the land that is subject of the CPO, by way of an option agreement. This option relates to a wider area of land than that directly affected by the CPO, however Plot 11b in particular is of concern owing to the size of the land take as it forms a considerable part of the land secured by the option. Losing this part of the land would clearly have a detrimental impact on the future development potential of the land.

7.1.2 FHL objects to the CPO and SRO on the following grounds.

7.1.3 ***There is not a compelling case in the public interest for the CPO to be made***

7.1.3.1 FHL indicates that the Statement of Reasons (SoR) published with the CPO purports to set out the case for the CPO in paragraph 7.2. This paragraph refers to parts 2.5 and 2.6 of the SoR in which the Need for the Scheme and the benefits of the Scheme are explained. There is however no explanation of how the benefits of the Scheme justify the use of compulsory purchase powers in comparison to the infringement of human rights that occurs when a person's land is compulsorily acquired.

7.1.3.2 The SoR should demonstrate that the reasons for the Order scheme outweigh the landowners' rights. Compulsory purchase powers should only be used as a tool of last resort, and that is because of the interference with human rights. It is difficult to see in this case where or how that assessment has been made. The SoR explains the public benefits but does not consider the impact of the Order scheme on the landowners. In the case of FHL, the impact would be significant as the land that is the subject to its option would be greatly reduced and the proposed use of Plot 11b as a Flood Attenuation Pond may restrict the development potential of the remainder of the land that is subject to the Option. Whilst the overall goals of the Order scheme, to reduce congestion and improve safety may be considered to be in the public interest, it is not clear that there is a compelling case for all of the land that is the subject of the CPO to be taken.

7.1.4 No evidence of consideration of alternative options

7.1.4.1 FHL indicates that part 2.2 of the SoR describes the options that were considered to meet the overall objectives of the Order scheme. The different options that were considered were different types of scheme that may have achieved the goal of reducing congestion and improve safety between junctions 5 and junction 8 of the M27. The SoR explains the reasons for choosing the Order scheme as the preferred option but there is no explanation of how the design of this Order scheme itself was developed and what other options were explored for the Order scheme to see how it could be delivered without resorting to compulsory acquisition.

7.1.4.2 Plot 11b is identified in Appendix A of the SoR as being required to enable the provision of a Flood Attenuation Pond. The SoR does not explain if it would have been possible for the Scheme to be delivered using different drainage methods or whether a different area of land could have been designated for this purpose. Without demonstrating that this has been done it cannot be concluded that Plot 11b is being compulsorily required as a last resort.

7.1.4.3 The SoR does not therefore demonstrate that there is a compelling case in the public interest as it does not appear as if all options for the Order scheme have been properly considered.

7.1.5 The Loss of Plot 11b could impede the future delivery of housing

7.1.5.1 FHL identifies that Plot 11b forms part of land subject to an option agreement that has the potential to contribute to the delivery of much needed housing in the local area. The SoR does not consider this potential use and whilst the existing use of the land is not housing, the CPO would of course take away a substantial part of the option land and the impact of the use of Plot 11b for flood attenuation on the development potential for the remainder of the option land is unknown.

7.1.5.2 As explained above, the SoR has not explained what alternative drainage options were explored and why the purchase of Plot 11b is considered to be necessary as a tool of last resort to provide the drainage measures for the scheme. It has therefore not been demonstrated that the proposed use of this land by the Order scheme is more important than the existing use of the land and its potential future uses.

7.1.5.3 It is also questionable whether the amount of land sought is necessary to deliver the attenuation pond and whether or not everything has been done that can be done in design terms to minimise the amount of land that needs to be acquired.

7.2 **Mr Paul Carnell** (PC)

7.2.1 PC's objection to the proposed modifications to M27 junction 8 and Windhover Roundabout is because he considers there are a number of road junctions in the vicinity that cause traffic build-up radiating back to the area, the subject of these Inquiries, and should be amended prior to the proposals. They are:

a) Hamble Lane/Portsmouth Road (south west of Windhover Roundabout)– PC indicates that this junction is heavily used and is only two lanes wide - one south and one north - and south-bound traffic waiting to turn right from Hamble Lane into Portsmouth Road blocks the road south - there is considerable north-bound traffic at 'rush hour'. This eventually feeds back to Windhover Roundabout and then down to the motorway junction 8;

b) Bursledon Road/Botley Road (north west of Windhover Roundabout)– PC identifies that in the last 2/3 years the layout of this junction was altered - supposedly to alleviate congestion - which it hasn't - westbound towards Bitterne/Southampton city - from a dedicated left turn lane and a dedicated straight ahead lane with option to turn right. This is now a dedicated left/straight ahead lane and a dedicated right turn lane. Traffic wishing to turn left slows through traffic and the occasional - one approximately every two minutes - official figures - block the remaining lane to the left as there is insufficient room for right-turning traffic to adequately clear the inner lane. Further, traffic trying to avoid the left-turning traffic tries to go around it risking an accident. Likewise there is an accident risk with through and left-turning traffic trying to avoid an obstructing right-turning vehicle.

c) Botley Road from Bursledon Road to the A27 (north west of Windhover Roundabout)- road closed to through traffic for approximately 35 years, since when PC considers that there has been a considerable increase in traffic passing through the area. Traffic requiring to go south-west from the A27 has to go via Windhover Roundabout, then onto Bursledon Road or Hamble Lane. The reverse also applies.

d) Dodwell Lane, Bursledon - restricting access and egress would only add to congestion at M27 junction 8.

7.2.2 PC says that points to note are:

a) The junction at Hamble Lane/Cunningham Gardens/Chamberlayne Way - approximately 360/460 metres south of Hamble Lane/Portsmouth Road junction - is traffic-light controlled for traffic accessing/egressing small housing estates. The road here has been widened to allow a full filter lane/filter

light phase. The filter lane section is several yards longer than that at Hamble Lane/Portsmouth Road.

b) Bursledon Road/Le Marechal Avenue (north west of Windhover Roundabout) is also traffic-light controlled - again, to allow housing-estate traffic to access and egress.

Yet, the major junction at Hamble Lane/Portsmouth Road has a very short traffic filter section and no traffic light control. This junction has been a problem for some 20 years, a matter which has finally been recognised, in 2017, by HCC and, PC understands that funds have been set aside once Windhover Roundabout and M27 junction 8 have been modified.

7.2.3 Until these traffic congestion points are resolved all that NH will achieve is months of aggravation and inconvenience for motorists only to wind up with an increased-sized rush-hour car park.

8 INSPECTOR'S CONCLUSIONS

Having had regard to the evidence submitted, I have reached the following conclusions, references being given in square brackets [] to earlier paragraphs where appropriate

8.1 Introduction

8.1.1 As is allowed for by the *Highways Act 1980*, the CPO and SRO were considered simultaneously at concurrent public Inquiries.[4.4.88] In these conclusions I will deal with the CPO first before turning to the SRO.

8.2 The Compulsory Purchase Order (CPO)

8.2.1 The tests

8.2.1.1 The legal tests to which the CPO is subject are a matter of disagreement between NH and MK, in relation to which both parties have made submissions, which are recorded above as part of the parties' cases. Whilst I give my view below, these are legal matters upon which the Secretary of State may wish to take advice.

8.2.1.2 There is no dispute that the CPO Guidance reflects the law.[4.4.7, 6.3.22.4] Consistent with the *Swish Estates* judgment, the CPO Guidance indicates that:

- *'A CPO should only be made where there is a compelling case in the public interest*'; and,
- '*an acquiring authority should be sure that the purposes for which it is making a CPO sufficiently justify interfering with the human rights of those with an interest in the land affected*'.

8.2.1.3 This also reflects the *Prest* judgment '*…where the scales are evenly balanced - for or against compulsory acquisition… the decision - by whomsoever it is made - should come down against compulsory acquisition… no citizen is to be deprived of his land…unless… the public interest decisively so demands…If there is any reasonable doubt on the matter, the balance must be resolved in favour of the citizen'.*[4.4.8, 6.2.1.6]

8.2.1.4 The CPO has been made under the *Highways Act 1980* and there is no dispute that neither the statutory tests for planning permission (section 38(6) of the Planning and Compulsory Purchase Act 2004) nor for development consent (section 104 of the Planning Act 2008) are engaged in this case.[4.9.1.1, 4.9.5.3, 6.3.1.1, 6.3.17.4] Furthermore, in the event that the CPO were to be confirmed and enacted, planning permission would not be required for implementation of the Order scheme.[4.9.5.3, 6.3.17.42-49, 6.3.19.7] Nonetheless, planning policy is developed in the public interest and so I consider that it is a relevant factor when considering whether there is a compelling case in the public interest for the Order to

be confirmed.[4.9.1.3-5]

8.2.1.5 Furthermore, there is no dispute that a decision to confirm the Order may be informed by whether the purpose(s) could be achieved by other means, giving consideration to whether a lesser, equivalent or greater public interest would be associated with an identified alternative. This is supported by the CPO Guidance[351], the NN NPS and case law such as *de Rothschild.* [4.4.14-28, 4.4.51c), 4.4.75, 4.4.79d), 6.2.1.9e)-13, 6.4.12.3] However, as set out in the *Mount Cook* judgment by the Court of Appeal *'where alternatives might be relevant, vague or inchoate schemes, or those which have no real possibility of coming about, are either irrelevant, or where relevant, should be given little or no weight'.* Whilst that case was about a planning permission, rather than a scheme under the *Highways Act 1980*, I share the view of NH that it would be reasonable to apply the same approach.[4.4.29, 4.4.75, 6.3.21]

8.2.1.6 NH disagrees with MK's view that the 2 stage 'Samaroo' process, and in particular the 'least intrusive' approach, is applicable in this case.[4.4.20, 6.2.1.9b)] That is:

> *"19. ... in deciding what proportionality requires in any particular case, the issue will usually have to be considered in two distinct stages. At the first stage, the question is: can the objective of the measure be achieved by means which are less interfering of an individual's rights?"*
>
> *"20. At the second stage, it is assumed that the means employed to achieve the legitimate aim are necessary in the sense that they are the least intrusive of Convention rights that can be devised in order to achieve the aim. The question at this stage of the consideration is: does the measure have an excessive or disproportionate effect on the interests of affected persons?"*

8.2.1.7 The *'Samaroo'* case, which related to the impact of deportation upon Mr Samaroo's rights under Article 8 of the EHCR, is not directly comparable to the current CPO case, which involves an Order made under the *Highways Act 1980* to facilitate highway improvements and interference with the rights under Article 1 of the First Protocol[352] of MK, and other parties. I consider that the same can be said in relation to other case law judgments provided to me, from which the following key points arise to my mind:

[351] CD F.13 para 106.
[352] CD D.3 Article 1 of the First Protocol '*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.'*

a) *Lough,* which was cited in *Clays Lane*[353], was concerned with the application of Article 8 and Article 1 of the First Protocol to a grant of planning permission, not a CPO. [6.3.17.37] The Judges indicated '… *the process outlined in Samaroo while appropriate where there is direct interference with Article 8 rights by a public body, cannot be applied without adaptation in a situation where the essential conflict is between two or more groups of private interests.'* (my emphasis)

b) *Clays Lane*[354],[4.4.22-23, 6.2.1.9, 6.3.17.28, 6.3.17.50-66, 6.3.22.17-23] in which a Housing Corporation, in exercise of its powers under the *Housing Act 1996*, directed the Claimant to transfer its land to another registered social landlord, engaged rights under Article 1 of the First Protocol. The judge indicated: '*It is not a case of naked property deprivation*' and '*Although not in every respect the same as a planning decision, it approximated to what Keene LJ was describing in Lough v First Secretary of State [2004] 1WLR 2557, para 55, namely "a situation where the essential conflict is between two or more groups of private interests". I conclude that the appropriate test of proportionality requires a balancing exercise and a decision which is justified on the basis of a compelling case in the public interest and as being reasonably necessary but not obligatorily the least intrusive of Convention rights.*' (my emphasis)

c) *Pascoe*[355],[4.4.42-51, 6.3.16] involved the promotion of a CPO to secure area-wide regeneration, in relation to which a number of planning permissions had been granted. The statutory basis of the CPO was the *Leasehold Reform, Housing and Urban Development Act 1993* and it involved direct interference with Article 8 rights by a public body. The Judge indicated that '*Samaroo is not universally applicable*' and approached the matter on the basis of the law as stated in the *Clays Lane* case above; '*on the basis of a compelling case in the public interest and as being reasonably necessary but not obligatorily the least intrusive of Convention rights… If 'strict necessity' were to compel the 'least intrusive' alternative, decisions which were distinctly second best or worse when tested against the performance of a regulator's statutory functions would become mandatory. A decision which was fraught with adverse consequences would have to prevail because it was, perhaps quite marginally, the least intrusive. Whilst one can readily see why that should be so in some Convention contexts, it would be a recipe for poor public administration in the context of cases such as Lough v First Secretary of State and the present case.'*.[4.4.49]

[353] INQ-7.1.
[354] INQ-7.1.
[355] INQ-91.6.

d) *Smith*[356],[4.4.52-59, 6.3.11, 6.3.16.3,6.3.17.4-5, 6.3.18, 6.3.22] in which the statutory basis for the CPO was the *Regional Development Agencies Act 1998,* included 'naked deprivation' of the Claimants' homes, engaging Article 8 rights. The Judge indicated that:
   i. '…*context is all important*.'[4.4.58, 6.3.11]
   ii. '…*a decision to confirm a compulsory purchase order may be proportionate even though it does not amount to the least intrusive interference of the landowner's rights under Article 8…'*[4.4.24]
   iii. In the particular context of that case '*it is unnecessary for the Defendant to demonstrate that the measure he proposes to take is the least intrusive available…*'.(my emphasis). Nonetheless, the Judge went on to say '*I am conscious, however, that an alternative view point is clearly arguable. It is for that reason that I proceed on the basis, contrary to my view, that a decision to confirm this compulsory purchase order will not be proportionate unless, on the particular facts of the case, it is the least intrusive measure open to the decision maker*'.[4.4.53-55]

e) *Belfields*[357],[4.4.25, 4.4.60-64, 6.3.19] in which the statutory basis for the CPO was the *Town and Country Planning Act 1990*, engaged rights under Article 1 of the First Protocol, rather than under Article 8.[6.3.19.3] The Judge indicated '*I do not accept that proportionality in a case such as this is to be determined by treating as a requirement that the CPO should be the "least intrusive" means of achieving the public benefit that is sought. Such a test was rejected by the Court of Appeal in* R. (on the application of Clays Lane Housing Co-operative Ltd) v The Housing Corporation *[2005] 1 W.L.R. 2229 (see para.[25] in the judgment of Maurice Kay L.J.) and by Forbes J. in* Pascoe *v First Secretary of State [2007] 1 W.L.R. 885 at paras [68]-[75], both of which were cases in which rights under Art.8, as well as under Art.1 of the First Protocol, were engaged.* (my emphasis)

8.2.1.8 To my mind these cases indicate that: the *Samaroo* approach (requiring 'least intrusive' means) is not one of universal application; whilst it may be appropriate where there is direct interference with Article 8 rights by a public body, that is not always the case; context is all important; and, where the *Samaroo* process does not apply, the appropriate test of proportionality requires a balancing exercise and a decision which is justified on the basis of a compelling case in the public interest and as being reasonably necessary but not obligatorily the least intrusive of Convention rights.

356 INQ-91.3.
357 INQ-91.5.

8.2.1.9 The current CPO, which does not seek to acquire any dwellings, does not engage Article 8 rights.[358] Furthermore, I consider that some parallels can be drawn with the circumstances in *Pascoe*. It is a CPO promoted by NH, although not a public body, in pursuance of its Statutory duties[359] and in the public interest, although not engaging Article 8 rights.[4.5.1.3, 6.3.17.26] Furthermore, the proposed scheme can be regarded as being acceptable in planning terms, in that there is no requirement for express planning permission or development consent for the Order scheme, which would be built out under permitted development rights following confirmation of the CPO. To my mind, the same applies; '*… If 'strict necessity' were to compel the 'least intrusive' alternative, decisions which were distinctly second best or worse when tested against the performance of… statutory functions would become mandatory… it would be a recipe for poor public administration'*.[8.2.1.7c)] Therefore, I consider that the '*Samaroo*' approach is not appropriate in this case. The appropriate test of proportionality requires a balancing exercise and a decision which is justified on the basis of a compelling case in the public interest and as being reasonably necessary but not obligatorily the least intrusive of Convention rights.

8.2.1.10 However, I consider that if 'less intrusive' means of meeting the objectives are identified, consideration should be given to them. When considering whether there is a compelling case in the public interest for the proposal a factor to weigh in the balance would be whether a lesser, equivalent or greater public interest would be associated with an identified alternative. Furthermore, if an alternative were identified which would interfere less with Article 1 of the First Protocol rights and would meet or exceed the objectives of the Order scheme, it would be difficult to conclude that the interference associated with the Order was reasonably necessary, in the context of whether the purposes for which the Order was made justify interfering with the human rights of those with an interest in the land affected.[4.4.75, 4.4.79d), 6.3.17.29-32]

8.2.1.11 There appears to me to be no dispute that the CPO could not be confirmed in an evidential vacuum.[4.4.1, 6.3.20.27]. Furthermore, it appears that the *Grafton* judgment supports the position that the details of the Order scheme do not need to be finalised in order to provide sufficient evidence to support a decision to confirm the CPO; a position echoed by the CPO Guidance.[4.4.64b), 4.4.66] In the current case, NH and MK disagree in some respects on where the evidential position lies between a vacuum and sufficient to support confirmation.[4.4.1-6, 6.3.20.1-29] However, MK acknowledges that NH relies on its General Arrangement drawings

[358] CD D.3 Article 8-'*Everyone has the right to respect for his private and family life, his home and his correspondence*.'

