

B E T W E E N:

THE KING (o.a.o TRANSPORT ACTION NETWORK LIMITED)

Claimant

- and -

SECRETARY OF STATE FOR TRANSPORT

Defendant

CLAIMANT'S SKELETON ARGUMENT

FOR FINAL HEARING: 9-10 APRIL 2025

References in the form [CB/x] and [SB/x] are to pages of the Core and Supplementary Hearing Bundles; those in the form [DGR/x] and [SFG/x] are to paragraphs of the Detailed Grounds of Resistance and Statement of Facts and Grounds; those in the form [WS1/CM] and [WS2/CM] are to the first and second witness statements of Dr Catherine Miller. An agreed Chronology, List of Issues, and Essential Reading will be provided in separate documents.

Introduction

1. The existential threat posed by the climate crisis, and the urgency of addressing it, are widely recognised. In its 2021 Net Zero Strategy (“**NZS**”), the then Government stated:

“People are rightly concerned, with the latest IPCC report showing that if we fail to limit global warming to 1.5°C above pre-industrial levels, the floods and fires we have seen around the world this year will get more frequent and more fierce, crops will be more likely to fail, and sea levels will rise driving mass migration as millions are forced from their homes.”
2. The UK ratified the Paris Agreement on 17 November 2016. The Climate Change Act 2008 (“**CCA 2008**”) is the main domestic legislation dealing with climate change. The importance and operation of Parts 1 and 2 CCA 2008 were explained in **R (Friends of the Earth Ltd) v Secretary of State for Business, Energy and Industrial Strategy** [2022] EWHC 1841 (Admin), [2023] 1 W.L.R. 225 (“**Net Zero I**”). In summary:

- a. Section 1 CCA 2008, as amended, requires “*the Secretary of State*” to ensure that the “*net UK carbon account*” in 2050 is at least 100% below the 1990 baseline (the “**Net Zero Target**”), in recognition (internationally and in the UK) of the urgent need to reduce GHG emissions.
 - b. Sections 4 to 10 CCA 2008 provide for five-yearly “carbon budgets”. The Secretary of State must ensure that the net UK carbon account does not exceed the carbon budgets. The sixth carbon budget (“**CB6**”) (for the period 2033-2037) – the first set in line with the Net Zero Target – was adopted on 24 June 2021.
3. Applications for development consent orders (“**DCOs**”) of major road schemes (being examples of Nationally Significant Infrastructure Projects (“**NSIPs**”) are dealt with under the Planning Act 2008 (“**PA 2008**”). PA 2008 provides for National Policy Statements (“**NPSs**”) which, among other things, set out a Statement of Need for relevant NSIPs which cannot then be challenged during decision-making on individual projects. The National Networks National Policy Statement (“**NNNPS**”) applies to major road and rail schemes. It has historically stated a need for, and thus presumed support for, major road schemes. These generate carbon emissions, by increasing road traffic, and also in their construction, and thus add to climate change.
4. Domestic transport generates the largest share of UK carbon emissions of any sector, mostly from petrol/diesel road vehicles, which produced 25% of total UK emissions in 2022 [**CM1 ¶144; CB/143**]. Electric vehicles (“**EVs**”) will help over time, but they are not a complete answer and contribute to non-tailpipe emissions. The Defendant, the Secretary of State for Transport (“**SST**”), agrees: “*we cannot, of course, simply rely on the electrification of road transport, or believe that zero emission cars and lorries will solve all our problems, particularly for meeting our medium-term carbon reduction targets to 2035.*” [**SB/197**].
5. To meet its climate targets, the UK must also thus reduce the growth in distance travelled by road vehicles (“**car-km**”, for short) – by switching journeys to other modes (“**modal shift**”) and/or by reducing the overall distance travelled (“**demand management**”). Again, the SST seemingly agrees: in his 2021 Transport Decarbonisation Plan (“**TDP**”), the first of the “*Strategic priorities*” was “*Accelerating modal shift to public and active transport*” [**SB/207**]. The TDP also promoted policies,

such as ridesharing and car clubs, that manage demand by reducing total car-km, and similarly for freight as well as passenger travel [**SB/199**].

6. The NNNPS sets decision-making tests to be applied to road DCO applications. The tests include consideration of carbon emissions (including emissions arising from additional traffic). Insofar as an NNNPS establishes a ‘need’ for road schemes it necessarily constrains the ability of the SST to encourage demand management and modal shift, for example, by reducing the need for public transport schemes.
7. The NNNPS, which had been written in 2014 and designated in 2015 (“**the 2015 NNNPS**”), pre-dated the Paris Agreement, the Net Zero Target and the TDP. As explained further below, those developments prompted the SST to undertake a review of the 2015 NNNPS under section 6 PA 2008 in 2021.
8. Pursuant to permission granted by Lieven J [**CB/103-104**], the Claimant challenges the legality of the decision taken on 24 May 2024 under section 5(1) PA 2008 to designate an amended NNNPS (“**the 2024 NNNPS**”):¹
 - a. **Ground 1:** The consultation on the Draft NNNPS (defined below) was unlawful, because the Minister did not conscientiously consider the substance of the Claimant’s responses on modal shift and demand management.
 - b. **Ground 2:** The Minister failed to provide lawful reasons as to how the 2024 NNNPS could maintain reliance on the policies in the TDP, notwithstanding the judgment in **Friends of the Earth v Secretary of State for the Department for Energy and National Security** [2024] P.T.S.R. 1293 (“**Net Zero II**”).
 - c. **Ground 3:** The SST unlawfully failed to re-consult on the Revised NNNPS, following post-consultation amendments. Neither the SST nor the Minister decided for themselves (as they were required to do) whether the amendments materially affected the NNNPS policy, so that they could rely on section 6A PA 2008 to avoid further consultation.

¹ In law the decision of the SST, but here taken by a Minister – see ¶167 below.

NATIONAL POLICY STATEMENTS

9. Part 2 PA 2008 provides for NPSs. By section 5(1), a Secretary of State (“**SS**”) may designate an NPS for specified development. The SS must first carry out an Appraisal of Sustainability (“**AoS**”) of the proposed NPS (see section 5(3)) and comply with (i) the consultation and publicity requirements of section 7 and (ii) the parliamentary requirements of section 9 (see section 5(4)). By section 5(7)-(8), the NPS must give reasons for the policy it sets out which must explain, in particular, how the policy takes account of Government policy on climate change mitigation and adaptation.
10. By section 6(1), the SS must review an NPS whenever he thinks it appropriate to do so. By section 6(3), when deciding whether to review an NPS, the SS must consider whether, since the statement was first published (or later reviewed)
- “(a) [...] there has been a significant change in any circumstances on the basis of which any of the policy set out in the statement was decided,
 - (b) the change was not anticipated at that time, and
 - (c) if the change had been anticipated at that time, any of the policy set out in the statement would have been materially different.”
11. A review under section 6 PA 2008 accordingly deals with “*a contention that a policy, or the basis for a policy, has been overtaken by events, or has become out of date*”: **R (ClientEarth) v SSBEIS** [2020] PTSR 1709 (“**ClientEarth**”), [108], see also [38]. Following a review, the SS may, by section 6(5), amend an NPS, withdraw it, or leave it as it is. By section 6(7), he may only amend an NPS if the proposed amendment has complied with both the consultation and the publicity requirements of section 7, and the parliamentary requirements of section 9. Section 6A applies to the interpretation of section 5(4) and 6(7) and contains two deeming provisions that obviate the need for further consultation and publicity where an NPS is to differ from the consultation draft, if specified conditions are met. Insofar as relevant here, by section 6A(2) the conditions are met if the consultation and publicity requirements
- (a) “[...] have been complied with in relation to a different [...] proposed amendment (“the earlier proposal”);

- (b) the final proposal is a modified version of the earlier proposal, and
- (c) the Secretary of State thinks that the modifications do not materially affect the policy as set out in the earlier proposal” [underlining added].

FACTUAL BACKGROUND

12. The 2015 NNNPS relied on the Carbon Plan 2011, then the national carbon reduction strategy [[**SB/744-745**], ¶5.18] to meet the section 1 CCA 2008 target at that time: an 80% reduction by 2050.
13. The Net Zero Target was adopted with effect from 27 June 2019.² On 14 July 2021, the SST published the TDP, a document whose purpose was to “*set out a series of actions and timings that will decarbonise transport by 2050 and deliver against carbon budgets along the way*” [**SB/747**].
14. The TDP also signalled a review of the 2015 NNNPS (the “**Review**”), the need for which was explained by the SST in a formal announcement on 22 July 2021 [**SB/14**]:

“The current National Policy Statement (NPS) on national networks, the government’s statement of strategic planning policy for major road and rail schemes, was written in 2014 – before the government’s legal commitment to net zero, the 10 point plan for a green industrial revolution, the new sixth carbon budget and most directly the new, more ambitious policies outlined in the transport decarbonisation plan. [...]

“This review will include a thorough examination of the modelling and forecasts that support the statement of need for development [...] that planning decisions must take into account.”
15. In May 2022, the Claimant responded to the consultation on the scoping report for the AoS and raised concerns about its “*lack of connection*” with “*modal shift policy*” in the TDP [**SB/25** ¶1.3]. It proposed specific assessment criteria, such as accelerating modal shift from road to public transport, increasing vehicle occupancy, and increasing modal shift in freight [**SB/31**], all of which are TDP policies.

² By The Climate Change Act (2050 Target Amendment) Order 2019, S.I. 2019/1056

16. On 23 May 2022 and consistent with that response, a ministerial submission advised on the strategic themes underpinning the Statement of Need (“**SoN**”), including modal shift [**SB/54**, ¶¶4-5], on proposed interventions to meet the need (in the form of road capacity enhancements [**SB/58**], and on alternatives [**SB/59-60**]. One of the reasonable alternatives proposed for the purposes of the AoS and the necessary Habitats Regulation Assessment (“HRA”) involved a “[g]reater focus on managing congestion through demand management” [**SB/55** ¶6(b)]. However, on 15 July 2022, the SST rejected that advice and personally said demand management should not be part of the alternative scenario being consulted upon [WS/CM1, ¶32; **CB/140**].
17. A draft revised NPS (the “**Draft NNNPS**”) was laid before Parliament on 14 March 2023 for public consultation from 14 March to 6 June 2023 (the “**Consultation**”). The consultation webpage said its “*principal purpose*” was “*to identify whether the draft revised national policy statement presented is fit for purpose. This means whether it provides a suitable framework to support decision making for nationally significant infrastructure road [...] projects*” [**SB/296**]. In parallel, the Transport Select Committee (“**TSC**”) called for evidence on the Draft NNNPS on 24 March 2023.
18. A key change in the Draft NNNPS was its approach to carbon emissions. The 2015 NNNPS said consent should only be refused for major road schemes where emissions would have a material impact on the Government’s ability to meet its carbon reduction targets [**SB/10**, ¶5.18] (“**the Material Impact Test**”). That very high threshold for an led to comparing the emissions from an individual project against the whole economy-wide carbon budget. That inevitably produced a very small percentage figure which obscured the significance of those emissions in the context of regional and sectoral ambition to tackle climate change. It never (to the Claimant’s knowledge) resulted in refusal of development consent – indeed ¶5.17 of the 2015 NNNPS stated that it was “*very unlikely*” to be met [**SB/10**]. Importantly, the Draft NNNPS proposed dropping that presumption against refusal, instead stating that [**SB/256**, ¶5.37]:

“Operational emissions will be addressed in a managed, economy-wide manner, to ensure consistency with carbon budgets, net zero and our international climate commitments. Therefore, approval of schemes with

residual carbon emissions is allowable and can be consistent with meeting carbon budgets, net zero and the UK's Nationally Determined Contribution. “

19. The Draft NNNPS also newly required applicants to complete a carbon management plan which ‘should include assessment of the level of residual emissions and

“the impact of those [residual emissions] on national and international efforts to limit climate change, both alone and where relevant in combination with other developments at a regional or national level, or sector level, if statutory sectoral targets are developed and come into force” [SB/255, ¶5.31].