[359] INQ-33 section 2.

submitted to the Inquiries, which in my view present a scheme which is neither vague nor inchoate.[360][4.4.69, 4.4.78, 6.3.20.5-6]

8.2.1.12 As indicated above, I adjourned the Inquiries on 10 June 2022, having dealt with all other matters, to allow Mr Keeling an opportunity to prepare and to provide legal submissions concerning the case law referred to by NH for the first time in closing submissions. In the event, Mr Keeling chose to make submissions on other matters as well, to which NH was given an opportunity to respond. I consider, with reference to Article 6 of the HRA, both parties have had a fair hearing, as have the others who chose to appear.[4.4.32-33, 4.13.3, 6.3.1-5]

8.2.2 **The public benefits associated with the Order scheme**

8.2.2.1 The M27 is a major route providing access to the 'international gateways' of Hampshire and acts as a nationally important corridor, servicing north-south journeys between urban areas across the country. Junction 8 serves as one of the main entries into the City of Southampton. Insufficient capacity there results in slow access to the A3024 corridor towards Southampton, limiting access to the ports and economic growth, plus congestion at Windhover Roundabout which impedes access to the residential areas east of Southampton. Additionally, there is transport congestion at peak times at the M27 junction 8, and further to the southwest at Windhover Roundabout, which causes potential highway and pedestrian safety issues.[361]
The crash data record, set out in the *RSA2*, identifies clusters of accidents at both junctions, the most common type being rear shunt collision.[362][4.5.1.5]

8.2.2.2 Congestion and capacity issues at junction 8 and the Windhover Roundabout and the need for a scheme to address them has been identified in a number of transport policy documents since 2012. More recently, the evidence base for the *Eastleigh Borough Local Plan (2016-2036), April 2022* (the Local Plan) identified that planned improvements at junction 8 would include the provision of an additional lane on the circulatory carriageway, additional traffic lanes on all the approach roads, plus full signalisation of the roundabout and enhancement of facilities for pedestrians and cyclists. Similar measures were identified for Windhover Roundabout.[4.5.1.1f)] Subsequently, although no particular land is allocated, the recently adopted Local Plan Policy S11(l) identifies improvements to those junctions as a key proposal in the main local transport policy, the reasoned justification citing the issue of significant

[360] CD A.9.
[361] CD B.24 section 1.1
[362] See also CD B.24 Appendix C-personal Injury Accident Plots

peak hour congestion.[4.4.32, 4.13.3d)ii, 6.4.7.26][363] That the proposed junction improvements are a key proposal in the context of local transport policy is echoed by HCC who has indicated that the Order scheme is key to the success of important planned improvements to the local highway network.[5.1.1-5, 7.2.1-3] RIS2 was published in March 2020 and, again, the improvements to the junctions are identified as a committed project in Road Period 2 (2020-2025). [4.5.1.1-2]

8.2.2.3 The *Economic Appraisal Package* (EAP) for the scheme, which was informed by the Department for Transport's *Transport Analysis Guidance*, confirms that it is expected to improve journey times, reduce accidents in the area surrounding the Order scheme and give rise to wider economic benefits over the 60 year appraisal period. For example, using the Department for Transport's COBA-LT software, the estimated network wide accident saving benefits are 3 fatal, 51 serious and 373 slight accidents.[4.5.1.4-6] Whilst NH is obliged to seek to provide a safe and reliable network, in my view, that in no way diminishes the public benefits associated with delivering the Order scheme or the weight to be attached to be them.[4.5.1.7] Furthermore, by comparison with the predicted benefits, the EAP indicates that the adverse environmental consequences likely to be associated with the Order scheme would be small. The EAP identifies an adjusted BCR of 1.6, representing medium value for money.[4.5.1.11]

8.2.2.4 The economic appraisal has been undertaken in accordance with the Department for Transport's *Transport Analysis Guidance* and no comparable contrary assessment has been provided.[4.5.1.3-11]

8.2.2.5 In addition, the Order scheme would address the poor connectivity and lack of safe shared facilities for pedestrians and cyclists around Windhover Roundabout and junction 8 from Hamble Lane to Hedge End to the benefit of non-motorised users.[4.5.1.8, 5.1.2]

8.2.2.6 I consider therefore, that the Order scheme would be likely to provide significant public benefits. It would accord with the aims of RIS2, which include improving safety for all as well as fast and reliable journeys, and the NPPF and Local Plan Policy S1 insofar as they seek to support the local economy.

8.2.2.7 However, that is not the end of the matter. MK disagrees with NH in a number of respects regarding the works required and land needed to realise those benefits. I turn now to those matters.

[363] INQ-5 page 47, see also para 4.59

8.2.3 The CPO-Highway modelling and design

Junction 8 modelling

8.2.3.1 At PCF Stage 3[364] the highway improvement works included widening the junction 8 southbound diverge slip road (southbound off-slip) carriageway eastwards into the nearside verge to create an additional 2 lanes, resulting in a four lane approach to the junction 8 gyratory. At PCF Stage 5 NH determined that 3 lanes would provide sufficient capacity for the forecast traffic flows. This change reduced the encroachment of the proposed highway works (carriageway, verge and embankment) over land to the east of the existing slip road, owned by MK.

8.2.3.2 MK argues that the land take associated with the southbound off-slip highways works could be reduced further, having regard to LinSig modelling of alternative geometric arrangements. I acknowledge NH's view that such analysis amounts to detail design, which is not normally required in support of a CPO/SRO.[4.4.1-6, 4.5.2.1] Nonetheless, in the circumstances of the current case, where there is disagreement regarding the land take necessary to accommodate the highways works, in my judgement, those matters are worthy of some consideration to inform a view as to whether it has been demonstrated that the Order scheme is supported by a compelling case in the public interest.

Modelled traffic flows

8.2.3.3 NH's case for the Order scheme in terms of transport modelling is based on evidence taken from its SATURN software model; a static equilibrium highway assignment model which seeks to replicate driver behaviours in choosing routes between trip origins and destinations. In simple terms, modelled traffic will arrange itself to the most appropriate route between its point of origin and destination taking account of where delay and congestion may be encountered.[365][4.5.2.1]

8.2.3.4 LinSig software models have been used to assess the performance of particular junctions. Initial LinSig modelling submitted to the Inquiries was based on traffic flows derived from the SATURN model outputs, in the form of average peak hour flows for the modelled period. The results of that initial modelling is discounted for the following reason. There is no dispute that those average flows do not necessarily represent the peak hour within the peak period, which, as the worst traffic case, is required for design purposes by the DMRB and therefore, for LinSig modelling purposes.[4.5.2.2]

8.2.3.5 To derive the peak hour within the peak period, it is necessary to calculate and apply a PHF to the average peak hour flow output from

[364] KEE/1/7/3 Appendix C-The Project Control Framework Handbook pages 9-13.
[365] NH/1/2 paras 3.6 & 4.8.

the SATURN model.[366] This is done by reviewing the existing traffic patterns and calculating the differences between the average hour in the peak and the actual peak hour.

8.2.3.6 The M27 junction 8 SATURN model covers a neutral weekday in March 2015 as the base model from which forecasting is derived. For the calculation of the PHF, Sweco used what it identified as the nearest available data which reflected the core data used in the development of the SATURN model; March 2014 WebTRIS data. To my mind, this approach is reasonable. I have no reason to believe that data from 2015, if it had been available to Sweco, would have provided a significantly different result. In contrast, data from recent years may well not reflect normal operational conditions, due to: a) temporary traffic restrictions on the M27 to accommodate smart motorway works, some of which were still in place during the Inquiries; and, b) the likely impact of COVID restrictions on traffic volumes. Therefore, I share the view of NH that more recent data should not be the basis of the PHF calculation.[367] [4.5.2.4-8]

Degree of saturation

8.2.3.7 The DoS is a measure used to determine how busy each lane at the stop line of a signalised junction is likely to be. It is the ratio of the actual flows to the maximum possible flows on the approach and is usually expressed as a percentage. Although a DoS below 100% is within the theoretical capacity (demand does not exceed capacity), random traffic arrivals through the modelled period may result in shorter time periods when the DoS exceeds 100%. In order to make some allowance for flow variability during the modelled period a DoS of 90% is generally regarded as the point at which the practical capacity of the approach has been reached and the PRC of the junction (dictated by the lane with the worst DoS) is zero. A DoS figure above 100% indicates that the lane is operating over capacity, with an increased risk of delay. Therefore, NH seek to design its schemes to achieve a DoS if not below, then as close to 90% as possible.[4.5.2.9][368]

Junction optimisation

8.2.3.8 MK has provided a summary table, 5.2b, showing LinSig results, with a 2041 future year base, for NH's 3-lane southbound off-slip Order scheme (pre-optimisation PCF Stage 5 design) and Mr Moore's (post-optimisation) 3-lane southbound off-slip alternative as well as the 2-lane southbound off-slip options of both parties (in NH's case a PCF Stage 3 design).[369] It indicates that, in comparison with the NH 2-lane

[366] INQ-12 shows the modelling runs adjusted with a peak hour factor.
[367] INQ-48 section 3.
[368] KEE/2/6 para 5.19.
[369] INQ-48 KEE/2/10.

option, the NH 3-lane option improves the PRC of the junction. Whilst the results also indicate that the capacity of the NH 3-lane option would be exceeded in the AM peak, there is no dispute that better results would be obtained if the modelling took account of the signal optimisation applied to the Mr Moore options and accepted as appropriate by NH. NH considers that this would ensure that its 3-lane option would operate within theoretical capacity in the peak hours and I have not been provided with results to the contrary.[4.5.2.10-14]

8.2.3.9 A direct comparison between the NH and Mr Moore options in Table 5.2b is not appropriate as, in addition to the design changes favoured by MK, the Mr Moore option results have been influenced by signal optimisation, as referred to above.[4.5.2.10-11]

Conclusion-Junction 8 modelling

8.2.3.10 Based on the evidence presented, I am satisfied that, in comparison with the NH 2-lane option, the NH 3-lane option is to be preferred on capacity grounds. Furthermore, in the absence of LinSig results for both the NH and the Mr Moore options that are based on the same signal optimisation assumptions, it cannot be reliably concluded that the Mr Moore 3-lane option would perform better than the 3-lane option promoted by NH.

8.2.3.11 In my judgement, NH's approach in this case does not amount to 'build it bigger/predict and provide' as suggested by MK. The scope of highway works associated with the southbound off-slip has been reduced during the design process from 2 to 1 additional lanes (the 3-lane southbound off-slip Order scheme). Furthermore, as set out above, the Order scheme has been brought forward to address congestion, amongst other matters, in relation to which the 3-lane scheme is likely to outperform a 2-lane alternative. The NN NPS indicates that the '*Government's policy on development of the Strategic Road Network is not that of predicting traffic growth and then providing for that growth regardless. Individual schemes will be brought forward to tackle specific issues, including those of safety, rather than to meet unconstrained traffic growth (i.e. predict and provide).*'[370] I consider that the Order scheme accords with that approach.[4.5.2.15, 6.4.3.4]

Highway geometric design

8.2.3.12 NH has confirmed that the Order scheme has been/will be designed in accordance with the DMRB and, in accordance with the DMRB, where its standards cannot be met, an application for approval for a departure from standard has been, or will be, made to the relevant Overseeing Organisation during the design process. The Overseeing Organisations in

[370] CD F.2 para 2.24

this case would be NH's SESD or HCC.[4.5.3.2, 4.5.3.4, 6.4.4.6]

8.2.3.13 Both of the 3-lane southbound off-slip options, NH's and Mr Moore's suggested alternative, would require departures from standard in relation to entry path radius set out in DMRB CD 116. As indicated by NH's SESD, entry path radius does not fall outside the scope of the departure process.[371][6.4.4.6] It is unclear whether the existing 2-lane southbound off-slip arrangement is compliant with the DMRB entry path radius requirements.[4.5.3.8, 6.2.1.15, 6.4.4.6, 6.4.4.8] Nonetheless, in any event, the DMRB confirms that an approved departure is deemed to meet the Overseeing Organisation's requirements for that element of works and to my mind therefore, the above departures if approved can be regarded as being acceptable in terms of safety.[4.5.3.12, 6.4.4.8] I acknowledge that until an application for a departure has been determined by the Overseeing Organisation, it cannot be said for certain that it will be approved. Nonetheless, regarding the likelihood of the necessary departure approvals being obtained in this case, I consider that greater weight is attributable to the view of Sweco than Mr Moore, given Sweco's direct experience of liaising with the relevant Overseeing Organisations in relation to the Order scheme.[372] Sweco considers that the identified departures are likely to be approved.[4.5.3.8]

8.2.3.14 Whilst NH was unable to provide a formally signed off version of the RSA1 for the Order scheme, I understand that it was approved by email. Furthermore, the RSA2 confirms that it has taken account of issues raised by the RSA1. Sweco considers that no serious concerns have been raised by the RSA2 and this appears to be echoed by HCC, who has confirmed that it has no further queries and is working towards final sign off.[4.5.3.11, 6.4.4.7]

Conclusion-highway geometric design

8.2.3.15 Under these circumstances, I consider it likely that the requisite highway design approvals for the Order scheme would be secured and little weight is attributable to MK's suggestion that the 3-lane southbound off-slip arrangement proposed by NH would be unsafe.[4.5.3.12, 6.4.4.6] The Order scheme would be likely to comply with the aims of Local Plan Policy DM13 as regards meeting the highway geometric design standards likely to be required by the Highway Authority and not adversely impacting the safety of the highway network.

[371] INQ-61 Appendix B.
[372] For example, INQ-28.2 email, dated 5 May 2022, from HCC '*…we are satisfied with both the responses provided and the reasons for the remaining departures. There are also no further queries on the Road Safety Audit exceptions report*.'

Alternative geometric designs

8.2.3.16 MK has suggested 3 main alternatives to the Order scheme arrangement of southbound off-slip/Dodwell Lane highway works that would otherwise encroach to some degree onto his land:

a) A 2-lane southbound off-slip in place of the NH 3-lane proposal. Whilst the 2-lane alternative would avoid the need to remove existing planting alongside the highway, the impact of the 3-lane scheme in this respect is assessed as initially a minor adverse effect on biodiversity which would be made neutral as a result of proposed compensation planting.[373] It attracts little weight. As set out above, the Order scheme has been brought forward to address congestion, amongst other matters, in relation to which the 3-lane scheme is likely to outperform a 2-lane alternative. I consider that this benefit would far outweigh the impact on biodiversity.[4.5.4.1a), 6.4.3.6][374]

b) Mr Moore's 3-lane southbound off-slip would alter the alignment of the proposed new lane leading onto Dodwell Lane to enable the highway works to be accommodated within the existing highway boundary.[375] Whilst NH considers that there would need to be some localised verge widening and the Dodwell Lane splitter island would be more congested, Mr Moore's alternative would be acceptable in highway design terms and could be accommodated within the highway boundary.[376]

However, in common with NH's proposed 3-lane scheme, the suggested alternative would require entry path radius departures to be approved. Furthermore, it would require some sections of retaining wall, the cost of which would be significant, even if Mr Moore's estimate of around £217,000 is found to be more accurate than that of Sweco at around £360,000.[377] I have had regard to NH's concern that adoption of Mr Moore's alternative would necessitate some of the PCF Stage 5 design work being repeated, giving rise to delay and additional costs. However, to my mind this should not be weighed against the alternative, given that NH has chosen to proceed with PCF Stage 5 design before obtaining the necessary orders at PCF Stage 4.[378]

[373] NH/6/2 page 26 para 6.3
[374] INQ-14 indicates the extent to which the proposed highway (carriageway/verge/earthworks) would encroach on MK's land
[375] INQ-14
[376] NH/12.1 page 1
[377] INQ-66
[378] KEE/1/7/3 Appendix C (page 16)-The Project Control Framework Handbook pages 9-13. NH/9/2 para 2.48-2.50 'Having successfully completed Stages 0, 1, 2 and 3, the M27 Southampton Junction 8 Scheme is currently in PCF Stage 4. Under the Governance process, a Scheme cannot progress to the next PCF Stage without completing the preceding, therefore any work undertaken for a later

The circumstances differ from those in the *Bexley* case.[4.4.16] Nonetheless, I consider that the disbenefit of additional cost to the public purse of the retaining walls weighs against that alternative. [4.5.4.1b)]

c) NH's proposed Dodwell Lane improvements include widening the current eastbound exit from the junction 8 roundabout to accommodate two exit lanes and the westbound entry to accommodate three lanes. Whilst the eastbound works require a small area of MK's land, the westbound works can be accommodated within the highway boundary.[379] MK's third highway alternative would involve moving the highway works on Dodwell Lane further south such that the land take would be evenly divided between MK and the owner of the land immediately to the south of Dodwell Lane, which MK considers fairer.[380] However, there is no evidence to show that this would provide any greater public benefit. I consider that in those terms, it is without merit.

Whilst I understand that some land to the south of Dodwell Lane has recently been for sale, it does not automatically follow that the owners would be willing to sell a part of it for highway works. [4.5.4.1c)]

8.2.3.17 I conclude that the 3 main alternatives identified by MK are not to be preferred or worthy of further consideration.

Conclusion-Highway modelling and design

8.2.3.18 I conclude, having had regard to the transport modelling undertaken, that in comparison with the NH 2-lane option, the NH 3-lane southbound off-slip option is to be preferred on capacity grounds. Furthermore, that 3-lane option would be likely to comply with the aims of Local Plan Policy DM13 as regards meeting the highway geometric design standards likely to be required by the Highway Authority and not adversely impacting the safety of the highway network. In addition, I consider that the alternative southbound off-slip/Dodwell Lane arrangements put forward by MK are not to be preferred or worthy of further consideration.

stage is undertaken at risk. The M27 Southampton junction 8 Scheme is progressing Stage 5 detailed design (at risk) in parallel with Stage 4, in order to meet public delivery commitments.'

[379] NH/2/2 paras 4.31

[380] KEE/1/1 paras 7.7-7.9

8.2.4 **Whether or not the need for flood risk mitigation has been demonstrated**

8.2.4.1 As I have indicated, at PCF Stage 3 the highway improvement works included, at junction 8, widening the southbound off-slip carriageway eastwards into the nearside verge to create an additional 2 lanes, resulting in a four lane approach to the roundabout. At PCF Stage 5 NH determined that 3 lanes would provide sufficient capacity for the forecast traffic flows, the effect of which was to reduce the encroachment of the proposed highway works (carriageway, verge and embankment) over land to the east of the existing slip road.

8.2.4.2 The FRAa [381] indicates that parts of the highway network subject of the Orders would be at risk of flooding if the capacity of a partially culverted watercourse, named Bursledon Brook, is exceeded. In the vicinity of junction 8, Bursledon Brook consists of 2 unnamed tributaries, which run in a north-south direction towards junction 8 on either side of the M27 (the eastern and western tributaries) and join to the southeast of the junction.

8.2.4.3 Whilst a number of flooding events have been recorded in NH's drainage data management system (identified in the evidence as HADDMS), they are identified on the western side of junction 8. They are not identified as being caused by exceedance of the capacity of the culvert serving the eastern tributary of Bursledon Brook, between Peewit Hill Close and Dodwell Lane.[382] There is limited anecdotal evidence of '*flooding to northeast…*'.[383] However, contrary to NH's assertion, there is no evidence before me recording a flooding incident resulting from the capacity of the culvert serving the eastern tributary of Bursledon Brook, between Peewit Hill Close and Dodwell Lane, being exceeded. [4.5.5.49] Insofar as that is a risk it appears to be theoretical, based on predictions of future events, and not based on past incident(s) directly attributable to the culvert.[6.4.6.2]

8.2.4.4 NH's SoR[384] indicates that Plot 11b, which forms part of MK's landholding, is required for the provision of a Flood Attenuation Pond for the purpose of mitigating the adverse effects which the existence or use of the highways to be improved may have on the surroundings. However, following the changes to the southbound off-slip design, that is not now the case. Mr Pickering confirmed, whilst at design Stage 3 it was anticipated that the extent of the works would result in some loss of floodplain associated with the ordinary watercourse[385], that is no

[381] CD B.17 para 2.2.1.
[382] INQ-32 Appendix A-HADDMS flood incident record plans and details.
[383] INQ-32 para 1.42.
[384] CD A.7 pages 51 and 56.
[385] CD B.5 section 6.2.

longer expected to be the case to the northeast of junction 8, as a result of the design changes since, referred to above. He indicated that the purpose of the proposed flood attenuation basin (FAB) to the northeast of junction 8 (NE FAB) is now to address a pre-existing risk that the ordinary watercourse may cause flooding of the existing/improved highway in future storm events. Therefore, if there is a need for flood attenuation to the northeast of junction 8, it is not required, contrary to the SoR and FRAa[386], to mitigate the impact of the proposed highway improvements.

Sequential and Exception Tests

Sequential Test

8.2.4.5 DMRB LA 113 indicates that road projects must be compliant with the NPPF and the NPPG.[387] The NPPF indicates that '*Inappropriate development in areas at risk of flooding should be avoided by directing development away from areas at highest risk (whether existing or future)'*.[388][4.5.5.54] The means is provided by the Sequential Test and, where necessary, the Exception Test.

8.2.4.6 The aim of the Sequential Test, as is recorded in the FRAa, is to steer new development to areas with the lowest risk of flooding from any source.[4.5.5.51]

8.2.4.7 The Order scheme comprises a package of measures for the purposes of improving junction 8 of the M27, including highway improvements and measures to address flood risk. Whilst at the Inquiries NH argued that for the purposes of the Sequential and Exception Tests the proposed scheme should be considered as a whole, that was not the approach taken in the FRAa.[4.5.5.59] It stated '*The sequential test is applied to the existing site, the highway junction roundabout. The surrounding land is not subject to the Sequential Test as it is not a part of the highway scheme…Due to the existing risk of flooding to the highway…flood mitigation works are required. The proposed mitigation to protect the Scheme is to locate flood basins in the surround[ing] land adjacent to the Scheme…'*.[389] MK considers that the proposal to site a FAB on his land, the northeast flood attenuation basin (NE FAB), should be

[386] CD B.17 para 3.1.3 '*Hydraulic modelling has assessed flood risk from ordinary watercourses and concludes that the Proposed Scheme would have a detrimental impact to peak flood levels caused by encroachment of earthworks embankments into the active floodplain. However, the main risk to the Proposed Scheme is a pre-existing risk of flooding to the highway.'* and Appendix A-Stage 5 Hydraulic Model Report para 1.1.5.
[387] CD F.9a England National Application Annex para E/1.4.
[388] CD F.1 para 159.
[389] CD B17 para 1.6.1-2.

separately subject to the Sequential Test.[6.4.7.26]

8.2.4.8 NH argues that there is no policy requirement to apply the Sequential Test to separable elements of the scheme.[4.5.5.53] However, as referred to above, NH has confirmed that the NE FAB is not now required to mitigate the impact of the proposed highway improvements on flood risk, it is needed to address a pre-existing flood risk to junction 8 arising from the eastern branch of Bursledon Brook. Nor are those discrete elements of the scheme (the highway improvement works and the NE FAB) physically linked. Sweco confirmed that they are separable from one another. In my judgement, against this background, whilst NH has chosen to bundle the proposed highway improvements and measures to address flood risk together in the same scheme, they are separable and it would be reasonable to deal with the NE FAB separately from the highways improvements when considering the application of the Sequential Test. Nonetheless, as indicated below, it would not change the outcome in my view.[4.5.5.53]

8.2.4.9 Dealing first with the highway improvement works. The FRAa indicates *'In this case the site is located within Flood Zone 1*[390] *according to the Environment Agency's 'Flood map for planning'.* However, with reference to the EA's surface water flood risk map, the FRAa identifies that Bursledon Brook is a potential source of local flood risk to the junction 8 roundabout.[391] Sweco's modelling indicates that the area occupied by junction 8 is at risk of flooding during a 1 in 100 year event, which is equivalent to *Flood Zone 3-High Probability* under the terms of the NPPG.[392] The proposed development involves improvements to the highways associated with junction 8 of the M27, it would be impractical to site those works elsewhere and so it passes the Sequential Test. Furthermore, there is no dispute that the M27 and the associated on/off slip roads at junction 8 form part of the SRN, which needs *'to remain operational during floods'* according to paragraph 5.107 of the NN NPS.[4.5.5.59] In my view, for that to be the case junction 8 must be operational, as otherwise the slip roads could not be used. Against this background and in the context of Annex 3 of the NPPF, I consider it reasonable to regard junction 8 as essential transport infrastructure which has to cross the area at risk and so it falls within the 'essential infrastructure' vulnerability classification. It follows, with reference to Table 3 of the Flood Risk and Coastal Change section of the NPPG, that the Exception Test is applicable to the proposed highway improvement works.

8.2.4.10 Turning to the NE FAB, self-evidently it would comprise 'flood control

[390] CD F.15 Table 1- Land having a less than 1 in 1,000 annual probability of river flooding (0.1% AEP)
[391] CD B.17 para 2.2.1
[392] NH/3/2 para 6.21. CD B.17 Figure 3.4. CD F.15 Table 1- Land having a 1 in 100 or greater annual probability of river flooding (1% AEP)

infrastructure' and so would fall within the 'water-compatible development' vulnerability classification set out in Annex 3 of the NPPF.[4.5.5.58] However, it does not automatically follow, contrary to the view of NH, that the Sequential Test is not required. Support for NH's position is not provided by Table 2 of the Flood Risk and Coastal Change section of the NPPG (NPPG table 2); the NPPG confirms that the table does not show the application of the Sequential Test which should be applied first to guide development to the lowest risk areas. NH poses the question; what is the point of directing water-compatible development away from water? To my mind, even water-compatible development may benefit from being subject to a lower flood risk.

8.2.4.11 However, the FRA indicates that, in contrast with junction 8, the location of the proposed NE FAB falls within an area with a low risk of flooding, equivalent to Flood Zone 1, I have not been provided with any compelling evidence to the contrary.[393] The NPPG confirms that it should not normally be necessary to apply the Sequential Test to developments in Flood Zone 1 (land with a low probability of flooding from rivers), unless other information indicates that there may be flooding issues now or in the future (for example through the impact of climate change).[394] I consider therefore, that in the case of the NE FAB there is no need to apply the Sequential Test. There is no requirement for the purposes of the NPPF, to look for sites elsewhere. Furthermore, having regard to NPPG Table 2 the need for the Exception Test would not be triggered by the NE FAB considered in isolation.[4.5.5.58]

8.2.4.12 Nonetheless, in my judgement whether the Order scheme is considered as a whole or in the two discrete parts (the highway improvement works and the NE FAB), the highway works trigger the application of the Exception Test; a view shared by NH.[4.5.5.59 Footnote 199]

Exception Test

8.2.4.13 The NPPF states that the application of the Exception Test should be informed by a site specific flood risk assessment. Although I have significant concerns about the reliance that can be placed upon them (set out later), I consider that, together, the FRA and the PCF Stage 5 design update provided by the FRAa are a 'site specific' assessment of flood risk for the scheme, as they reference the updated highway improvements and flood risk management elements of the scheme. Furthermore, the FRAa has regard to the updated NPPF, including the requirement to take account of flooding from all sources with reference not only to Flood Zones, identified by the EA's Flood Map for Planning, but also areas at risk of flooding, identified by the EA's Surface Water

[393] CD B.5 Figure 4.3.
[394] CD F.15 page 15

Flood Risk Map and scheme specific modelling.[395] [4.5.5.60]

8.2.4.14 The NPPF confirms that to pass the Exception Test it should be demonstrated that:

a) The development would provide wider sustainability benefits to the community that outweigh the flood risk; and

b) The NPPF seeks to ensure that the development will be safe for its lifetime taking account of the vulnerability of its users, without increasing flood risk elsewhere.

8.2.4.15 I deal first with MK's argument that the requirement '*without increasing flood risk elsewhere*' would not be met as the NE FAB would be sited on his land; as he puts it putting a 'pond' on his land would increase flood risk there. [6.4.6.41-68] I consider that the argument is entirely without merit. The site of the Order scheme, which includes the land for the NE FAB, has been found to be sequentially acceptable, with reference to the NPPF's Sequential Test. It is then that sequentially acceptable site to which the Exception Test applies and it follows that the requirement not to increase flood risk 'elsewhere' relates to locations outside of the sequentially acceptable site, not within it. Furthermore, the test makes no reference to land ownership and in my view, MK's ownership of part of the Order site is of no relevance to the application of the test. In any event, as observed by NH, MK's land, as it is now, would only be used for flood attenuation facilities in circumstances where it had become NH's land and formed part of the Order scheme. [4.5.5.63-64]

8.2.4.16 Returning to the Exception Test. Strategic Policy S11 of the *Eastleigh Borough Local Plan (2016-2036)*, April 2022 (Local Plan) identifies junction 8 of the M27 and the Windhover Roundabout amongst the key proposals for improved transport infrastructure in the Borough and the reasoned justification explains that they suffer from significant peak hour congestion. [396] I have found that the Order scheme would address highway congestion problems, recognised in both transport and planning policy documents, at junction 8 of the M27 and the Windhover Roundabout. In this regard it would provide wider sustainability benefits to the community. [4.5.5.61]

8.2.4.17 As to flood risk, consistent with the NN NPS, the notes to Table 2 of the NPPG indicate that in Flood Zone 3 essential infrastructure should be designed and constructed to remain operational and safe in times of flood. The FRAa indicates that the proposed flood attenuation facilities would be designed to eliminate flooding of junction 8 from Bursledon Brook during the design event (a 1 in 100 year plus 35% allowance for

[395] KEE/3/7 page 706.
[396] INQ-5 page 47

climate change event), thereby ensuring that it remains operational and safe in times of flood. Against this background, NH argues that the Order scheme would not increase flood risk elsewhere, it would be safe for its lifetime and by removing the flood risk it has identified the benefits would outweigh the flood risk.[4.5.5.62, 6.4.6.49] I turn to consider those matters.

Justification of the NE FAB

8.2.4.18 NH's case that the Order scheme would make provision for necessary and adequate flood attenuation facilities on the site is founded on the hydraulic modelling referred to in evidence. The hydraulic model referred to is a computer programme designed to solve the equations that describe how water flows through a river system and or over a surface, such as a floodplain. It is used to calculate flow, velocity and depth for a defined river geometry, surface geometry and downstream boundary. Such a hydraulic model typically requires estimates of flood flows (known as hydrographs) to be input at the upstream end of the model. Models are then able to calculate flow, velocity and depth by applying parameters which represent the frictional resistance of the channel and floodplain to flow (these are known as the Manning's 'n' roughness values) and the energy loss characteristics of bridges and other structures such as culverts and weirs.[397]

8.2.4.19 The FRAa indicates that the design event[398] used to assess the fluvial flood risk is the 1 in 100 year storm plus a 35% allowance for climate change (1% AEP+ 35%).[399] In my judgement, this approach is consistent with DMRB LA 113, which indicates that road projects must be compliant with the NPPF and the NPPG. The NPPF indicates that flood risk should be considered on the basis of risks now and in the future.[400] The NPPG indicates that in the context of fluvial flooding the design flood is '*flooding likely to occur* with a *1% annual probability (a 1 in 100 chance each year)…against which the suitability of a proposed development is assessed and mitigation measures, if any, are designed.'* Furthermore, it indicates that an assessment of the risk of flooding over the lifetime of the development should include appropriate allowances for climate change, with reference to the Government's Flood risk assessments: CCA. Having had regard to the Government's *Flood risk assessments: climate change allowances, 2017*[401], NH agreed

[397] NH/3/2
[398] Referred to as the 'gauge of assessment for risk' by MK-INQ/64 para 3.
[399] CD B.17 para 2.2.6.
[400] CD F.1 para 159.
[401] CD F.24. Inspector's note: This guidance was updated in May 2022, including updated peak rainfall allowances. However, the LLFA has confirmed that transitional provisions apply, in that any site upon which it has already provided comments, should continue to use CD F.24 (see INQ-49). This is the position in relation to the Orders. Both NH and MK are content that the Orders continue to be assessed with reference to CD F.24, rather than the updated guidance and I have now reason

with HCC, the LLFA for the ordinary watercourse, to apply a 35% CCA, which is the minimum allowance.[4.5.5.22] Whilst NH indicates the CCA would have been 105%, if the watercourse had been a main river and the EA had been the regulator, neither is the case here.[402] Against this background, I consider the 35% allowance used to be appropriate. The approach is also consistent with the aims of Local Plan Policy DM3 insofar as it seeks to ensure that account is taken of predicted climate change impacts so as to reduce the potential impacts of surface water flooding.[403] As an aside, given that the 35% allowance is appropriate in this case, it follows that 105% was not and so I give little weight to NH's view that the allowance used '…*is considerably below 105% and is a clear demonstration of Mr Pickering* [Sweco] *not taking the most conservative option…*'.[4.5.5.22]

8.2.4.20 NH has indicated that when reviewing the PCF Stage 3 hydrology assessment at PCF Stage 5, Sweco identified that the modelling was very unstable, leading to significant concerns with respect to confidence in the model. Therefore, NH chose to rebuild the model at PCF Stage 5. Furthermore, it was identified that the PCF Stage 3 modelling was incorrectly based on a summer storm, rather than a winter storm, and when this was corrected the critical duration changed from a 3.5 hour event to a 6 hour event.[404][6.4.6.36] Under the circumstances, I consider that little weight is attributable to the PCF Stage 3 modelling results which informed the FRA and therefore, the FRA conclusions.