20. The reference to assessments at a regional or sectoral level was an important innovation in the Draft NNNPS, given that (as above) the assessment required by the 2015 NNNPS (against the economy-wide carbon budget) inevitably obscures the significance of scheme emissions, which conversely is more clearly revealed by setting them in the context of the emission reduction effort required (to achieve net zero overall) in the geographical area or economic sector which the project occupies.

21. The Draft NNNPS was accompanied by an AoS. Appendix 3 of the AoS noted the reliance placed on the TDP, but continued [SB/189]:

“There is uncertainty over several factors relating to decarbonising road transport, including of the rate of the transition to low emission vehicles and management of demand. Overall, this effect is considered uncertain. There could be an increase in emissions, but there is uncertainty in the assessment due to lack of modelled evidence and uncertainties around the effectiveness of carbon reduction measures.”

22. The Claimant responded on 6 June 2023 [SB/304-329], emphasising the importance of infrastructure in delivering net zero and calling for road schemes to be subject to a “net zero test” as the Climate Change Committee (“CCC”) had advised [SB/320-321]. It referred to modal shift and demand management, for example:

- a. The National Road Traffic Projections (“NRTTP”) [SB/66-153] had assumed traffic growth and, in turn, informed the Draft NNNPS statement that “*continued absolute traffic growth is likely under all scenarios*” [SB/236, ¶3.31]. The Claimant quoted work done by the Government Office for Science, which sets

out four scenarios – two of which involved less driving, one with a reduction of 20% [SB/308]. The Claimant proposed that the SoN should recognise the effect on demand of policies such as improving public transport, or enabling car sharing and higher occupancy rates, which (as the SST’s witness acknowledges [WS/CM2, ¶43, CB/167]) are TDP policies.

- b. The Claimant noted that the SoN should consider the important role of modal shift required to meet net zero [SB/308-309]. The Claimant queried the reliability of the ‘need’ case, when – even with record road spending – congestion on the SRN is set to double [SB/309]. It, therefore, called for the needs case to be ‘reset’ to reflect a “*decisive shift from high carbon infrastructure to that required to deliver modal shift, higher occupancy and electrification*” [SB/319]; in particular “*aligning the statement of need with the TDP’s first priority of accelerating modal shift*” [SB/321]
- c. Even before the **Net Zero II** case, the Claimant noted that the Carbon Budget Delivery Plan (“**CBDP**”), produced by the Secretary of State for Energy Security and Net Zero (“**SSESNZ**”) by Order of Holgate J in **Net Zero I**, accepted that the policies in place would only “*meet 92% of reductions necessary to meet the Nationally Determined Contribution in 2030 and miscalculations regarding hybrid cars and HGVs were largely to blame.*”³ [SB/319]

23. Officials produced a revised NNNPS following consultation (“**the Revised NNNPS**”). Among other things, they (i) re-instated the Material Impact Test (WS/CM1, ¶57, [CB/147]) and (ii) removed references to sectoral and regional carbon assessment (WS/CM1, ¶¶58-59, [CB/147]). The amendments effectively meant that the Revised NNNPS reverted to the 2015 NNNPS, notwithstanding the SST’s recognition that the 2015 NNNPS had required revision because of developments in climate change policy and legislation since 2015.

24. It was agreed on 2 June 2023 that the consultants who had produced the AoS would review the revisions to determine if they had an impact on AoS scoring (WS/CM1, ¶40, [CB/142]). The consultants concluded that they did not. (This was later communicated

³ See the Technical Annex to the CBDP, ¶¶20-22 and Table 3 [SB/275/276-276/277]

in a “high-level assessment” in the first paragraph of an updated AoS published on 6 March 2024 (the appendices to which were unchanged) (WS/CM1, ¶42, [CB/143]); further explanation was then provided in the post-adoption statement published on 24 May 2024 (WS/CM1, ¶43) [CB/132]; [SB/691, Section 5].)

25. On 28 June 2023, the CCC reported to Parliament on Government progress in reducing emissions: “*the draft [NPSNN] needs to be clearer on the network’s role in reducing traffic growth rather than simply meeting the demand projected*” [SB/380].

26. On 17 October 2023 (in the “**Committee Report**” [SB/404-437]) the TSC criticised the lack of transparency in the SoN, the failure to consider sufficient traffic demand scenarios, including scenarios of no growth and traffic reduction, and the lack of clarity and alignment with net zero [SB/408].

27. On 6 February 2024, ministers were provided with a briefing [SB/456-458] on the final version of the Revised NNNPS, which was included as Annex A [SB/460]. Other Annexes included [SB/458]:

- a. An ‘Outline of Changes to the NNNPS’ (Annex G, [SB/570-573]). This document identified changes between the 2015 NNNPS and the Revised NNNPS; its focus was not changes between the consultation Draft NNNPS and the Revised NNNPS; and
- b. An Environmental Principles Policy Statement (“**EPPS**”, Annex L [SB/598-617]). The EPPS noted that policies to decarbonise transport were contained in the TDP and CBDP. It cited the assessment in CBDP that “*we still have a reasonable to high level of confidence that the proposed policy package will deliver in line with what is needed to enable carbon budgets to be met.*” [SB/606, ¶13] However, it also noted that the AoS had considered greenhouse gas emissions were uncertain, which “*arises from uncertainty around factors relating to decarbonising road transport*” ([SB/603, ¶4]); WS/CM1, ¶¶ 60-63 [CB/147-148]).

28. On 6 March 2024, the SST published the 2024 NNNPS, along with the final AoS and HRA and a response to the Consultation (the “**Consultation Response**” [SB/648-685]). Repeatedly, the Consultation Response said that responses dealing with modal shift or

demand management had been outside the scope of the consultation. For example, ¶2.21 [SB/659] defined “*encouraging modal shift*” as “*not [a] matter [...] for the NNNPS*”; and ¶2.9 [SB/655] stated:

“A number of [respondents] concerns related to the role of the NNNPS and its ability to address wider transport concerns such as modal shift and public transport. The NNNPS's purpose and function is to provide guidance and clarity about existing government policy to support and inform decisions about applications for the development of NSIPs on the road and rail networks and SRFIs. The NNNPS is not a vehicle for setting out a new transport strategy. Wider questions concerning the overarching transport strategy are therefore beyond the scope of this consultation.” [underlining added]

29. Ministers received a further briefing and recommendation on 23 April 2024⁴, which was re-drafted following the judgment in **Net Zero II** and sent to the ministers on 13 May 2024 (WS/CM1, ¶64 [CB/149], [SB/692-693]). The submission explained that the NNNPS “*allows residual emissions from national network schemes partly on the basis that these emissions are managed in an economy-wide way through carbon budgets*” [SB/692]. It also asserted that “*there remained a reasonable to high level of confidence*” in delivery of the TDP, and that the **Net Zero II** judgment was not a reason to pause designation of the 2024 NNNPS [SB/693].

30. The designation decision was delegated to roads minister, Guy Opperman MP (with whose consideration, rather than that by officials, the court is thus concerned) (WS/CM1, ¶65, [CB/149]). He confirmed on 21 May 2024 he was content to designate the 2024 NNNPS [SB/696] and that was formally done on 24 May 2024.

GROUND 1: UNLAWFUL CONSULTATION ON THE DRAFT NNNPS

The Law

31. Lawful consultation must comply with the Gunning principles, confirmed in **R (Moseley) v Haringey LBC** [2014] 1 W.L.R 3947, ¶ 25: (i) it must be when the decision-

⁴ Not disclosed

maker's thinking is at a "formative stage."; (ii) it must afford adequate information and time; and (iii) it must involve conscientious, open-minded consideration of responses.

32. A proposal will be at a formative stage when "*the views of those consulted might influence it*": **R (Eveleigh) v Secretary of State for Work and Pensions** [2023] 1 W.L.R. 3599, ¶85. The Court will ask whether the decision-maker had any intention of changing his/her mind: **R (Stephenson) v Secretary of State for Housing, Communities and Local Govt** [2019] P.T.S.R. 2209 ("**Stephenson**") at ¶58. A proposal is not at "*a formative stage*" if an option of central significance has already been excluded (**R (Montpeliers & Trevors Association) v City of Westminster** [2005] EWHC 16 (Admin) at ¶25-29), a definite solution has evolved or a central element cannot be changed (**R (Draper) v Lincolnshire CC** [2014] EWHC 2388 (Admin) at ¶17-18 and ¶27).
33. The requirement to give conscientious consideration to responses is a corollary of the requirement that the proposal still be at a formative stage: **R v Barnet LBC, ex p B** [1994] ELR 357, QBD, 375. A decision must be based on a reasonable view of the evidence and the outcome of the consultation must not be predetermined: **R (British Academy of Songwriters, Composers and Authors) v Secretary of State for Business, Innovation and Skills** [2015] EWHC 1723 (Admin) at ¶168.
34. In **Stephenson**, the Court held that the scope of a consultation is to be judged objectively, by what a reasonable reader would understand from the published materials, and if the decision-maker fails conscientiously to consider material relevant to the true scope of the consultation, that will be unlawful (¶67, see also ¶52, 57).
35. By analogy with the EIA regime (see **R (Finch) v Surrey County Council** [2024] UKSC 20 at ¶21), public consultation on the AoS served the important functions of increasing democratic legitimacy and promoting education on environmental matters.

Submissions

36. The Claimant's response was clearly within scope of the Consultation, given: (i) the terms of the Review (that the revised NPS should take into account the Net Zero Target and the ambitious policies in the TDP and (ii) the open-textured nature of the Consultation, the "*principal purpose*" of which was "*to identify whether the draft revised national policy statement presented is fit for purpose*" [SB/296].

37. Further, the consultation document underlined that Chapter 3 of the Draft NNNPS “establishes that there is a compelling need for development of the national networks at the strategic level” and identified challenges and drivers relating to need [SB/234, ¶3.22]. Indeed, the Draft NNNPS relied extensively upon modal shift, especially in Chapter 3 in relation to the SoN: including the assessment and drivers of needs in the context of freight (¶2.3, 3.60, 3.63, 3.64, 3.75, 3.85, 3.87, 3.94, 3.98, 3.100-3.108 [SB/225, 242-244, 246-250]); the general shift from road to rail for decarbonisation (¶3.56-3.57, 3.98 [SB/241, 248]; and when considering the limitations of modelling used to inform the assessment of need, such as the NRTP (¶3.30 [SB/236]): an issue directly addressed in the Claimant’s consultation response (see paragraph 20 above). In any event, the SST’s stated policy intention was to facilitate modal shift to active travel and public transport [SB/257, ¶5.261]) and through modal shift to rail freight [SB/253, ¶4.83]. The “heart of the [TDP]” was said to be “enabling more active travel and public transport” and this was listed as the first intervention “make the best use of all road capacity (not just the SRN) which may impact upon demand for the SRN” [SB/238, ¶3.42] In addition, the consultation document made clear that the Consultation sought views on the AoS [SB/283] – which of course set out the ‘reasonable alternatives’ to the NNNPS policy.