8.2.4.21 NH's FRAa was produced by Sweco at PCF Stage 5. Its purpose was to update the FRA, confirming, amongst other things, the predicted flood risk to the site, impact of development on flood risk and proposed mitigation measures, informed by the re-built model.[405] The FRAa includes a review of the re-built model by BMT UK Ltd who concluded that it was fit for purpose for the determination of flood risk in the area.[4.5.5.17.d)]

8.2.4.22 Whilst uncertainties within the modelling software itself are likely to be negligible, NH has indicated that more significant uncertainties can arise from the chosen inputs to the model.[4.5.5.17]

8.2.4.23 MK has suggested a number of changes to the way in which Sweco has chosen to represent watercourse and surface geometry in the model.[406][4.5.5.26] Sweco accepted that some changes to Manning's 'n' values which account for surface roughness values would be

to disagree.
[402] NH/3/2 para 8.31.
[403] INQ-5.
[404] CD B.17 St 5 Hydraulic Model Report para 3.4.3
[405] CD B.17 para 1.2.2.
[406] KEE/1/6 section 3.

appropriate.[4.5.5.38, 6.4.9.9] Furthermore, it is also more appropriate to account for the flows arising from the intervening catchment immediately downstream of the head of the culvert which carries the eastern tributary of Bursledon Brook flows beneath Dodwell Lane as an input to manhole MH507[407], adjacent to Dodwell Lane, rather than further north to the head of the culvert close to Peewit Hill Close, as originally modelled by Sweco.[408] However, contrary to MK's approach, it is not appropriate to simply remove that input from the head of the culvert and not account for it elsewhere, as it represents a flow arising within the modelled catchment.[409][4.5.5.35-36] Nonetheless, in my view, those changes which are appropriate appear not to make a significant difference to the outcome, having regard to the flood mapping presented.[4.5.5.37-41]

8.2.4.24 However, significant concerns do arise in relation to the flow estimation inputs to the model. There is no dispute that flood estimates associated with small catchments, such as that associated with the Orders, are particularly uncertain.[4.5.5.28]

8.2.4.25 The Sweco's PCF Stage 5 Hydrology estimation calculation record (HECR), attached to the FRAa, provides a record of the calculations and decisions made during flood estimation. The document indicates that its purpose is to update the hydrology used at PCF Stage 3, for the updated hydrograph needed as an input to the model to be generated. For the estimation of design peak flow, the FEH Statistical method and ReFH2 method were applied, with the intention of adopting the method resulting in the larger flood peaks. [410] The HECR records that the final choice of method is to use a hybrid method based on the hydrographs derived from ReFH2 scaled to the FEH Statistical peak (FEP1=1.66 m^3/s and FEP2=3.34 m^3/s), which was the higher than the ReFH2 peak.[411]

8.2.4.26 I acknowledge NH's argument that use of the lower ReFH2 peak flow, rather than the higher FEH Statistical peak flow, may mean that flood risk is understated and inadequately mitigated.[4.5.5.29] However, choosing a method based solely on the reason that it gives the highest flow is discouraged by the FEG[412], which indicate instead that '*Analysts should aim for the best estimate…This is better than making successive*

[407] INQ-31 drawing ref. 13248 (A0-L9) D. shows the location of MH507 adjacent to the northern side of Dodwell Lane together with the culvert beneath Dodwell Lane to a concrete headwall on the southern side of the road.
[408] NH/3/2 page 8 Figure 2-1 shows the route of the eastern tributary of Bursledon Brook. The watercourse is culverted from a point close to Peewit Hill Close to the southern side of Dodwell Lane.
[409] INQ-32 paras 1.11.
[410] CD B.17 Appendix A page 3.
[411] CD B.17 Appendix A page 21. For schematic of hydrological inflow locations FEP1 and Res12 see Figure 3.2
[412] CD F.25 page 35 point 4.

decisions that are biased on the conservative side that could result in a final answer that lies a long way above the best estimate.' Furthermore, to my mind, in cases such as this involving compulsory purchase, use of an unduly conservative estimate may overstate the flood risk, exaggerate the need for mitigation and the land area belonging to others needed to accommodate it.[413] Therefore, a conservative approach is not without consequences. Faced with this criticism, NH argued at the Inquiries that the FEH Statistical peak flow estimate provided the best estimate, having regard to (a) the guidance as to when to use ReFH2 with caution; (b) taking the most certain data set; and, (c) based on years of experience in this field.[4.5.5.30] I take each of these in turn.

8.2.4.27 The FEG indicate that for estimating peak river flows in a typical catchment, often the results of the FEH Statistical method will be preferable and to exercise particular caution when designing flood storage.[4.5.5.28] However, it advises caution, not avoidance, and the means of addressing such concerns are also identified.[414]

8.2.4.28 Sweco considers that its chosen method, identified by the FRAa as being based on the FEH Statistical peak flow estimate, is more certain than the ReFH2 peak flow estimate and so should be preferred.[4.5.5.29] However, the FEG indicate that rather than just acknowledging results are uncertain, you should try to quantify the uncertainty and that quantitative assessment of uncertainty often uses confidence intervals. It identifies FSEs by which an estimated FEH statistical design flow should be multiplied/divided to obtain a confidence interval.
For comparative and illustrative purposes, Sweco draws attention to a 68% confidence interval[415] for which the FSE for the FEH peak flow (1.23 m^3/s, excluding 35% CCA) is 1.43. It follows that there is 68% confidence level that the true 100 year peak flow lies within a confidence interval 0.86-1.76 m^3/s;[416] a range of 0.9 m^3/s. Whilst the FEG does not give a FSE figure for the ReFH2 peak flow (0.88 m^3/s, excluding 35% CCA), Sweco has provided one from another reference document, which is 1.47, and I have no reason to dispute it.[4.5.5.31, 6.4.8.12][417] For the ReFH2 estimate, it follows that there is 68% confidence level that the true 100 year peak flow lies in a confidence interval 0.60-1.29 m^3/s;[418] a range of 0.69 m^3/s.

8.2.4.29 Sweco's argument that the FEH Statistical peak flow is more certain and therefore the better estimate is based on the associated FSE (1.43)

[413] INQ-32 para 1.40
[414] CD F.25 pages 70/71
[415] CD F.25 page 80-The 68% confidence interval is the range within which we are 68% confident that the true answer lies.
[416] 1.23 m^3/s / 1.43=0.86 m^3/s, 1.23 m^3/s x 1.43=1.76 m^3/s.
[417] INQ-32 para 1.39.
[418] 0.88 m^3/s / 1.47=0.60 m^3/s, 0.88 m^3/s x 1.47=1.29 m^3/s.

being lower than that for the ReFH2 peak flow estimate (1.47). However, to my mind, it is not self-evident that it is more certain, as the confidence interval associated with the ReFH2 peak flow estimate is narrower and on that basis appears to me to be a better estimate.

8.2.4.30 Whilst NH indicate that JBA Consulting's judgement in an adjacent catchment was also to use the hybrid method, I give it little weight as it appears to me that the circumstances were not directly comparable there.[4.5.5.30] In that case the difference between the peak flow estimates derived from the FEH Statistical and the ReFH2 methods for small catchments was less than 15%, whereas it is much greater in the current case.[419]

8.2.4.31 The FEG indicates that uncertainty could be reduced by obtaining flow data at the site. However, whilst 2 years of temporary flow logging on *typical catchments* would be enough to improve the estimate of Qmed versus a Qmed estimated from catchment descriptors alone, it indicates that a minimum of 8 years of data would be required to carry out an enhanced single-site analysis, in which the gauged subject site would be given more weight than the rest of the sites in the pooling group. It appears to me therefore that, even if gauging had been begun at the start of the project in 2016, sufficient data for an enhanced single-site analysis would not be available. I consider it unlikely therefore, that gauging in this case would have materially changed the outcome of the analysis.[4.5.5.33-34, 6.4.6.3]

8.2.4.32 Turning to the weight to be placed on Sweco's experience in the field. As I have indicated, Sweco considers that the approach should be as set out in the HECR. That is, use the hydrographs derived from ReFH2 and scale them to the FEH Statistical peak (FEP1=1.66 m^3/s and FEP2=3.34 m^3/s), a hybrid approach.[420] Throughout much of the Inquiries, Sweco maintained a position that this was the basis of the PCF Stage 5 modelling, which informed the findings of the FRAa. However, during the course of the Inquires, it became clear that a number of errors had been made in the FRAa and inputs to the modelling that informed it, as set out below, which to my mind cast serious doubt over the reliance to be placed on the findings of the FRAa.[4.5.5.20, 6.4.8.1]

8.2.4.33 The identification of these errors was prompted by submissions earlier in the Inquiries by JBA, acknowledged experts in the field who had been asked by MK to review the modelling submitted by NH in evidence. JBA indicated that the flow inputs to the model were not consistent with the FRAa.[421] In response and towards the end of the Inquiries, Sweco

[419] INQ-32 Appendix JBA Consulting - Flood Estimation Report section 5.2.
[420] CD B.17 Appendix A page 21.
[421] INQ-37 (24 May 2022) and INQ-64 (27 May 2022)

acknowledged that a number of errors had been made.

8.2.4.34 Firstly, Sweco identified that the ReFH2 peak flow value of 0.74 m^3/s set out in the HECR should read 0.88 m^3/s, which leads to a model input FEP1 of 1.19 m^3/s = 0.88+35% CCA. Initially the reason given by Sweco for the change was '*the database behind ReFH2 have been updated, therefore the estimates have subtly changed'*. However, Sweco subsequently confirmed that the inclusion of 0.74 m^3/s in the HECR was a typographical error. [422]

8.2.4.35 Secondly, Sweco confirmed that the model had been run in error on ReFH2 peak flows, rather than, as set out in the HECR, based on the FEH Statistical peak flows.[4.5.5.18, 6.4.8.4] Consequently, the flood mapping provided in evidence by NH was also based on these ReFH2 peak flows (save for 001 and 002 of INQ-60), contrary to the position set out in earlier evidence. For example, rather than an FEP1 peak flow of 1.66 m^3/s, the input had been based on a peak flow of 1.19 m^3/s.

8.2.4.36 In addition to those errors acknowledged by Sweco, JBA identified a further area of inconsistency relating to the Res12 flow input. JBA confirmed that the inflows to the model included FEP1 1.19 m^3/s (Bursledon Brook east branch 0.56 m^3/s + Bursledon Brook west branch 0.63 m^3/s) and Res12 2.71 m^3/s. This would give a total flow figure FEP2 3.9 m^3/s (FEP1 + Res12).[423] This is not consistent with either the ReFH2 (FEP2 2.35 m^3/s) or FEH Statistical (Res12 1.68 m^3/s and FEP2 3.34 m^3/s) peaks identified by the HECR.[424] I share the view of MK that this appears to be a further input error.[4.5.5.21, 6.4.8.9-10]

8.2.4.37 I accept NH's statement that the errors which have been identified at a late stage were not intentionally hidden from the Inquiries and consider it follows that they were not known about earlier.[4.5.5.18, 6.4.8.2-3] However, that the errors were not identified by Sweco at an earlier stage casts significant doubt, in my view, over its checking processes and the reliance that can be placed on the flood mapping evidence submitted to the Inquiries. The concern is not diminished by NH's view that this is 'an inputting error into what is a highly complex model'. On the contrary, that error(s) were made in the input of basic, key data casts doubt over reliability of the more 'complex' modelling activities undertaken.[6.4.8.6-9] Nor is the concern diminished by NH's confirmation that further modelling work would be carried out during PCF Stage 5, as that is not available to the Inquiries. Furthermore, I consider that little weight is attributable to the assertion that, as the lower ReFH2 peak flow has been used, the majority of the mapping provided

[422] INQ-32 para 1.35 and INQ-60 para 1.23.
[423] INQ-64 JBA Technical Briefing Note section 2.
[424] CD B.17 Appendix A page 20 flood estimates from the ReFH2 method site code 02, 100+35%, 2.35 m^3/s. Page 22 FEH Stat, final results, 100+35%, 3.34 m^3/s.

underrepresents the impact of the design event, not least as Res12 flow appears to have been overstated.[4.5.5.19-20, 6.4.8.6]

8.2.4.38 Under the circumstances, I consider that conclusions cannot be drawn, with any reasonable degree of confidence, on the basis of the flood mapping submitted in evidence by either Sweco or JBA, who were provided with and used the Sweco model. This includes Sweco's figures 001 and 002 attached to INQ-60, which was submitted at a late stage in the Inquiries and following the concerns identified by JBA.
Whilst INQ-60 indicates that figures 001 and 002 represent the results of Sweco re-running the model using hybrid flows, which would be consistent for the first time with the HECR recommendation, the mapping was not accompanied by the inputs used and more importantly there is no evidence to show that that work has been checked by others; a process which brought significant errors to light in the earlier modelling.

8.2.4.39 Against this background, in my judgement, little weight is attributable to the FRA and FRAa, there is significant uncertainty as to the extent of flooding likely to be associated with the design event modelled and also volumes of attenuation, if any, that may be required to mitigate it.[4.5.5.20, 6.4.8.1] Furthermore, given that there is a relationship between the volume of attenuation required and the area of land needed to accommodate it, there is significant uncertainty as to whether the area of land acquisition related to the provision of attenuation facilities is over-stated, such that it is not required to mitigate flood risk, or under-stated, such that it would not be sufficient to mitigate flood risk.

Flood attenuation alternatives

8.2.4.40 MK has suggested that the proposed NE FAB could be located on land owned by others to the southeast of junction 8. However, in contrast to the below ground NE FAB proposed, such an alternative would be likely to require substantial above ground embankments/flood walls, which to my mind would likely be more expensive and potentially more visually obtrusive, to the detriment of the character and appearance of the countryside. Furthermore, whilst I understand that some land to the south of Dodwell Lane has recently been for sale, it does not automatically follow that the owners would be willing to sell a part of it for that purpose.[4.5.5.66d), 6.4.7.29] I give that suggestion little weight.

8.2.4.41 MK has also suggested that, insofar as there is a risk of flooding of the highway due to the capacity of the culvert beneath Dodwell Lane being limited, it could be addressed by increasing the size of the culvert, rather than providing the proposed NE FAB.

8.2.4.42 I do not share the view of MK as to the relevance of the distinction he draws between the proposed Link Road development, which would

include flood attenuation facilities, and his suggestion that the existing culvert be upsized from 450mm diameter to 675mm diameter to serve the Order scheme (in place of the NE FAB). To my mind both would involve works which would alter the drainage characteristics of the catchment and increase the downstream flow rates associated with the ordinary watercourse if not mitigated. In the case of the proposed Link Road, the developer laid tarmac would have the effect of increasing the flow rate downstream, if the associated increased runoff rate is not mitigated. Attenuation is proposed for that purpose. Increasing the size of the existing Dodwell Lane culvert would reduce the degree to which pass-forward flow rates, associated with the design event, would be limited by the culvert, also increasing the flow rate downstream without mitigation.[6.4.6.63, 6.4.11.22] However, contrary to the view of NH, I consider that increased flow is not a synonym for increasing flood risk, flood risk being a combination of the probability and potential consequences of flooding according to the NPPG[425].[4.5.5.70]

8.2.4.43 NH has expressed the concern that a single upsized box culvert beneath Dodwell Lane would need to be shallow to achieve the required cover between the soffit and the road deck, and so may be prone to blockage and installation would require excavation of Dodwell Lane, disrupting the highway network. However, I give those concerns little weight, as Sweco has indicated that a possible alternative would be to install multiple smaller culverts using less disruptive directional drilling techniques.[426][4.5.5.66d)]

8.2.4.44 Sweco indicates that it has checked the likely downstream impact of removing the NE FAB and upsizing the culvert beneath Dodwell Lane using the PCF Stage 5 model.[427] However, whilst Sweco suggests this would be likely to lead to a predicted worsening of flooding to the southbound M27 carriageway where the watercourse passes beneath the motorway, I have not been provided with any compelling evidence in support of that view. The associated flood hazard mapping submitted in evidence by MK does not indicate any flooding of the M27 southbound carriageway at that point either in the 'baseline' or 'only changes the diameter of the culvert scenarios'. Whilst the latter shows some increase in flood hazard further to the south alongside the carriageway, it appears not to encroach onto the road to any material extent.[428][4.5.5.70-71, 4.5.5.73, 4.5.5.75, 4.5.5.76d)-e), 6.4.11.22] In any event, as I have previously indicated, little weight is attributable to the flood mapping provided to the Inquiries due to Sweco's input errors, which were built into the PCF Stage 5 model provided to JBA. Under the circumstances, I give little weight to NH's view that if the culvert were to be upsized there would be flooding downstream unless attenuation is provided

[425] CD F.15 para 001.
[426] NH/3/2 para 8.54
[427] NH/3/2 para 8.60
[428] INQ-37 Figure 1 (baseline) vs Figure 7 (only changes the diameter of the culvert).

south of Dodwell Lane.[4.13.3.d)iii.]

8.2.4.45 I have not been provided with any compelling evidence to show that if the culvert were to be upsized, it would materially increase the extent of flooding downstream or flood risk more generally. I consider that this alternative, which could be facilitated through section 110 of the *Highways Act 1980*, would be worthy of further investigation as an alternative to the provision of a NE FAB.[4.4.77, 4.5.5.66b) & e)] However, my conclusions below do not turn on this matter.

Flood Risk-Conclusions

8.2.4.46 I conclude that, due to modelling errors, there is significant uncertainty with respect to flood risk and in particular the extent of flooding likely to be associated with the design event and the volumes of attenuation, if any, that may be required to mitigate it. Against this background, little weight is attributable to: the FRA and FRAa, the conclusions of which are based on the flawed modelling; and, the supplementary modelling evidence submitted to the Inquiries estimating flood extent. Furthermore, given that there is a relationship between the volume of attenuation required and the area of land needed to accommodate it, there is significant uncertainty as to whether the areas of land acquisition identified by NH as required for the provision of attenuation facilities is over-stated, such that it is not required to mitigate flood risk, or under-stated, such that it would not be sufficient to mitigate flood risk.

8.2.4.47 NH has indicated that the purpose of the NE FAB is to address a pre-existing risk of flooding to the highway (existing/improved) identified by NH as arising from Bursledon Brook. Nevertheless, based on my findings above, with particular reference to the inadequate justification for the proposed NE FAB and uncertainty with respect to flood risk, I cannot conclude that: the Order scheme promoted by NH would be safe for its lifetime; or, that the scheme would either remove the flood risk as asserted by NH or that the benefits would outweigh flood risk.[4.5.5.62] I consider therefore, that the Exception Test has not been passed, contrary to the aims of the NPPF, the NN NPS and Local Plan Policy DM5[429].[4.5.5.4, 4.5.5.63]

8.2.4.48 Furthermore, the uncertainty with respect to the area of land required, if any, for a NE FAB has implications for the assessment of public interest. As set out in the *Prest* judgment, *'It is the duty of the Minister to have regard to the public interest. For instance, in order to acquire the land the acquiring authority has to use the taxpayers' money or the ratepayers' money. The Minister ought to see that they are not made to*

[429] INQ-5.

pay too much for the land…'.[6.4.12.4] Based on the evidence presented, I cannot conclude that the compulsory acquisition of Plot 11b is reasonably necessary. The findings also have implications in relation to whether the purposes for which the CPO is made justify interfering with the human rights of those with an interest in the land affected, which I return to below.