38. The consultation questions plainly allowed for (and would not be taken by the reasonable reader to rule out of scope) any such responses:

- a. Question 4 asked if the draft provided suitable information to those engaged in the DCO application process [SB/287];
- b. Question 5 sought views on whether the draft adequately set out: (a) “the need for developing national networks”; and (b) the government’s “policy for addressing the need for the development of national networks” [SB/288];
- c. Question 12 asked whether “the draft NNNPS adequately address: a. carbon considerations in the development of national networks [...]” [SB/290]
- d. Question 16 asked: “Do you agree with the findings of the appraisal of sustainability?” [SB/290]

39. Accordingly, a reasonable reader would have formed the view that consideration of modal shift, and relatedly increasing occupancy and demand management, were within the scope of the consultation: **Stephenson** at ¶ 52.
40. There was anyway an obvious link between: (a) the SoN for the strategic road network; and (b) policies in the TDP, which affect levels of demand for road transport and, therefore, any need for road infrastructure. The Claimant's consultation response raised concerns that the impact of TDP policies on the need for road infrastructure had not been properly reflected in the SoN. Far from trying to set out a new transport strategy (as the SST has alleged) such responses sought to ensure coherence between the TDP and NNNPS. Its response was plainly in scope, and thus needed to be conscientiously considered with an open mind at a formative stage of policy development.
41. However, ¶2.9 and ¶2.21 of the Consultation Response (cited above, see also ¶2.50 [SB/669]) make clear that responses were not conscientiously considered by the Minister insofar as they advocated an NNNPS reflecting in its SoN the imperatives of modal shift and demand management. The Minister considered such responses only in that he was told of their existence, so as then to treat them as out of scope.
42. That was a legal error: on a reasonable interpretation of the consultation, such responses were in scope. Moreover, the question of 'need' for road enhancements, once settled in the NNNPS, is not then a matter that can be challenged (such as by advocating demand management or modal shift as alternatives) during DCO application consideration (**R (Spurrier) v Secretary of State for Transport [2020] PTSR 240, ¶110; ClientEarth, ¶106**). That made it particularly important that views of consultees on that issue were conscientiously considered during the development of the NNNPS and the establishment of the 'need' case (as per section 5(5) PA 2008).
43. Contradicting that, the Defendant nonetheless suggests the Minister did somehow conscientiously consider responses dealing with modal shift and demand management (DGR ¶33 [CB/117]). Having said demand management and modal shift were out of scope (and thus already been excluded (**Montpeliers (supra), Draper (supra)**)), the suggestion that these responses were still considered with an open mind is untenable: the very paragraphs cited in the DGR as demonstrating conscientious consideration are

those in which these matters are declared to be out of scope. Nor is there is any mention of the Defendant having considered the related issue of increasing occupancy.

44. The Defendant relies, as supposedly demonstrating that consideration, on the fact that the Mode-Balanced Decarbonisation and Behaviour Change scenarios were taken into account (WS/CM2, ¶29, **[CB/162-163]**). But these scenarios still assumed traffic growth (even if lower than the NRTP Core Scenario) (ibid, 2024 NNNPS, ¶3.29 **[CB/200]**). Both the Draft NNNPS and the 2024 NNNPS stated that “continued absolute traffic growth is likely under all scenarios [...]” (¶3.31, **[CB/200]**). Further, even though the Defendant took the decision not to rely on a ‘predict and provide’ model, it is apparent that the NRTP are deployed to understand “*drivers of travel demand and how they impact on traffic levels, congestion and emissions*” (WS/CM2, ¶18-19, **[CB/159]**). As set out above at paragraph ¶23, however, the Claimant was concerned precisely because the NRTP scenarios all assumed traffic growth. Its consultation response called not just for the need to model any alternative scenarios, but those that demonstrated a reduction in traffic levels, or at least an end to growth (cf. DGR, ¶30, **[CB/115]**). The points raised by the Claimant relating to the SoN were thus not conscientiously considered (cf. DGR, ¶30, **[CB/115]**).
45. The Defendant also appears to suggest (at DGR, ¶31 **[CB/116]**) that ¶¶3.42-3.45 of the 2024 NNNPS addressed how modal shift and public transport can impact need for the SRN. But those paragraphs are concerned with the interaction between demand for the local road network and SRN, not the points raised by the Claimant namely: (i) the shift from high carbon infrastructure to that required to deliver modal shift, higher occupancy and electrification and (ii) the impact of car-sharing and higher occupancy on the SoN.
46. The Defendant states he was entitled to treat other points raised by the Claimant in its consultation response as beyond the scope of the NNNPS and relating to wider transport policy (DGR, ¶32, **[CB/116]**) – see by Dr Miller (WS/CM, ¶75, **[CB/152]**). But again that simply confirms that the Claimant’s points were not conscientiously considered. It seems that that the Defendant anyway failed to understand points being made by the Claimant that were relevant to the SoN: for example, on public transport, the Claimant raised the integration between local public transport and longer distance services and coach travel, requiring enabling infrastructure on the SRN **[SB/316]**.

47. The Defendant's witness offers her own reasons why the Claimant's points on demand management were not addressed, namely that these are matters for the Treasury and not, in any event, government policy (DGR, ¶32, [CB/117]). This reasoning is legally irrelevant for two reasons: (i) it is after the event and (ii) it is from officials not the Minister or Secretary of State: see **Net Zero Case** at ¶256.
48. For these reasons, the Minister unlawfully failed to give conscientiously consideration to consultation responses that were in scope.
49. The DGR (¶37-38 [CB/119-120]) seek to argue that, even if Ground 1 succeeds, relief should be refused under s.31(2A) Senior Courts Act 1981. The burden is on the Defendant, by way of witness statement, to support the counterfactual analysis for such an argument, and the threshold is very high: **R (Strongroom Limited) v LB of Hackney** [2024] EWHC 1221 (Admin) ¶28, ¶71⁵. Here, it is untenable to suggest that it is 'highly likely' the outcome would have been the same, if the Minister had conscientiously considered a matter that he was required to, but did not, consider. By definition, if the Court has reached this stage of the analysis, the matter left out of account was relevant to the exercise of revising the NNNPS and significant enough to be material, and therefore may well have resulted in a different NNNPS. That is plainly the case in relation to the Claimant's responses, which called for a different SoN. The exercise would anyway involve the court "*straying [...] into the forbidden territory of assessing the merits*" and casting itself into the role of decision-maker (**R (Plan B Earth) v Secretary of State for Transport** [2020] EWCA Civ 214, ¶273; **R (Cava Bien Ltd) v Milton Keynes Council** [2021] EWHC 3003 (Admin), ¶52(xi)).