8.2.4.49 Whilst the focus of the analysis set out above is on the justification for the NE FAB, the conclusions reached regarding the unreliable nature of the Sweco modelling evidence also have implications for the justification of the proposed FAB to the northwest of Junction 8 (NW FAB). I consider it follows that there is uncertainty regarding the volume of attenuation required there and therefore the justification for the extent of land acquisition proposed.

8.2.4.50 NH's position statement on *Flood Alleviation* (INQ-62) indicates, in summary, that should the Secretary of State not support the provision of the proposed flood alleviation facilities, NH would only be able to proceed with the remainder of the Order scheme if directed /indemnified to do so; the implications of which I will return to later.[8.2.9.1-3]

8.2.5 **Landscape and visual amenity**

8.2.5.1 The EAR (2020) confirms that the Order scheme site forms part of *Area 11: M27 Corridor* (LCA11) in the *Eastleigh Borough Council Landscape Character Assessment 2011*, which is dominated by the motorway and other key characteristics include undulating ground to the east and small pasture fields with unmanaged hedges.[4.5.6.3] I saw that MK's land subject of the CPO comprises parts of a small pasture field, which generally slopes down from Peewit Hill Close, to the north, towards the junction of Dodwell Lane and the junction 8 roundabout to the south. The western boundary of the field is predominantly characterised by woodland alongside the M27 southbound off-slip road, which limits the visibility of the slip road from vantage points to the east. In contrast, its southern boundary is enclosed for the most part by lower hedging, which allows views across the field from the highways which wrap around its southern and eastern sides. The north eastern corner of the field adjoins a group of residential/commercial buildings known as Hillside, which belong to MK. Having regard to these factors, I consider that the EAR assessment of LCA11 as being of low sensitivity is reasonable.[430]

8.2.5.2 The EAR landscape assessment was based on the PCF Stage 3 scheme, which included the addition of two lanes to the southbound off-slip road,

[430] CD B.1 section 7.

which would necessitate the extension of the slip road embankment eastwards. As identified by the EAR, that extension would not greatly change the pattern of topography. It also included a FAB in the southern section of MK's field, which would receive wildflower meadow seeding.[431] In addition, replacement tree/hedge/shrub planting was proposed along the eastern side of the slip road and the northern side of Dodwell Lane, the purpose of which would be to mitigate the visual impact of the Order scheme and integrate the infrastructure within its specific landscape character context.[4.5.6.1] The EAR concluded that both the landscape and visual impact of the completed scheme would be slight adverse, a view which I share.[4.5.6.7]

8.2.5.3 Turning to the PCF Stage 5 scheme, it includes the addition of only one lane to the southbound off-slip road, reducing the extent of the proposed embankment extension. Similar replacement planting would be provided along the eastern side of the slip road and northern side of Dodwell Lane. I consider that this is necessary to soften the visual impact of the highways works in views from vantage points to the east, mitigating not only the impact of the slip road and other highway works, but also the loss of planting within the roundabout, which would otherwise increase the visual prominence of the raised section of the M27 there. In that context, the lower level replacement planting suggested by MK as an alternative would not provide effective mitigation.[4.5.6.18, 6.4.4.3] In my judgement, in relation to these elements of the Order scheme, the finding of the EAR remains applicable; both the landscape and visual impact of the completed scheme would be slight adverse.

8.2.5.4 The PCF Stage 5 scheme would include a flood attenuation basin (NE FAB) in the southern section of MK's field similar to the Stage 3 proposal, which would also receive wildflower meadow seeding.[432] It appears to me that the NE FAB would be unobtrusive, characterised by a low profile depression in the lower southern section of the field. Furthermore, the proposed meadow seeding would be in keeping with the retained pasture to the north of the site. Whilst not shown on the general arrangement drawings, the environmental masterplans indicate that there would be tree/hedgerow planting along the northern side of the site, which would be consistent with other boundary planting nearby, such as along Peewit Hill Close.[6.3.20.29] The Order scheme would appear to be well integrated with the character of the landscape.[4.5.6.16] Views from the closest neighbouring buildings, MK's residential/commercial group of buildings, Hillside, at the north eastern corner of the field, are limited by their own boundary planting. Under these circumstances, whilst MK's preference for a more open boundary along the northern side of the proposed NE FAB is noted, I consider that

[431] CD A.6.
[432] CD A.6, A.9, A.10 and B.4.

the proposed tree/hedgerow planting would not have a significant adverse impact on the views from those neighbouring buildings.[433]

8.2.5.5 The Order scheme falls within the settlement gap between Hedge End and Bursledon designated by the *Eastleigh Borough Local Plan, 2022* (Local Plan). In relation to that gap Policy S6 seeks to ensure that development would not undermine the physical extent and/or visual separation of settlements and it would not have an urbanising effect detrimental to the character of the countryside.[434] I consider that in the vicinity of the proposed works on the eastern side of junction 8 the character of the countryside is dominated by the high level section of the M27 which passes over the junction 8 roundabout. In that context the relatively minor highway works and the wildflower seeded NE FAB would not add materially to the urbanisation of the locality nor undermine the physical extent and/or visual separation of settlements. The Order scheme would not conflict with Local Plan Policy S6.[4.5.6.4, 6.4.4.2]

8.2.5.6 I conclude that the Order scheme would have only a slight adverse impact on landscape and visual amenity. Therefore, it would conflict with Local Plan Policy S5 insofar as it seeks to avoid adverse impacts on the intrinsic character of the landscape. However, as the harm would be slight it would not amount to an unacceptable impact, which Local Plan Policy DM1 seeks to avoid. I afford the harm little weight.[4.5.6.3]

8.2.5.7 Local Plan Policy S9, which deals with the provision of multi-functional green infrastructure, appears to me to be of little relevance in the context of this Order scheme.[4.5.6.3]

8.2.6 ***Biodiversity***

8.2.6.1 The EAR indicated that the effect of the Order scheme would be neutral for all ecological receptors except for semi-natural broadleaved and mixed woodland and plantation broadleaved woodland habitats in relation to which there would be likely to be a slight adverse effect. Sweco has confirmed that the same conclusion would apply to the likely impact of: the PCF Stage 5 3-lane scheme; MK's 3-lane alternative with retaining walls; and, a PCF Stage 5 3-lane scheme with the NE FAB omitted. However, it indicates that the first of those three would be more beneficial for biodiversity than the other two, due to the potential for added variety and extent of habitat.[4.5.4.1a)][435] I have not been provided with any compelling evidence to the contrary.

[433] NH/4/2 para 2.19.
[434] INQ-5.
[435] INQ-36.

8.2.6.2 I acknowledge that retaining, rather than extending, the existing two lane southbound off-slip road would avoid the need to remove neighbouring planting and the associated slight adverse effect on semi-natural broadleaved and mixed woodland and plantation broadleaved woodland habitats. However, in comparison with a signalised 2-lane scheme, the PCF Stage 5 3-lane scheme would provide greater transportation benefits, which I consider would outweigh the slight adverse impact on biodiversity.[4.5.4.1a), 6.4.4.4] The 2-lane scheme is not to be preferred.

8.2.6.3 I conclude that, whilst the Order scheme would not provide a net gain in biodiversity, contrary to Local Plan Policy S1, nor would it have a significant adverse effect on biodiversity and in this respect it would be consistent with Local Plan Policies DM1 and DM11.

8.2.7 ***Noise***

8.2.7.1 The EAR, produced by Jacobs, identifies and Sweco has confirmed that operational noise associated with the Order scheme is unlikely to give rise to any significant effects at any noise sensitive receptors.[436] Amongst others, this applies to MK's properties at Hillside. Furthermore, they confirm that whilst construction noise has the potential to result in adverse impacts, the adoption of best practical means measures to minimise construction noise would ensure that the impact would not be significant. For example, measures such as the use of silenced equipment, temporary noise screens and working hours restrictions.[437] I have not been provided with any expert assessment to the contrary. NH's *Technical Note-Noise Review of design change option against the PCF Stage 3 scenario*[438] (including a reduction to 3-lanes on the southbound off-slip) confirms that the change to a 3-lane scheme would not result in a different noise outcome.

8.2.7.2 NH's *Register of Environmental Actions and Commitments* indicates that, in the first instance, the necessary mitigation measures, in line with those referred to in the EAR, would be set out in the Construction Environmental Management Plan which the contractor would be required to produce.[439] Whilst NH has given an undertaking that the measures would be implemented as part of the Order scheme, it is within the powers of the local authority under the Control of Pollution Act 1974 to ensure that they are.[440] In my judgement, these safeguards provide sufficient certainty that noise associated with the Order scheme would be unlikely to have a significant adverse impact on noise

[436] CD B.1 section 11 and NH/4/2.
[437] CD B.1 section 11.8.
[438] CD B.16
[439] CD B.8 pages 16-17.
[440] CD B.1 section 11.8.1. and NH/4/2 para 4.12.

sensitive receptors.[6.2.1.14, 6.4.4.5]

8.2.7.3 I conclude that the Order scheme would be unlikely to have an unacceptable effect on the noise environment, in keeping with the aims of Local Plan Policy DM8.

8.2.8 Resource implications

8.2.8.1 The CPO Guidance indicates that the acquiring authority should provide substantive information as to the sources of funding available for both acquiring the land and implementing the Order scheme for which the land is required.

8.2.8.2 The RIS2 pledges £27.4 billion of capital investment funding that will be made available during the period 2020/21-2024/25 and identifies, amongst other things, the enhancement schemes the Government expects to be built. The schemes identified there include '*M27 Southampton Junction 8-additional capacity at junction 8 through improvements to the Windhover roundabout*'. The *Highways England Delivery Plan 2020-2025* sets out how NH will invest the Government funding in the SRN up to 2025. The schemes for improving capacity on strategic roads identified include improvements to the M27 junction 8 and Windhover Roundabout[441].[4.8] Against this background, I conclude it is likely that the funding necessary to satisfactorily implement the Order scheme, estimated to be around £35.19 million, would be made available in a timely manner.

8.2.9 Impediments

NH's position statement on Flood Alleviation

8.2.9.1 NH's position statement on *Flood Alleviation* (INQ-62) indicates, in summary, that should the Secretary of State modify the CPO to remove plots relating to flood attenuation, NH would only be able to proceed with the Order scheme if *'(i) the Secretary of State gave National Highways a direction relieving it of its obligations under the Licence (and even then, the Secretary of State could not relieve it of its obligations under section 5 of the 2015 Act, LA 113, or the NPPF); and (ii) the Secretary of State gave National Highways an indemnity in relation to any actions or claims arising as a result of the failure to address flood risk experienced by the improved off-slip.'* There is no evidence before me to show that those conditions would be likely to be met. It follows that removal of plots identified by NH as being needed for flood attenuation, would result in the Order scheme not being

[441] CD F.8 page 38.

implemented.

8.2.9.2 I have had regard to the view of NH that its position in relation to this matter does not amount to an impediment in the terms set out in the CPO Guidance. The CPO Guidance indicates that the '*Acquiring Authority will also need to show that the scheme is unlikely to be blocked by any physical or legal impediments to implementation. These include: the programming of any infrastructure accommodation works or remedial work which may be required; and, any need for planning permission or other consent or licence'*. I acknowledge that, in those terms, NH's position set out in INQ-62 does not amount to a physical or legal impediment to implementation.[4.9.5.8]

8.2.9.3 However, the CPO Guidance indicates that the '*Minister confirming the order has to be able to take a balanced view between the intentions of the acquiring authority and the concerns of those with an interest in the land that it is proposing to acquire compulsorily and the wider public interest*'. I consider that NH's position set out INQ-62 has potentially significant implications in this context, particularly in relation to whether there is a compelling case in the public interest for the Order to be confirmed and whether the purposes for which the CPO is made justify interfering with the human rights of those with an interest in the land affected. I will return to these matters below.

Link Road

8.2.9.4 The key proposals identified by Local Plan Policy S11 for new and improved transport infrastructure also include the provision of a Link Road which would run across part of MK's land from Dodwell Lane to a land allocation, HE4, situated to the north of Peewit Hill Close.[4.9.1.4, 6.4.2.6][442] Planning permission Ref. F/17/81809 was granted for it on 6 March 2020.[443]

8.2.9.5 An overlay of the CPO plot plan with the approved details for the Link Road indicates that there would be likely to be an overlap between the western raised embankment of a Link Road attenuation pond and Plot 11a.[444] Based on the details before me, Plot 11a is intended by NH to be used as the new route of the watercourse, comprising some culverting and earthworks embankment.[445] Firstly, in my judgement, those works may well coexist. For example, the culverted watercourse may pass beneath the raised embankment of the pond. Secondly, there appears to be sufficient room within the redline of the Link Road in that vicinity to provide a pond of the same size which does not overlap with any of

[442] INQ-5 pages 46 and 200, Policies Map (South)
[443] INQ-45
[444] INQ-47
[445] NH/3/2 Figure 5-4 and CD A.9 sheet 3 of 5

the CPO plots. Whilst such a change to the approved scheme would be likely to require some sort of application, such an application is likely to be required in any event due to inconsistency in the approved Link Road plans, some of which show two ponds and others one. [4.5.5.66c), 4.9.5.4-7, 6.4.6.63] Under these circumstances, I am satisfied that the Link Road development and the Order scheme would be unlikely to be an impediment to the implementation of one another. EBC, who has expressed an interest in purchasing MK's land in order to secure the delivery of the Link Road, has confirmed it does not regard there to be any inconsistency between the schemes and if there were to be that it could be resolved. This adds further weight to my finding.[4.9.5.6, 7.1.3-5]

8.2.9.6 There is no requirement for express planning permission or development consent for the Order scheme, which could be built out under permitted development rights following confirmation of the CPO.[4.9.5.3]

8.2.9.7 I conclude it is unlikely that there would be any impediments, in the terms of the CPO Guidance, to NH exercising the powers contained within the Order.

Other matters

8.2.9.8 MK has drawn attention to Local Plan Policy DM12 and that EBC had indicated in relation to the Link Road proposal the potential for previously unidentified archaeology.[446] However, the associated planning permission did not require any such potential to be investigated.[447] In any event, there is no evidence before me to show that the Order scheme would affect an archaeological site that is already identified or discovered through development proposals. I consider that Local Plan Policy DM12 is of little relevance in this case.

8.2.10 **Last resort**

8.2.10.1 The CPO Guidance indicates that '*Compulsory purchase is intended as a last resort to secure the assembly of all the land needed for the implementation of projects*'. 'Last resort' here is used in the context of encouraging the acquiring authority to secure the assembly of land needed through negotiation in the first instance. The use of the phrase in this context does not support MK's view that the Order scheme should be shown to be the 'least intrusive means' of addressing the purposes for which the land is sought so that the use of CPO powers can be considered a 'last resort'.[4.10]

[446] KEE/3/7 page 59.
[447] INQ-45.

8.2.10.2 The CPO Guidance indicates that the *'confirming authority will expect the acquiring authority to demonstrate that they have taken reasonable steps to acquire all of the land and rights included in the Order by agreement'.* In relation to the required plots of land for which landowners have been identified, NH has provided evidence of the steps it has taken. It is only the plots of land in which MK has an interest where NH has been unable to reach some form of acquisition agreement through negotiation. MK maintains his opposition to the acquisition of his land by NH. I consider that in this context the use of compulsory purchase powers by NH can be regarded as a last resort, in keeping with the CPO Guidance.[4.10.3]

8.2.11 Whether there is a compelling case in the public interest

8.2.11.1 The CPO Guidance indicates that the '*Minister confirming the order has to be able to take a balanced view between the intentions of the acquiring authority and the concerns of those with an interest in the land that it is proposing to acquire compulsorily and the wider public interest*'.

8.2.11.2 In my view, the Order scheme comprises two discrete elements. The first element involves highway improvement works, including measures such as: signalisation and additional lanes, which would improve journey times, reduce accidents in the area surrounding the scheme and give rise to wider economic benefits over the 60 year appraisal period; and, improved facilities for NMUs by addressing the poor connectivity and lack of safe shared facilities for pedestrians and cyclists around Windhover Roundabout and junction 8 from Hamble Lane to Hedge End. The second element involves drainage works, including the provision of the NE FAB, to the northeast of junction 8, intended to address a pre-existing risk of flooding to the highway (existing/improved) identified by NH as arising from an ordinary watercourse.

Impediments and resources

8.2.11.3 There would be no physical or legal impediments to the implementation of the Order and it is likely that the necessary funding would be made available in a timely manner.[8.2.8.1-2, 8.2.9.1-8]

Beneficial impacts

8.2.11.4 Junction 8 serves as one of the main entry points to the City of Southampton off the M27. Congestion and capacity issues at junction 8 and the neighbouring Windhover Roundabout have been identified in a number of transport policy documents since 2012 and the recently adopted Local Plan Policy S11(l) identifies improvements to those junctions as a key proposal, citing the issue of significant peak hour congestion. A number of strategic options that could address the issue were considered, before the Order scheme was selected on the basis of

best value for money and fewer environmental impacts.[448]
The economic appraisal of the Order scheme, undertaken in accordance with Government guidance, has identified a BCR of 1.6, representing medium value for money. As well as addressing congestion, the Order scheme would be likely to reduce accident rates and would improve facilities for NMUs.

8.2.11.5 Details of the proposed modifications to the junction 8 southbound off slip road and Dodwell Lane were subject to challenge at the Inquiries. In my judgement, NH's proposed 3-lane southbound off-slip road arrangement and Dodwell Lane changes (PCF Stage 5) would be appropriate for the purposes of realising the identified benefits and the alternatives suggested by MK are not to be preferred.

8.2.11.6 I consider therefore, that the Order scheme would be likely to provide significant public benefits.

Adverse impacts

8.2.11.7 The Order scheme would be unlikely to have an unacceptable effect on the noise environment. Furthermore, it would be likely to have only a slight adverse impact on landscape and visual amenity as well as on biodiversity.

8.2.11.8 NH has indicated that the majority of CPO Plot 11b would be used to accommodate the NE FAB. However, in my judgement there is no compelling evidence firstly, to show that it is necessary for that purpose and, secondly, if it is, that it would be sufficient to ensure that flood risk would be adequately addressed. Whilst the NPPF's Sequential Test has been satisfied, the Exception Test has not been passed. This is a serious conflict with the NPPF and, in my judgement, amounts to a conflict with the NPPF taken as a whole and with DMRB LA 113 insofar as it indicates that road projects must be compliant with the NPPF. Furthermore, it is uncertain whether the southbound off-slip would *'remain operational during floods'* as required by the NN NPS. NH has also indicated that a failure to adequately address flood risk would also amount to a breach of its licence terms.[4.5.5.4, 4.5.5.8] It would also conflict with Local Plan Policy S1 insofar as it seeks to ensure adaptability to predicted climate change and limit risks from flooding.[449]

Conclusions

8.2.11.9 The proposed highway improvement works would be likely to provide significant benefits, not least associated with reduced congestion. However, NH's evidence in support of the proposed flood attenuation facilities is flawed, such that there is significant uncertainty with respect to flood risk, including whether the compulsory acquisition of Plot 11b is reasonably necessary, and whether therefore, the expenditure related to the associated infrastructure would be in the public interest.
I conclude on balance that there would not be a compelling case in the

[448] CD B.1 section 3.3.
[449] INQ-5.

public interest for the confirmation of the CPO as made.

8.2.12 **Whether any interference with rights under the European Convention on Human Rights ('the Convention') is justified**

8.2.12.1 Government CPO Guidance indicates that in order to justify a CPO it is necessary to be sure that the purposes for which the CPO is made justify interfering with the human rights of those with an interest in the land affected. Particular consideration should be given to the provisions of Article 1 of the First Protocol to the European Convention on Human Rights and, in the case of a dwelling, Article 8. The Order does not seek to acquire any residential properties. However, the effect of the Order would be to deprive those parties identified in its schedules of titles and/or rights to land. Article 1 indicates 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.*'

8.2.12.2 NH has indicated that the majority of CPO Plot 11b would be used to accommodate the NE FAB. However, in my judgement there is no compelling evidence firstly, to show that it is necessary for that purpose and, secondly, if it is, that it would be sufficient to ensure that flood risk would be adequately addressed. Under these circumstances, I consider that it cannot be concluded that the public interest in NH acquiring the land would outweigh the private loss of MK or that the interference would be proportionate. In relation to CPO Plot 11b the purposes for which the Order was made would not sufficiently justify interfering with the human rights of those with an interest in the land affected.[4.4.6]

8.2.12.3 Under the circumstances, I consider that it would be necessary to remove Plot 11b from the Order, if it were to be confirmed. However, in INQ-62, NH has indicated if that were the case, it would not implement the Order scheme unless the Secretary of State '*gave National Highways a direction relieving it of its' obligations under the Licence…; and (ii) the Secretary of State gave National Highways an indemnity in relation to any actions or claims arising as a result of the failure to address flood risk experienced by the improved off-slip*.' There is no evidence before me to show that those conditions would be likely to be met. Whilst this would be a matter for the Secretary of State, to my mind, it is unlikely in circumstances where, as here, NH has failed to show whether flood risk would be adequately addressed.

8.2.12.4 If as appears likely therefore, the Order scheme would not be implemented, the benefits would not be realised, further weakening the case in the public interest for confirmation of the Order. Furthermore, in such circumstances, the public interest in NH acquiring the other land identified by the CPO would not outweigh the private loss of those with an interest in that land and the interference would be disproportionate.

8.2.12.5 I conclude overall that the purposes for which the Order was made would not sufficiently justify interfering with the human rights of those with an interest in the land affected, not least as, under the circumstances I have identified, the Order scheme would be unlikely to be implemented and so the purposes would not be realised. To my mind, insufficient justification for the interference with the human rights of those with an interest in the land affected would indicate on its own that the Order should not be confirmed as made.

8.2.13 **Suggested CPO modifications**

8.2.13.1 Without prejudice to the cases that had been made, a number of potential modifications to the Orders, as a means of addressing concerns raised, were discussed at the Inquiries. MODs 1-9 and 12 are associated with the CPO, some of which would necessitate changes to the SRO and are set out in MODs 10-13.[4.12]

8.2.13.2 MOD1[450] features MK's 3-lane southbound off-slip scheme, no NE FAB on MK's land, retaining sufficient of MK's land and rights (as assessed by NH) to facilitate widening of the slip road and to provide sufficient room for construction and maintenance of the retaining walls, including provision of maintenance access. In addition to those features, MOD2[451] also removes the proposed FAB to the northwest of junction 8 (NW FAB). MOD7[452] features MK's 3-lane southbound off slip scheme, no MK land acquired for NE FAB or other purposes, with access rights for inspection/maintenance secured either under section 250 of the *Highways Act 1980* or by licence, which has yet to be negotiated.[453][4.12.5-8]

8.2.13.3 However, for the reasons set out above, I consider that MK's 3-lane southbound off-slip scheme is not worthy of further consideration and so MOD1, MOD2 and MOD7 should be disregarded.

8.2.13.4 MOD3[454] features NH's 3-lane southbound off-slip scheme, no NE FAB

[450] INQ-82.1 and 83.1.
[451] INQ-82.2 and 83.2.
[452] INQ-INQ-86.2.
[453] INQ-86, 86.2-5.
[454] INQ-82.3 and 83.3.

on MK's land, retaining sufficient of MK's land (as assessed by NH) to facilitate widening of the slip road and the scheme's highway alignment as well as landscape planting. In addition to those features, MOD4[455] also removes the proposed FAB to the northwest of junction 8.

8.2.13.5 In the event that the Secretary of State considers that the Orders should be modified so as not to include land sought for the NE FAB, NH considers that the CPO should be subject to MOD3.[4.12.1] However, as set out above, unless directed and indemnified by the Secretary of State (NH's pre-conditions), NH has indicated that it could not proceed with the Order scheme on the basis of MOD3. I consider that:

a) As I have previously indicated, it is unlikely that NH's pre-conditions would be met and under those circumstances, NH would be unlikely to proceed with the Order scheme and so there would be no compelling case in the public interest for the Order to be confirmed and the purposes for which the Order was made would not sufficiently justify interfering with the human rights of those with an interest in the land affected.

b) In the event that the Secretary of State considers that the Orders should be modified so as not to include land sought for the NE FAB and is willing to comply with NH's pre-conditions, then the CPO would need to be modified in accordance with MOD3 or in accordance with MOD4 if the land identified by NH for the NW FAB is also to be omitted.

For the avoidance of doubt, I consider that MOD3 and MOD4, which also includes the omission of the NE FAB, should be disregarded for the reason given in a) above.

8.2.13.6 MOD5[456] features MK's 2-lane southbound off-slip scheme, no NE FAB on MK's land, retaining a small area of MK's land (as assessed by NH) adjacent to Dodwell Lane to enable highway works. In addition to those features, MOD6[457] also removes the proposed FAB to the northwest of junction 8. MOD8 features MK's 2-lane southbound off-slip scheme and no MK land acquired for NE FAB or other purposes.

8.2.13.7 However, for the reasons set out above, I consider that MK's 2-lane southbound off slip scheme is not worthy of further consideration and so MOD5, MOD6 and MOD8 should be disregarded.

[455] INQ-82.4 and 83.4.
[456] INQ-82.5 and 83.5.
[457] INQ-82.6 and 83.6.

8.2.13.8 MOD9[458] and MOD12[459] comprise minor amendments to the CPO, including: the correction of a typographical error (square metres); the removal of Plot 2 following an agreement reached by NH with the landowner; replacing references to 'Highways England' with 'National Highways'; and, updating some ownership/interest details following changes since the Order was made. In the event that the CPO is to be confirmed, I consider that the MOD9 and MOD12 changes to that Order would need to be applied and would be unlikely to prejudice the interests of anyone.

8.2.14 **CPO-Conclusions**

8.2.14.1 Based on the evidence provided, which I consider to be seriously flawed in relation to flood risk, I conclude that there would not be a compelling case in the public interest for the confirmation of the Order as made and the purposes for which the Order was made would not sufficiently justify interfering with the human rights of those with an interest in the land affected. Furthermore, in my judgement, the suggested modifications to the CPO would not alter this position.

8.2.14.2 If the Secretary of State disagrees with my conclusions and:

a) The Secretary of State concludes that:

1) Due to the uncertainty with respect to flood risk, the land associated with proposed flood risk management facilities should be removed from the Order (NE FAB-MOD3 or NE FAB and NW FAB-MOD4); and,
2) Absent those facilities and notwithstanding the implications of the uncertainty with respect to flood risk, there would be a compelling case in the public interest for the confirmation of the Order in respect of the remainder of the Order scheme, comprising for the most part highway improvement works; and,
3) The Secretary of State would be willing to comply with NH's pre-conditions for implementation (INQ-62) and considers, in those circumstances, that the purposes for which the Order was made would sufficiently justify interfering with the human rights of those with an interest in the remaining land affected.

Then, in those circumstances, it would be necessary to modify the Order as made in accordance with MODs 9, 12 and 3 or 4, if it is to be confirmed.

Or

[458] INQ-74 NH/11.
[459] INQ-80.

b) The Secretary of State concludes that:

1) Notwithstanding the implications of the uncertainty with respect to flood risk, there is a compelling case in the public interest for the confirmation of the Order as made; and,
2) The purposes for which the Order was made would sufficiently justify interfering with the human rights of those with an interest in the land affected, such that the Order should be confirmed.

Then, in those circumstances, it would be necessary to modify the Order as made in accordance with MODs 9 and 12, if it is to be confirmed.

8.3 **The Side Roads Order** (SRO)

8.3.1 **The statutory provisions under which the Order was made**

8.3.1.1 In this case the SRO was made under sections 18 (Supplementary orders relating to special roads) and 125 (Further powers to stop up private access to premises) of the Highways Act 1980.

8.3.1.2 NH has confirmed that, as shown in the CD A.12 Jurisdiction Plans, it maintains the slip roads that link the M27 main line to the junction 8 roundabout, which in turn is maintained by the Local Highway Authority, HCC and that this would remain the case. I have not been provided with any compelling evidence to the contrary. I have had regard to MK's view that the CPO schedule identification of HCC as an occupier of the sections of the slip roads closest to the junction 8 roundabout indicates that HCC, rather than NH, maintains those plots. I give it little weight not least as NH is also identified as an occupier of the same sections, for example Plots 1h, 1u, 1v and 1w. It appears to me that those plots extend slightly beyond the jurisdiction of NH, shown on the CD A.12 Jurisdiction Plans, explaining the need for both parties to be identified in the schedule [4.4.81, 6.2.2.3]

8.3.1.3 I am satisfied that the M27 and the slip roads that link it to the junction 8 roundabout comprise parts of a special road and form part of the SRN.[4.9.2] Section 18(1) of the *Highways Act 1980*[460] states, amongst other things, that:

'*Provision in relation to a special road may be made by an order*

[460] CD D.1.

under this section for any of the following purposes:…

(c) for authorising the special road authority—

i. to stop up, divert, improve, raise, lower or otherwise alter a highway that crosses or enters the route of the special road or is or will be otherwise affected by the construction or improvement of the special road;…

(f) for any other purpose incidental to the purposes aforesaid or otherwise incidental to the construction or maintenance of, or other dealing with, the special road.'

8.3.1.4 The purpose of the SRO is to enable the improvement of the slip roads that form part of the special road as well as the alteration of highways affected by the improvement of the special road or incidental to that purpose or other dealing with the special road. Those highways include the linked junction 8 and Windhover Roundabouts and the highways that lead to and from them, which together with the junction 8 slip roads would all be subject to the Order scheme signalisation/capacity improvement works. I share the view of NH that these works fall within the scope of sections 18(1)(c)(i) and Section 18(1)(f) of the *Highways Act 1980*. Furthermore, I note that under section 4 of the *Highways Act 1980* an agreement has been reached between NH and HCC, and would be signed prior to work commencing, to allow NH to deliver the proposed improvement works on the roads outside the SRN, for which HCC is the Local Highway Authority. Against this background and contrary to MK's view, a prior section 16 order is not required in my view.[4.1.4, 4.4.81-86, 6.2.2.1-9]

8.3.2 The SRO tests

8.3.2.1 With reference to section 125(3) of the *Highways Act 1980*, if I am to recommend that the SRO be confirmed, I need to be satisfied in relation to the stopping up of a means of access to premises that, where reasonably required, another reasonably convenient means of access to the premises will be provided.

8.3.2.2 The SRO includes for the stopping up of a private gated access to pasture land at Hillside, which would otherwise conflict with the Order scheme improvement works along Dodwell Lane. However, the SRO also makes provision for a new replacement access (new access 2). Whilst on the original Order plan the new access would be located a short distance to the east of the existing access, at the Inquiries NH proposed a modification which would see the new access further to the

east, as shown in section 3 of NH/11.[461]

8.3.2.3 Provision is also made by the SRO for a new access (new access 1) off the northern side of Bert Betts Way to the area which would accommodate a FAB to the northwest of junction 8 (NW FAB).

8.3.2.4 I conclude that the requirements of section 125(3) of the *Highways Act 1980* would be met. Furthermore, the SRO is necessary for the implementation of the CPO as made. However, my findings with respect to necessary changes to the CPO as made, which are set out above, give rise to the need to modify the SRO as well. I deal with them next.

8.3.3 **Suggested SRO modifications**

8.3.3.1 Following on from MOD1 and MOD3, MOD10[462] features the removal from the SRO of the provision of a new access to MK's land (new access 2), consistent with the removal of the NE FAB. However, the provision to stop up the existing access is retained, as NH considers that this may be necessary in order to construct the highway works.
MOD13[463] features the removal of the provision of a new access to MK's land and the stopping up of the existing access, reflecting MK's contrary view that stopping up would not be necessary. Notwithstanding MK's expectation that its proposed eastern retaining wall would stop short of the existing access point[464], I consider, having regard to the extent of the highways works (whether MOD1 or MOD3) as well as the resultant differences in levels, that stopping up would be likely to be necessary. Furthermore, in my view there is a reasonably convenient alternative access to MK's field off Peewit Hill Close and so a new replacement access would not be required. Therefore, if the Secretary of State intends to confirm the CPO in either the MOD1 or MOD3 form (broadly, NE FAB land removed), I consider that it would be necessary to amend the SRO in accordance with MOD10.

8.3.3.2 Following MOD2 and MOD4, MOD11[465] features the removal from the SRO of the provisions for the two new accesses (new access 1 and 2), consistent with the removal of the land from the CPO of both proposed flood attenuation areas, NE FAB and NW FAB. Therefore, if the Secretary of State intends to confirm the CPO in either the MOD2 or MOD4 form, I consider that it would be necessary to amend the SRO in

[461] INQ-74.
[462] INQ-71.
[463] INQ-86.1.
[464] INQ-86.3-4.
[465] INQ-71.

accordance with MOD11.

8.4 Conclusions

8.4.1 For the reasons set out above, I conclude that the CPO should not be confirmed.

8.4.2 I have found that the SRO would be necessary for the implementation of the CPO as made and it would meet the requirements of section 125(3) of the *Highways Act 1980*. However, in light of my conclusion that the CPO should not be confirmed, there would be little merit in confirmation of the SRO.[4.11.5, 4.14.1] It would enable the alteration of access to premises for no purpose, if the Order scheme is not to be implemented. Therefore, I conclude that the SRO should not be confirmed.

9 RECOMMENDATIONS

9.1 I recommend that The Highways England (M27 Southampton Junction 8 Improvement Scheme - M27 Junction 8 and Windhover Roundabout)(Special Road) Compulsory Purchase Order 2021 not be confirmed.

9.2 I recommend that The Highways England (M27 Southampton Junction 8 Improvement Scheme - M27 Junction 8 and Windhover Roundabout) (Special Road)(Side Roads) Order 2021 not be confirmed.

I Jenkins

INSPECTOR

APPENDICES

APPENDIX 1-APPEARANCES

FOR NATIONAL HIGHWAYS:

M Westmoreland Smith Of Counsel	Instructed by National Highways
He called	
A Sim CTTP	Sweco UK Ltd.
D Warburton MICE CEng	Sweco UK Ltd.
J Pickering BSc(Hons) MSc C.WEM	Sweco UK Ltd.
P Black CMLI	Sweco UK Ltd.
J Williams MIOA	Sweco UK Ltd.
A Cooper CEnv CSci C.WEM MCIEEM MCIWEM	Sweco UK Ltd.
G Tremeer BSc MRICS	Valuation Office Agency
C Williams BA(Hons) MA MRTPI	WSP
J Clark MAPM	National Highways
V Bramhill (Orders modifications session only)	WSP
G McLaverty (Orders modification session only)	GRAHAM

FOR MR M KEELING:

C Zwart Of Counsel	Instructed by Blake Morgan LLP
He called	
P Bedwell BA(Hons) Dip TRP MRTPI	Bedwell Town Planning
S Singh BSc MSc(Eng) MCIHT	Mode Transport Ltd.
N Moore MEng(Hons) CEng MICE	Link Engineering Ltd.