GROUND 2: FAILURE TO PROVIDE LAWFUL REASONS FOR ADOPTING A POLICY APPROACH IN THE NNNPS THAT RELIES ON THE EFFECTIVE DELIVERY OF TDP POLICIES NOTWITHSTANDING THE JUDGMENT IN NET ZERO II

Background

⁵ Where Lang J could not determine what would have happened, had a lawful consultation been undertaken, ¶65, ¶68

50. On 14 July 2021, the SST published the TDP. In October 2021, the Net Zero Strategy (“**NZS**”) was laid before Parliament; it was subsequently declared unlawful in **Net Zero I**. In March 2023, the CBDP was published to supplement the NZS and purportedly remedy its legal defects. Both the NZS and CBDP explicitly relied on policies in the TDP for the transport sector to play its part in meeting CB6 and the Net Zero Target.

51. Those same ‘non-planning’ policies then informed the climate change policy test in the 2024 NNNPS. The starting point was that:

“Government’s [TDP] demonstrates how we will deliver transport’s contribution to emissions reductions in line with net zero, much of which has already been delivered or is in progress.” [CB/192, ¶2.24]

52. From that starting point, the premise of the 2024 NNNPS carbon decision-making test was the effective delivery of the non-planning policies:

“Operational carbon emissions from some types of national network infrastructure cannot be totally avoided. Given the range of non-planning policies aimed at decarbonising the transport system, government has determined that a net increase in operational carbon emissions is not, of itself, reason to prohibit the consenting of national network projects or to impose more restrictions on them in the planning policy framework” [CB/240, ¶5.41].

53. Effective management of these operational carbon emissions as part of the economy-wide approach were then made integral to the whole NNNPS policy approach:

“Any carbon assessment will include an assessment of operational carbon emissions, but the policies set out in chapter 2 of this NPS, apply to these emissions. Operational emissions will be addressed in a managed, economy-wide manner, to ensure consistency with carbon budgets, net zero and our international climate commitments. Therefore, approval of schemes with residual carbon emissions is allowable and can be consistent with meeting net zero” [CB/240, ¶5.42, emphasis added]

54. In other words: the extra carbon emissions arising from road expansion would have to be offset by TDP policies, and changes elsewhere in society and the economy.

55. Critically, the NNNPS assumed the effective management of the operational emissions at the economy-level, by means of the TDP policies, which it further assumed will be delivered effectively and on time (notwithstanding the uncertainty expressed in the AoS [SB/189] and EPPS [SB/603, ¶14] on this point). Indeed, that understanding was repeated in the 13 May 2024 ministerial briefing, which explained residual emissions were permitted as they would be “*managed in an economy-wide way*” [SB/692, ¶16]. Moreover, the 2024 NNNPS relied not only on the effective delivery of the TDP policies (adopted for the CDBP), but by necessary implication on the effective delivery of policies for all other sectors: otherwise, transport would be required to make greater reductions to compensate for shortfalls in other sectors, and the TDP policies would be insufficient to achieve carbon targets, even if delivered in full. That is the logical consequence of the NNNPS approach of relying on the management of emissions “*in an economy-wide way*” – there must be reasonable confidence that all of the pieces of the economy-wide jigsaw will fall into place, not solely those relating to transport.

56. However:

- a. By the date of the Decision, the UK Government had announced policy and funding changes that diluted key commitments in the TDP: for example, in September 2023, the Prime Minister announced a delay in the ban on sales of new internal combustion engines and in October 2023 the SST cancelled guidance on active travel. TAN in its consultation response cited academic analysis that concluded that “*most of the TDP’s ambition has been abandoned*” as a result of these and earlier changes [SB/320].
- b. On 3 May 2024, three weeks before the Decision, Sheldon J in **Net Zero II** declared that the government’s economy-wide carbon reduction strategy, the CDBP, was unlawful: the SSESNZ had erroneously proceeded on the basis that each of the proposals and policies in the CDBP would be delivered in full, but that was a mistaken understanding of the factual position and irrational. Further, the SSESNZ had not been provided with sufficient information to discharge his section 13(1) duty. That analysis relates to all sectors, including transport.

Submissions

57. Following **Net Zero II**, the Defendant could no longer assume (as the SSESNZ had been held wrongly to have done) that the TDP policies (some of which had already been cancelled, delayed or diluted) would be delivered in full, such that the NNNPS could dispense with consideration of modal shift and/or demand management.
58. As above, on 13 May 2024 the Minister received a specific briefing on the **Net Zero II** decision, which told the Minister he could maintain the policy approach set out in the NNNPS [SB/692-693]. However, it failed to recognise the full implications of the CBDP judgment, which was concerned with the CBDP's approach to delivery risk across all sectors (that being exactly the point of Sheldon J's conclusion). What the CBDP narrowly said about the delivery risk to the policies in the TDP misses the point: whether or not the TDP policies were achieved, they could no longer be regarded as part of an "economy-wide package of policies" that would meet net zero, because that overall package had been ruled unlawful, due to its inadequate approach to delivery risk.
59. That entirely undermined the policy approach of the carbon emission policy in the proposed NNNPS. The SST/Minister needed – at the very least – properly to grapple with that and explain (if they could) how the NNNPS policy approach could be sustained without a lawful economy-wide package in place on which it could rely. But they failed to do so. The Minister simply agreed with the briefing, so he cannot be taken to have considered any matters not contained in the briefing [SB/696], and it is not suggested that the SST addressed the issue. Given that (i) officials determined that it was necessary to update the ministerial advice in light of **Net Zero II**, (ii) the Minister took a decision on the policy approach in light of this judgment, (iii) it had been recognised by the Department that consultees were concerned with whether the approach in the NNNPS aligned with net zero, and (iv) the issue was high profile [SB/605, ¶19], reasons should have been provided in the NNNPS setting out the decision on this "principal important controversial issue" (**South Bucks District Council v Porter (No 2)** [2004] 1 W.L.R. 1953, ¶ 36. No reasons at all were given in the NNNPS itself addressing this issue or setting out how the Defendant reached his judgment.
60. That is a breach of sections 5(7)-(8) PA 2008, which specifically required reasons for how the 2024 NNNPS took into account Government policy on climate change mitigation. That breach rendered the NNNPS unlawful.