APPENDIX 2 – CORE DOCUMENTS (CD)

Ref	**Name of Document**
A.1	The Highways England (M27 Southampton Junction 8 Improvement Scheme – M27 Junction 8 and Windhover Roundabout) (Special Road) Compulsory Purchase Order 2021 (the CPO) Order and Schedule
A.2	The Highways England (M27 Southampton Junction 8 Improvement Scheme – M27 Junction 8 and Windhover Roundabout) (Special Road) Compulsory Purchase Order 2021 (the CPO) Plans
A.3	The Highways England (M27 Southampton Junction 8 Improvement Scheme M27 Junction 8 and Windhover Roundabout) (Special Road) (Side Roads) Order 2021 (the SRO)
A.4	Notice of making the Compulsory Purchase Order
A.5	Notice of making the Side Roads Order
A.6	General Arrangement Engineering Drawing (Stage 3) HE551514-BAM-HGN-ZZ-DR-CH-50008
A.7	Statement of Reasons
A.8	Statement of Case of National Highways
A.9	General Arrangement Engineering Drawing (Stage 5) HE551514-SWE-HGN-ZZ-DR-CH-50001-5 DRAFT
A.10	Details of Design Changes between PCF Stage 3 and Stage 5 HE551514-SWE-HGN-ZZ-RP-ZX-50001
A.11	Current and proposed maintenance plans
A.12	Jurisdiction of highways – current and post construction
A.13	Schedule of scheme drawings clarifying the relevance/evolution of Core Documents A.6, A.9, A.10
B.1	Environmental Assessment Report Highways England – PCF Stage 3 Environmental Assessment Report (27 January 2020))
B.2	Environmental Assessment Appendices
B.3	Environmental Impact Assessment – Notice of Determination
B.4	Environmental Masterplan Sheets 1 and 2, and Amended to Suit Flood Compensation Areas)
B.5	Flood Risk Assessment
B.6	Flood Compensation Areas Technical Note
B.7	Flood Attenuation Technical Note: Further Modelling of Proposed Link Road Development

Ref	Name of Document
B.8	Outline Environmental Management Plan
B.9	URBEXT2000 – A new FEH catchment descriptor: Calculation, dissemination and application. R&D Technical Report FD1919/TR, Department of Environment Food and Rural Affairs
B.10	Road Safety Audit 1 (HE551514-JAC-GEN-PCF3_SS1-HS-ZS-0003)
B.11	Stage 3 Transport Forecasting Package (HE551514-JAC-GEN-PCF3_SS1-RP-TR-0006)
B.12	Stage 3 Transport Model Package (HE551514-JAC-GEN-PCF3_SS1-RP-TR-0005)
B.13	WINFAP 4 Urban Adjustment Procedures
B.14	EIA Screening Determination
B.15	Stage 5 Air Quality Technical Note
B.16	Stage 5 Noise Technical Note
B.17	Addendum report to the Flood Risk Assessment
B.18	Highways Agency - Solent to Midlands Route Strategy Evidence Report, (April 2014)
B.19	Highways England – PCF Stage 2 Environmental Assessment Report (February 2018)
B.20	Flood model files (zip file)
B.21	Details of Highway Design Changes (Traffic Impacts) HE551514-SWE-INP-ZZ-RP-TR-50002
B.22	Stage 4 (incorporating Stage 5) Transport Model Package HE551514-SWE-TEC-ZZ-RP-TR-50002
B.23	Stage 4 (incorporating Stage 5) Transport Forecasting Package HE551514-SWE-TEC-ZZ-RP-TR-50003
B.24	Stage 4 (incorporating Stage 5) Economic Appraisal Package HE551514-SWE-TEC-ZZ-RP-TR-50004
B.25	Phase 1 Habitat Map HE551514-BAM-EBD-ZZ-DR-EG-0001 rev P01
B.26	DMRB Environmental Assessment Sensitivity Test Technical Note HE551514-JAC-EGN-PCF3_SS1-RP-LE-0006
B27	Walking, Cycling & Horse-riding Review
B28	Walking, Cycling & Horse-riding Assessment
C.1	Report on Public Consultation
C.2	Preferred Route Announcement brochure

Ref	Name of Document
C.3	Technical Appraisal Report (Highways England - PCF Stage 1 Technical Appraisal Report (November 2016)
C.4	Scheme Assessment Report
D.1	Highways Act 1980
D.2	The Acquisition of Land Act 1981
D.3	The European Convention on Human Rights (as amended)
D.4	Human Rights Act 1998
D.5	New Roads and Street Works Act 1991
D.6	The Town and Country Planning Act 1990
D.7	Water Resources Act 1991
D.8	Land Drainage Act 1991
D.9	The Planning Act 2008
D.10	Flood and Water Management Act 2010
E.1	The Highways (Inquiries Procedure) Rules 1994
E.2	The Compulsory Purchase (Inquiries Procedure) Rules 2007
E.3	The Town and Country Planning (General Permitted Development) (England) Order 2015
F.1	National Planning Policy Framework (NPPF) (2021) DCLG Department for Communities and Local Government
F.2	National Networks National Policy Statement (NN NPS) (2014)
F.3	Department for Transport (DfT) Road Investment Strategy 1 (2014)
F.4	Department for Transport (DfT) Road Investment Strategy 2 (2020)
F.5	Highways England Strategic Business Plan 2020-2025
F.6	Road to Good Design published by Highways England in 2018
F.7	Highways England Delivery Plan 2015 – 2020
F.8	Highways England Delivery Plan 2020 – 2025
F.9	Design Manual for Roads and Bridges (DMRB) Link only
F.9a	DMRB LA 113 revision 1 Road drainage and the water environment

Ref	Name of Document
F.9b	DMRB CD 356 revision 1 Design of highway structures for hydraulic action
F.9c	DMRB CG 501 - revision 2 Design of highway drainage systems
F.9d	DMRB LA 108 – revision 1 Biodiversity
F.9e	DMRB LA 111 - revision 2 Noise and vibration
F.9f	DMRB LD 117 Landscape design
F.9g	DMRB LA 107 revision 2 Landscape and visual effects
F.9h	IAN 135/10 Landscape and Visual Effects Assessment (Highways Agency, 2010)
F.9j	DMRB Volume 11, Section 3, Part 4 Ecology and Nature Conservation
F.9k	IAN 130/10, Ecology and Nature Conservation: Criteria for Impact Assessment
F.9m	DMRB HD 213/11, Volume 11, Section 3, Part 7 – Noise and Vibration HD213/11 – Revision 1
F9n	DMRB CD 127 - Cross-sections and headrooms,
F.10	Department for Transport (DfT) Transport Investment Strategy - Moving Britain Ahead July 2017
F.11	Solent to Midlands Route Strategy Study (2017)
F.12	Transforming Solent Economic Plan
F.13	Guidance on compulsory purchase process and the Crichel Down Rules
F.14	Planning Policy Statement 25 (2006)
F.15	Planning Practice Guidance: Flood Risk and Coastal Change (last accessed 18.10.21)
F.16	A Green Future: Our 25 Year Plan to Improve the Environment (2018)
F.17	National Planning Policy Framework (2019)
F.18	Flood and Coastal Erosion Risk Management Policy Statement (July 2020)
F.19	Flood and Coastal Erosion Risk Management Strategy for England (July 2020)
F.20	Draft HCC Local Flood and Water Management Strategy (2020)
F.21	Draft Eastleigh Surface Water Management Plan
F.22	Department for Environment, Food and Rural Affairs Non Statutory Technical Standards for Sustainable Drainage Systems (March 2015)

Ref	Name of Document
F.23	The Solent to Midlands Route Strategy Study (Highways England, 2015)
F.24	Flood risk assessments: climate change allowances (2017)
F.25	Environment Agency Flood Estimation Guidelines (2020)
F.26	The Revitalised Flood Hydrograph Model, ReFH 2: Technical Guidance (2015)
F.27	DfT Transport Analysis Guidance (TAG) (last accessed 18.10.21)
F.28	Natural England Guidance Note: European Protected Species and the Planning Process. Natural England's Application of the 'Three Tests' to Licence Applications
G.1	Adopted Eastleigh Borough Local Plan Review Saved Policies 2001-2011
G.2	Emerging Eastleigh Borough Local Plan 2016-36
G.3	Hampshire County Council Local Transport Plan 2011 – 2031
G.4	Southampton Council Local Transport Strategy 2015-18
G.5	Connected Southampton Transport Strategy 2040
G.6	Planning Permission reference O/13/73700 Site Location Plan
G.7	Planning Permission reference F/17/81809 Drainage Site Layout (17053-2400 Rev P3)
G.8	Eastleigh Borough Council, Biodiversity Supplementary Planning Document (adopted December 2009)
G.9	Biodiversity Action Plan for Eastleigh Borough 2012-2022
G.10	Planning Permission reference F/17/81809 Proposed Link Road Alignment Drawing No. ITB13373-GA-005 rev D dated 21 February 2018
G.11	Planning Permission reference F/17/81809 Landscape Proposals Plan Drawing No. DD130L05 rev B dated 22 August 2017
G.12	The Local Landscape Character Areas for Eastleigh Borough (Eastleigh Borough Council, 2011): Area 11: M27 Corridor
G.13	Partnership for Urban South Hampshire Strategic Flood Risk Assessment (SFRA) (December 2007)
G.14	Partnership for Urban South Hampshire Strategic Flood Risk Assessment (SFRA) Update - 2016 (February 2016)
G.15	Draft Eastleigh Borough Local Plan 2011-2029
G.16	Southampton Local Development Framework Core Strategy Development Plan Document - Amended Version incorporating the Core Strategy Partial Review March 2015
G.17	Planning officer's 2017 report to the planning committee

Ref	Name of Document
G.18	Solent Transport Delivery Plan 2012-2026
G.19	Hampshire County Council/Eastleigh Borough Transport Statement 2012
G.20	Transport Assessment of the Pre-submission Local Plan 2019 Part 2.
H.1	Mr Keeling's objection OBJ/7
H.2	Mr Keeling's response to National Highways Statement of Case – 15 September 2021
H.3	Foreman Homes' objection OBJ/6
H.4	Letter of support from Hampshire County Council dated 15 October 2021
H.5	Wates Development/Cranbury Estates objection OBJ/5
H.6	Email from Mr Paul Carnell
H.6.1	Email from Mr Paul Carnell
H.7	Withdrawal letter on behalf of Wates Development/Cranbury Estates objection OBJ/5
H8	Letter of withdrawal from SGN
H9	Letter of withdrawal from Eastleigh Ramblers OBJ/1
J.1	Prest v Secretary of State for Wales [1983] 1 WLUK 416
J.2	De Rothschild v Secretary of State for Transport [1989] 1 All ER 933
J.3	R & R Fazzolari Pty Ltd v Parramatta City Council [2009] HCA 12
J.4	R(oao Sainsbury's Supermarkets Ltd) v Wolverhampton [2011] 1 AC 437
J.5	Swish Estates Ltd v Secretary of State for Communities and Local Government [2017] EWHC 3331
K1	Statement of Common Ground between NH & Mr Carnell
K2	Statement of Common Ground between NH & Wates & Cranbury

APPENDIX 3 – PROOFS OF EVIDENCE

Ref	Document Name
National Highways (NH)	
NH/1/1	Summary Proof of Evidence by Alasdair Sim on Traffic and Economics
NH/1/2	Proof of Evidence by Alasdair Sim on Traffic and Economics
NH/1/3	Appendices to Proof of Evidence by Alasdair Sim on Traffic and Economics
NH/1/4	Rebuttal Proof of Evidence by Alasdair Sim on Traffic and Economics
NH/1/5	Supplementary Rebuttal Proof of Evidence by Alasdair Sim on Traffic and Economics
NH/2/1	Summary Proof of Evidence by Dan Warburton on Highways
NH/2/2	Proof of Evidence by Dan Warburton on Highways
NH/2/3	Rebuttal Proof of Evidence by Dan Warburton on Highways
NH/3/1	Summary Proof of Evidence by Jack Pickering on Flooding
NH/3/2	Proof of Evidence by Jack Pickering on Flooding
NH/3/3	Rebuttal Proof of Evidence by Jack Pickering on Flooding
NH/4/1	Summary Proof of Evidence by Phillip Black on Landscape
NH/4/2	Proof of Evidence by Phillip Black on Landscape
NH/4/3	Rebuttal Proof of Evidence by Phillip Black on Landscape
NH/4/4	Appendices to the Rebuttal Proof of Evidence by Phillip Black on Landscape
NH/5/1	Summary Proof of Evidence by James Williams on Noise
NH/5/2	Proof of Evidence by James Williams on Noise
NH/5/3	Appendices to Proof of Evidence by James Williams on Noise
NH/6/1	Summary Proof of Evidence by Alanna Cooper on Ecology
NH/6/2	Proof of Evidence by Alanna Cooper on Ecology
NH/7/1	Summary Proof of Evidence by Gavin Tremeer on Land Acquisition
NH/7/2	Proof of Evidence by Gavin Tremeer on Land Acquisition
NH/8/1	Summary Proof of Evidence by Clare Williams on Planning
NH/8/2	Proof of Evidence by Clare Williams on Planning
NH/8/3	Appendices to Proof of Evidence by Clare Williams on Planning
NH/9/1	Summary Proof of Evidence by Joseph Clark – overview
NH/9/2	Proof of Evidence by Joseph Clark - overview
NH/10	Note on legal matters from NH
NH/11	Proposed Orders Modification
NH/12	Note from NH on Alternatives proposed by Mr Keeling
NH/12.1	Updated Note from NH on Alternatives proposed by Mr Keeling

Ref	Document Name
Mr Keeling (KEE)	
KEE/1/1	Proof of Evidence by Nick Moore on Flood Risk and Highways Design
KEE/1/2	Appendices to the Proof of Evidence by Nick Moore
KEE/1/3	Rebuttal Proof of Evidence by Nick Moore
KEE/1/4	Appendices to the Rebuttal Proof of Evidence by Nick Moore (2 volumes)
KEE/1/5	Summary Proof of Evidence by Nick Moore on Flood Risk and Highways Design
KEE/1/6	Supplementary Proof of Evidence by Nick Moore
KEE/1/7	Appendices of Supplementary Proof of Evidence by Nick Moore. Please note this document consists of KEE/1/7/1, KEE/1/7/2 & KEE1//7/3
KEE/1/7/4	Appendices of Supplementary Proof of Evidence by Nick Moore
KEE/1/8	Rebuttal Proof of Evidence by Nick Moore
KEE/1/9	Appendices to Rebuttal Proof of Evidence by Nick Moore
KEE/2/1	Proof of Evidence of Alec Prince on Transport Planning (Replaced by Sunraj Singh, see KEE/2/5-9 update)
KEE/2/2	Appendices to Proof of Evidence of Alec Prince (Replaced by Sunraj Singh, see KEE/2/5-9 update)
KEE/2/3	Rebuttal Proof of Evidence of Alec Prince (Replaced by Sunraj Singh, see KEE/2/5-9 update)
KEE/2/4	Appendices to the Rebuttal Proof of Evidence of Alec Prince (Replaced by Sunraj Singh, see KEE/2/5-9 update)
KEE/2/5	Summary Proof of Evidence of Sunraj Singh on Transport Planning
KEE/2/6	Proof of Evidence by Sunraj Singh updating Proof of Evidence by Alec Prince
KEE/2/7	Appendices to the Proof of Evidence by Sunraj Singh updating Proof of Evidence by Alec Prince
KEE/2/8	Rebuttal Proof of Evidence by Sunraj Singh
KEE/2/9	Appendices to the Rebuttal Proof of Evidence by Sunraj Singh
KEE/3/1	Proof of Evidence of Paul Bedwell on Planning
KEE/3/2	Appendices of Proof of Evidence of Paul Bedwell on Planning
KEE/3/3	Rebuttal Proof of Evidence of Paul Bedwell on Planning
KEE/3/4	Appendices to the Rebuttal Proof of Evidence of Paul Bedwell on Planning (2 volumes)
KEE/3/5	Summary Proof of Evidence of Paul Bedwell on Planning
KEE/3/6	Supplementary Proof of Evidence of Paul Bedwell on Planning
KEE/3/7	Appendices to the Supplementary Proof of Evidence of Paul Bedwell on Planning

Ref	Document Name
KEE/3/8	Rebuttal Proof of Evidence of Paul Bedwell on Planning
KEE/3/9	Appendices to the Rebuttal Proof of Evidence of Paul Bedwell on Planning
Written Submissions	
REED/1/1	Written submission from Mr Reed on behalf of Bursledon Rights of Way and Amenities Preservation Group
CAR/1/1	Written submission from Mr Paul Carnell

APPENDIX 4 – INQUIRIES DOCUMENTS

REF	Name of Document	Submitted by
INQ-1	NH/1/6 Supplementary Rebuttal Proof of Evidence: Alasdair Sim Traffic Modelling	NH
INQ-2	NH/3/3 Rebuttal to the Supplementary Proof of Evidence: Jack Pickering - Flooding	NH
INQ-3	Statement from Mr Carnell	Mr Carnell
INQ-4	KEE/1/7/4 Further Appendix to KEE/1/6	KEE
INQ-5	Eastleigh Borough Local Plan, April 2022 & Plans	KEE
INQ-6	Exploring Bursledon pamphlet	Mr Reed
INQ-7	Opening Statement on behalf of National Highways	NH
INQ-7.1	Reginal (Clays Lane Housing Co-operative Ltd) v The Housing Corporation [2004] EWCA Civ 1658	NH
INQ-7.2	London Borough of Bexley v (1) SoS for the Environments Transport and Regions (2) Sainsburys' Supermarkets Limited and Sainsburys' Supermarkets Limited v (1) SoS for the Environments Transport and Regions and (2) London Borough of Bexley [2001] EWHC Admin 323	NH
INQ-8	Opening statement on behalf of Mr Keeling	KEE
INQ-8.1	Appeal Decision Ref: APP/R5510/W/21/3279371	KEE
INQ-8.2	CPO Decision Ref. APP/PCU/CPOP/G6100/326737	KEE
INQ-8.3	Secretary of State for Business, Energy and Industrial Strategy Decision letter- Application for the Aquind Interconnector Order. January 2022	KEE
INQ-9	DMRB CD122 – Geometric design of grade separated junctions	NH
INQ-10	Department for Transport Local Transport Note 1/09 (LTN 1/09) Signal Controlled Roundabouts	KEE
INQ-11	Transport and Road Research Laboratory Research Report	KEE

REF	Name of Document	Submitted by
	67 (RR/67). The prediction of saturation flows for road junctions controlled by traffic signals	
INQ-12	Matrix of LinSig model runs referred to in evidence	KEE & NH
INQ-13	Points of Agreement/disagreement between Mr Singh and Mr Sim	KEE & NH
INQ-14	PCF Stage 5 General Arrangement Drawing (sheet 3 of 5) and Mr Moore's alternative layout drawing (3 lane) showing the extent of Mr Keeling's land based on the Land Registry record comparison with NH Scheme and Mr Moore's Scheme	NH
INQ-15	DfT Traffic Signs Manual Chapter 6, Section 7 (extract)	NH
INQ-16	Jacobs Meeting minutes with Environment Agency dated 20 March 2019	NH
INQ-17	Email from HCC (LLFA) dated 5 May 2022	NH
INQ-18	DMRB CD 522 – Drainage of Runoff from natural catchments	KEE
INQ-19	CCTV Drainage Survey Plans	KEE
INQ-20	Updated version of INQ-14 – including position of cross-section referred to in NH/2/3	NH
INQ-21	DMRB CD 169 – The design of lay-bys, maintenance hardstandings, rest areas, service areas and observation platforms	NH
INQ-22	CNI Hub-NCSC.GOV.UK – What is Critical National Infrastructure?	NH
INQ-23	Hampshire County Multi Agency Flood Response Plan Part 1 (extract)	NH
INQ-24	DMRB CD 622 – Managing geotechnical risk	KEE
INQ-25	Hampshire County Multi Agency Flood Response Plan Part 1 (FULL DOCUMENT)	KEE
INQ-26	GOV.UK Guidance Flood risk assessment: the sequential test for applicants	KEE
INQ-27	CIRIA C786- Culvert, Screen and Outfall manual (extract)	KEE
INQ-28.1	Road Safety Audit Stage 2	NH
INQ028.2	Email from HCC with respect to RSA2 dated 5 May 2022	NH
INQ-28.3	Email from Mr Warburton with respect to RSA1 dated 17 May 2022	NH
INQ-28.4	Email from National Highways with respect to RSA1 dated 20 May 2019	NH
INQ-29	DMRB GG 101 – Introduction to the Design Manual for Roads and Bridges	KEE
INQ-30	M27 Junction 8 Traffic Signals: Degree of Saturation by Mr	NH

REF	Name of Document	Submitted by
	Sim	
INQ-31	CCTV drainage survey plans update (INQ-19)	NH
INQ-32	M27 Junction 8: Flood Risk, follow up information for the Inspector by Mr Pickering including appendices	NH
INQ-33	Note on securing environmental mitigation including appendices (National Highways' Licence and DMRB LA 120-Environmental Management Plans)	NH
INQ-34	Extracts of screen shots from CCTV, DMRB GM 701 and correspondence regarding culvert maintenance contract	KEE
INQ-35.1	McPhillips' cost estimate covering letter	KEE
INQ-35.2	Alternative layout option 3 drawing no. M27-LE-GEN-XX-DR-CE-108	
INQ-35.3	DMRB GM701-Asset delivery asset maintenance requirements	
INQ-36	Ms Cooper's technical note on ecology	NH
INQ-37	Mr Keeling's sensitivity analysis using hazard risk plans from Sweco Model	KEE
INQ-38	CIRIA c786 – Culvert, screen and outfall manual (Full copy)	KEE
INQ-39	Mrs Williams' update NH/8/2 Figures 3 and 5	NH
INQ-40	Land at St John's Road, Hedge End Link Road – Flood Risk Assessment and Drainage Strategy Ref APP/F/17/81809	NH
INQ-41	Planning Permission Ref APP/F/17/81809 approved drawings	NH
INQ-42	Highways England Operational Metrics Manual July 2021 (extract)	NH
INQ-43	Highways England Health, Safety & Wellbeing Policy 2021/2022 (extract)	NH
INQ-44	Environment Agency – National Flood and Coastal Erosion Risk Management Strategy for England (extract)	NH
INQ-45	Link Road Planning Permission Ref. APP/F/17/81809, dated 6 March 2020 & Red Line Plan	KEE
INQ-46	Additional Link Road planning application drawing 17053-2400 rev P05. Ref APP/F/17/81809	NH
INQ-47	CD H.1 Schedule 6 plan	KEE
INQ-48	KEE/2/10-Supplementary Proof of Evidence from Mr Sunraj Singh	KEE
INQ-49	Email from Sarah Reghif from HCC, re. Climate Change Allowances, dated 24 May	NH

REF	Name of Document	Submitted by
INQ-50	Appendix D to INQ-40 Land at St John's Road, Hedge End Link Road – flood risk assessment and drainage strategy. (Part of Planning Application ref APP/F/17/81809)	KEE
INQ-51	KEE/3/10-Supplemented Summary Proof of Evidence from Mr Paul Bedwell	KEE
INQ-52	CV information of Mr Sunraj Singh	KEE
INQ-53	Mr Moore's list of highways scheme experience	KEE
INQ-54	NH Approach to Degree of Saturation note	NH
INQ-55	Alasdair Sim's Proof of Evidence Errata	NH
INQ-56	Email from Andy Smith at EBC, re. potential CPO, dated 26 May 2022	NH
INQ-57	NH's Retaining Wall Costs Estimate	NH
INQ-58	Mr Keeling's Option A amendment to the CPO with plans showing no highway or flood compensation area on Mr Keeling's land 3 lane scheme and 2 lane scheme (as existing with signals)	KEE
INQ-59	Supplementary Proof of Evidence Mr Moore - Highways	KEE
INQ-60	Mr Pickering's Flood Risk, follow up information for the Inspector Note 2	NH
INQ-61	Highways Note – Dan Warburton with appendices	NH
INQ-62	Flood Alleviation – NH position statement	NH
INQ-63	Suggested List of Modification Options for Roundtable Discussion	NH
INQ-64	Supplementary Proof of Evidence from Mr Moore - Flood Risk	KEE
INQ-65	Mr Keeling's Modification Options List; and suggested modifications to the SRO.	KEE
INQ-66	Mr Moore's review of NH's Sheet Pile costs	KEE
INQ-67.1	Appendix E of the Graham/Sweco –Construction Programme August 2021	KEE
INQ-67.2	Appendix E of the Graham/Sweco –Construction Programme December 2021	KEE
INQ-68	List of Modification Options for Roundtable (updated)	NH
INQ-69.1	CPO MOD 1 Maps	NH
INQ-69.2	CPO MOD 2 Maps	NH
INQ-69.3	CPO MOD 3 Maps	NH
INQ-69.4	CPO MOD 4 Maps	NH
INQ-69.5	CPO MOD 5 Maps	NH

REF	Name of Document	Submitted by
INQ-69.6	CPO MOD 6 Maps	NH
INQ-70.1	CPO MOD 1 schedules(no link)	NH
INQ-70.2	CPO MOD 2 schedules (no link)	NH
INQ-70.3	CPO MOD 3 schedules (no link)	NH
INQ-70.4	CPO MOD 4 schedules (no link)	NH
INQ-70.5	CPO MOD 5 schedules (no link)	NH
INQ-70.6	CPO MOD 6 schedules (no link)	NH
INQ-71	SRO MOD 10 for CPO MOD 2, 4 and 6 & SRO MOD 11 for CPO MOD 1, 3 and 5	NH
INQ-72	Mr Moore's notes on his experience	KEE
INQ-73	Eastleigh Borough Council Cycle Map 2015 Edition	Mr Reed
INQ-74	NH/11 - Proposed Orders Modifications	KEE
INQ-75	DMRB CD 109 – Highway link design	NH
INQ-76	DMRB GG 119 – Road Safety Audit	NH
INQ-77	Volume 6 Road Geometry Section 1 Links – Cross-sections and headrooms	NH
INQ-78	SRO MOD 10 rev 1	NH
INQ-79	SRO MOD 11 rev 1	NH
INQ-80	CPO MOD 12 rev 1 (no link)	NH
INQ-81	SRO MOD 14 rev 1	NH
INQ-82.1	CPO MOD 1 Maps rev 1	NH
INQ-82.2	CPO MOD 2 Maps rev 1	NH
INQ-82.3	CPO MOD 3 Maps rev 1	NH
INQ-82.4	CPO MOD 4 Maps rev 1	NH
INQ-82.5	CPO MOD 5 Maps rev 1	NH
INQ-82.6	CPO MOD 6 Maps rev 1	NH
INQ-83.1	CPO MOD 1 rev 1 (no link)	NH
INQ-83.2	CPO MOD 2 rev 1 (no link)	NH
INQ-83.3	CPO MOD 3 rev 1 (no link)	NH
INQ-83.4	CPO MOD 4 rev 1 (no link)	NH
INQ-83.5	CPO MOD 5 rev 1 (no link)	NH
INQ-83.6	CPO MOD 6 rev 1 (no link)	NH
INQ-84	A1 sheet size version of CD A.9 Plans of Stage 5 (no link)	NH
INQ-85	Undertaking from NH	NH

REF	Name of Document	Submitted by
INQ-86	Covering letter for all INQ-86 documents	KEE
INQ-86.1	Refined SRO MOD 13	KEE
INQ-86.2	Refined CPO MOD 7	KEE
INQ-86.3	Modified CPO Plan-3 lane scheme drawing no. M27-LE-GEN-XX-DR-CE-MOD3 (MOD1 access rights secured by licence)	KEE
INQ-86.4	Modified CPO Plan-3 lane scheme drawing no. M27-LE-GEN-XX-DR-CE-MOD1 rev A (MOD1 access rights secured under section 250)	KEE
INQ-86.5	Draft Licence for Access	KEE
INQ-87	DMRB CD 529 – Design of outfall and culvert details	KEE
INQ-88.1	Closing submissions on behalf of Mr Keeling	KEE
INQ-88.2	Kane v New Forest District Council [2001] EWCA Civ 878	KEE
INQ-88.3	Smith v SoS for the Environment, Transport and Regions [2003] EWCA Civ 262	KEE
INQ-88.4	The Queen on the application of Save Stonehenge World Heritage Site Ltd V SoS for Transport & Highways England & Historic England [2021] EWHC 2161 (Admin)	KEE
INQ-89	Pilkington v Secretary of State for the Environment and Others [1973] 1 WLR 1527	KEE
INQ-90	Letter from Blake Morgan confirming section 250/licence areas shown on INQ/86.3 and 86.4	KEE
INQ-91	Closing submissions on behalf of National Highways	NH
INQ-91.1	Addendum to the Closing submissions on behalf of National Highways	NH
INQ-91.2	Grafton Group (UK) plc and another v Secretary of State for Transport [2016] EWCA Civ 561	NH
INQ-91.3	Smith, Reilly and Reilly v Secretary of State for Trade and Industry [2007] EWHC 1013 (Admin)	NH
INQ-91.4	Tesco Stores Limited v Secretary of State for Environment, Transport and the Regions & Wycombe District Council [2000] QBD	NH
INQ-91.5	Belfields Limited v (1) Nextdom (Bootle) Ltd (2) David Powell (3) Secretary of State for Communities and Local Government and (4) Sefton MBC [2007] EWHC 3040 (Admin)	NH
INQ-91.6	Pascoe v First Secretary of State and the Urban Regeneration Agency [2006] EWHC 2356 (Admin)	NH
INQ-91.7	Regina (Mount Cook Land Limited and another) v Westminster City Council [2003] EWCA Civ 1346.	NH

REF	Name of Document	Submitted by
INQ-92	Reply submissions of Mr Keeling on law and misstatements of fact	MK
INQ-93	Letter from Blake Morgan, dated 14 June	MK
INQ-94	Email chain response from National Highways to the Inspector 15 June 2022	NH
INQ-95	Email on behalf of the Inspector to the parties, dated 16 June 2022	INSP
INQ-96	Email from National Highways, dated 16 June 2022 (response to INQ-95)	NH
INQ-97	Email from Mr Keeling, dated 16 June 2022 (response to INQ-95)	MK
INQ-98	Reply to MK's further submissions on behalf of National Highways	NH
INQ-99	Email from the Inspector, dated 16 June 2022 (intention to close in writing)	INSP
INQ-100	Email from National Highways, dated 16 June 2022 (response to INQ-99)	NH
INQ-101	Email from Mr Keeling, dated 17 June 2022 (response to INQ-99)	MK
INQ-102	Email from the Inspector, dated 17 June 2022 (closing the Inquiries)	INSP

APPENDIX 5 – ABBREVIATIONS

AEP	Annual exceedance probability
Aquind	Secretary of State for Business, Energy and Industrial Strategy Decision letter- Application for the Aquind Interconnector Order
BCR	Benefit to cost ratio
Belfields	Belfields v Secretary of State for Communities and Local Government [2008] JPL 954
Bexley	London Borough of Bexley [2001] EWHC Admin 323
BROWAPG	Bursledon Rights of Way and Amenities Preservation Group
CCA	Climate change allowances
Clays Lane	R (oao Clays Land Housing Cooperative Limited v Housing Corp [2005] 1 WLR 2229
Convention	European Convention on Human Rights
CPO	The Highways England (M27 Southampton Junction 8 Improvement Scheme - M27 Junction 8 and Windhover Roundabout)(Special Road) Compulsory Purchase Order 2021
CPO Guidance	Guidance on Compulsory purchase process and The Crichel Down Rules
De Rothschild	De Rothschild v Secretary of State for Transport [1989] 1 All ER 933
DMRB	Design Manual for Roads and Bridges
DoS	Degree of saturation
EA	Environment Agency
EAR	Environmental Assessment Report (CD B.1)
EAP	Economic appraisal package
EBC	Eastleigh Borough Council
EHCR	European Convention on Human Rights
FAB	Flood attenuation basin
FCA	Flood compensation area
FEG	Environment Agency's Flood Estimation Guidelines
FHL	Foreman Homes Limited
FRA	Flood Risk Assessment
FRAa	Flood Risk Assessment Addendum Report, 2021
FSE	Factorial standard error
Grafton	Grafton Group (UK) plc v Secretary of State for Transport [2016] EWCA Civ 561
GPDO	Town and Country Planning (General Permitted Development)(England) Order 2015
HADDMS	Highways Agency Drainage Data Management System
HCC	Hampshire County Council
HECR	Hydrology estimation calculation record
Inquiry Rules	Highways (Inquiries Procedure) Rules 1994 and the Compulsory Purchase (Inquiries Procedure) Rules 2007 (to the extent applicable)
Kane	Kane v New Forest District Council [2001] EWCA Civ 878
LCA	Eastleigh Borough Council Landscape Character Assessment 2011
LLFA	Lead Local Flood Authority
Local Plan	Eastleigh Borough Local Plan (2016-2036), April 2022
Lough	Lough v First Secretary of State (2004) 1 WLR 2229
MK	Mr Mark Keeling
Mopac	Compulsory Purchase Order Decision Ref. APP/PCU/CPOP/G6100/326737
Mount Cook	R (Mount Cook Land Limited) v Westminster City Council [2017] PTSR 1166

NE FAB	Flood attenuation basin proposed to the northeast of junction 8
NH	National Highways (formerly Highways England)
NMU	Non-motorised user
NN NPS	National Networks National Policy Statement
NPPF	National Planning Policy Framework
NPPG	National Planning Practice Guidance
NW FAB	Flood attenuation basin proposed to the northwest of junction 8
Order scheme	The M27 Southampton Junction 8 Improvement Scheme The works facilitated by the CPO and SRO
Pascoe	Pascoe v First Secretary of State and the Urban Regeneration Agency [2006] EWHC 2356 (Admin)
PC	Mr Paul Carnell
PCF	Project control framework
PHF	Peak hour factor
PMA	Private means of access
PRC	Practical reserve capacity
Prest	Prest v Secretary of State for Wales [1983] 1 EGLR 17
RIS	Road Investment Strategy
RSA	Road safety audit
Secretary of State	Secretary of State for Transport
SESD	NH's Safety, Engineering and Standards Division
Smith	Smith, Reilly and Reilly v Secretary of State for Trade and Industry [2007] EWHC 1013 (Admin)
SoR	Statement of Reasons
SRN	Strategic Road Network
SRO	The Highways England (M27 Southampton Junction 8 Improvement Scheme - M27 Junction 8 and Windhover Roundabout)(Special Road)(Side Roads) Order 2021
Stonehenge	The Queen on the application of Save Stonehenge World Heritage Site Ltd V SoS for Transport & Highways England & Historic England [2021] EWHC 2161 (Admin)
Swish Estates	Swish Estates Ltd v Secretary of State for Communities and Local Government [2017] EWHC 3331
TCPA	Town and Country Planning Act 1990
Tesco	Tesco Stores Limited v Secretary of State for Environment, Transport and the Regions & Wycombe District Council [2000] QBD
URA	Urban Regeneration Agency
1993 Act	Leasehold Reform, Housing and Urban Development Act 1993