GROUND 3: FAILURE TO RE-CONSULT ON THE REVISED DRAFT NNNPS FOLLOWING MATERIAL CHANGES AS A MATTER OF FAIRNESS / THE SST FAILED TO DECIDE FOR HIMSELF WHETHER RE-CONSULTATION WAS REQUIRED

Background

61. As above, the trigger for the review of the 2015 NNNPS included the significant and unanticipated changes in international and domestic climate change policy, which (had they been anticipated) would have led to a materially different policy.

62. The ministerial briefing (at that stage advising on the NPS review) on 8 July 2021 had specifically noted that these changes called into question the Material Impact Test in the 2015 NNNPS, and the steer that it was unlikely to be met (**Transport Action Network v Secretary of State for Transport** [2022] EWHC 503 (Admin) at ¶21, emphasis added):

“The [TDP] recognises significant developments that have affected road demand and will impact on future traffic growth, and specifically commits to keeping road emissions stable in the medium term. This is a substantial policy change unanticipated at the time of designation, and invites a reconsideration of the assumption in para 5.17 of the NNNPS that 'it is very unlikely that the impact of a road project will, in isolation, affect the ability of government to meet its carbon reduction plan targets'.”

63. As described above, consistently with the advice of officials, the Draft NNNPS had reconsidered (and proposed removal of) the Material Impact Test, replacing it with the more open statement at ¶5.37 [**SB/256**] that “*approval of schemes with residual carbon emissions is allowable and can be consistent with meeting carbon budgets, net zero and the UK's Nationally Determined Contribution.*”

64. However, the Revised NNNPS, and the final, designated 2024 NNNPS re-instated the Material Impact Test at ¶5.42 [**CB/240**].

65. Moreover, the 2024 NNNPS removed the references to assessment against regional or sectoral targets from ¶5.31 of the Draft NNNPS [**SB/255**] (see paragraph 20 above). The equivalent paragraph in the 2024 NNNPS merely required applicants to assess “*the*

level of [residual] emissions and the impact of those on any relevant statutory carbon budgets” [CB/239, ¶5.35].

Submissions

66. PA 2008 requires that a designated NPS must have been consulted on (PA 2008, s 5(4)). That does not, of course, mean that the final version must be exactly the same as the version consulted on – that would be odd for a consultation process. However, PA 2008 sets out a mechanism for determining whether changes from a consultation draft require there to be re-consultation (thus putting in the statute what is elsewhere dealt with as a question of common law fairness).
67. In particular, as set out above, section 6A PA 2008 obviates the need for further consultation and publicity but only where amendments are made to draft NPSs in respect of which a consultation has already been carried out and provided certain conditions are met. Those conditions include that post-consultation modifications “*do not materially affect the policy*” in the proposal that was subject to consultation. It is not in dispute (see DGR ¶52 [CB/125]) the Minister himself (as the delegated decision-maker) needed to consider whether the amendments were material and so whether re-consultation was required in accordance with sections 5(4) and 6(7). That is because sections 6A(2)(c) and (3)(c) focus on whether “*the Secretary of State thinks*” that the modifications materially affect the policy.
68. But the Minister did not here consider that question: there was no ministerial briefing on this issue. He was not asked to decide for himself whether the amendments were material and therefore necessitated re-consultation. Certainly there was no decision to that effect in the Ministerial read-out of 21 May 2024 that approved designation [SB/696-699]. On the contrary, officials and consultants decided that the two changes to the draft NNNPS were not material because they did not require a revised AoS (WS/CM, ¶¶40-41, 57, 59, [CB/142, 147]). There was thus a failure even to consider lawfully whether further re-consultation was required.
69. The Defendant says that the Minister had material before him from which he could deduce the extent of the post-consultation changes [DGR ¶52 [CB/125]; WS/CM2, ¶50, [CB/169]]. However, the Minister was not told, in either the 6 February or the 13

May submission [SB/456-459; SB/692-693], that he needed to decide whether the changes were materially different and his attention was not drawn to the requirements of s.6A or to the relevant changes. The document ‘Outline of changes made in the revised NNNPS’ [SB/570-572], that was annexed to the 6 February submission, focussed on the differences between the 2015 and 2024 NNNPSs, not on the differences between the pre-consultation Draft NNNPS and the Revised NNNPS that the Minister was being asked to lay before the House – and so unsurprisingly, that is how it was described to the Minister:

“The current NNNPS was designated in 2015. Changes in legislation and policy means that it is now out of date which increases the risk of challenge to individual schemes. A summary of changes to the revised NNNPS is attached at Annex G.” [SB/456, ¶14]

70. While that document did note that the Material Impact Test had been re-inserted, it did not explain the significance (or otherwise) of that change, and the Minister was not told that he had to assess the materiality of the change, relative to the consultation Draft NNNPS, or the need for reconsultation. There is simply no evidence that he addressed his mind to the statutory conditions, as the law required him to: it was necessary not only for the changes not to be material, but for the Secretary of State (or his delegated Minister) to think that they were not material. The court cannot assume or infer that the Minister made a decision on a specific statutory question to which he was not referred (and to which he did not refer), simply because he could have answered the question.

71. If it matters (and the Claimant says the court does not need to address the question), it is very likely that the changes would have been considered material by the Minister, had he had his attention drawn to them (and, in any event, the Defendant does not here rely on section 31(2A) Senior Courts Act 1981):

- a. The re-introduced Material Impact Test is impossibly high: it has never (to the Claimant’s knowledge) resulted in refusal of development consent for an individual scheme and is never likely to (as was acknowledged in ¶15.17 of the 2015 NNNPS itself [SB/10]). Its removal from the draft NNNPS was therefore an important development that allowed for GHG emissions from road schemes to be considered in a more nuanced way. As is apparent from the ministerial

briefing on 8 July 2021 (see ¶62 above), the stringency of this test was a key factor supporting the need to review the 2015 NNNPS, and this contemporaneous evidence should be preferred to the self-serving *ex post facto* evidence at WS1/CM, ¶53 [CB/145-146], namely that there was no intention to make a significant change from the previous test. In any event, the court is invited to refuse to admit that evidence, which contradicts the contemporaneous documents or, at the very least, attempts to fill the vacuum presented by those documents (**R (United Trade Action Group Ltd) v Transport for London** [2021] EWCA Civ 1197 [2022] R.T.R 2, ¶125); see also **Net Zero Case** at ¶256. Even if the court accepts the evidence, Dr Miller's explanation as to why the change was made is not convincing and only serves to emphasise that the issue should have been properly considered by the Minister following a briefing. She suggests that the change arose because the TSC suggested the draft NNNPS should define "residual" emissions so that those that are acceptable can be distinguished from those that are not (WS/CM1, ¶56 [CB/146-147]). Rather than the DfT following that recommendation and defining "residual" emissions, Dr Miller states that officials decided to reinsert the material impact test (WS/CM, ¶ 57 [CB/147]).

- b. The removal of the references to regional impacts and statutory sectoral targets if they are developed and come into force, which built in essential flexibility into the NNNPS. The only justification for this change is given by Dr Miller (and after the event, so the Claimant again submits that this evidence is inadmissible): that the amendment better reflected the current legal framework (WS1/CM, ¶59, [CB/147]). However, that ignores that the draft had specifically stated "*where relevant*", and so built necessary flexibility into the NPS, noting that it would be in force for a significant period of time [SB/255]. In any case, it does not mean the changes are not material:

- i. As for potential sectoral targets: the draft NNNPS importantly left the door open for future legislative changes, including the introduction of a statutory sectoral target, which was a key aspect of the draft NNNPS, given: (i) the pressing need to reduce emissions from surface transport;

(ii) the CCC advice; (iii) the delivery risks to policies relied upon by the Government and the recent declaration that the CBDP was unlawful; (iv) the fact that applications for DCOs must be determined in accordance with the extant NPS (subject to certain exemptions) (PA 2008, section 103-104(3)); and (v) that the merits of an NPS cannot, at the DCO stage, be challenged (PA 2008, section 106(1)(b));

- ii. As for regional targets: one ‘unquantified policy’ relied on in the CBDP was to “*Drive decarbonisation and transport improvements at a local level by making quantifiable carbon reductions a fundamental part of local transport planning and funding.*” While this policy intervention was focussed on local transport planning, documents disclosed in the **Net Zero II** litigation show that the Defendant became concerned that ‘Quantifiable carbon reductions’ (“QCRs”, in other words, local to regional carbon targets) would prevent the delivery of national road schemes. The ‘delivery risk’ associated with this policy stated “*DfT is also seeking advice from King’s Counsel (KC) to explore further if there are possible legal risks that the QCR guidance will present for the development of national or large local transport infrastructure schemes*” [SB/20]. The mitigation for that risk was said to be that “*any necessary amendments [will be] made to the [QCR] guidance to mitigate potential risks to scheme development, if advice suggests that these are material*” [SB/20]. Draft QCR guidance dated April 2023 (after the CBDP) does now go out of its way to emphasise that QCRs should not be “*treated as a local decarbonisation target in the determination of planning applications for transport schemes or in applications for development consent for national and regionally significant transport infrastructure projects*” [SB/303]. Clearly, the potential for the development of regional targets, and the requirement in the Draft NNNPS to assess scheme emissions against them, was considered a material risk to delivery of road NSIPs. It follows that removing references to regional targets was a material change to the NNNPS,

since it removed that ‘risk to delivery’ or – as the Claimant would have submitted had the proper consultation been carried out on this change – it removed a new and more meaningful layer of carbon assessment from the Draft NNNPS.

72. The removal of wording relating to regional and sectoral targets was thus a material change, because it now means the only benchmark for assessing a scheme’s carbon emissions is the economy-wide carbon budgets (and that would remain so even if other targets were introduced, unless the cumbersome process of NPS review was undertaken again). It was a proposed amendment and material change that should have been consulted on, as required by PA 2008 section 6(7), 6A and 7.
73. The Secretary of State relies on Holgate J’s judgment in **R (Save Stonehenge World Heritage Site Limited) v Secretary of State for Transport** [2024] EWHC 339 to argue that re-introducing the Material Impact Test made no difference (¶151(a) [CB/123]). But Holgate J was simply concerned (at ¶255) with the rationality of a particular paragraph in the decision letter for that particular DCO. He was not concerned with differences between the draft and final versions of the NNNPS, and whether those differences were material for the purposes of section 6A.
74. Overall: by section 6A, the Minister needed to decide for himself whether the changes were material. There is no evidence he was advised on this issue or decided it for himself. Rather, officials and consultants decided not to reconsult.
75. Moreover, insofar as they did so by reference to the statutory test, they did so by erroneously conflating whether a change was material to the policy in the NNNPS, with the question of whether it altered the outcome of the AoS. The two are not the same thing, since a material change in policy could relate to a variety of matters that do not necessarily produce a different environmental outcome, or could produce a different environmental outcome at individual scheme level without altering the overall, very high-level AoS outcome.
76. In any event, officials’ conclusion was wrong: the changes made in the Revised NNNPS, subsequently adopted in the 2024 NNNPS, did materially affect the policy set out in the Draft NNNPS.

77. For these reasons, the 2024 was not lawfully designated, because it failed to comply with the consultation requirements of section 7 PA 2008, as required by s.5(4) PA 2008. The conditions for the application section 6A 2008, which would have obviated the need for further consultation, were not met.

Relief

91. The Claimant seeks:

- a. A declaration that the decision to designate the 2024 NNNPS was unlawful;
- b. An order requiring the SST to consult on the 2024 NNNPS, as revised, and review it with an open mind following consultation;
- c. Such other or further relief as the Court considers appropriate; and
- d. Costs.

DAVID WOLFE KC, Matrix

PETER LOCKLEY, 11 KBW

STEPHANIE DAVID, 39 Essex Chambers

18 March 2025