

**HIGH COURT OF JUSTICE**  
**KING'S BENCH DIVISION**  
**ADMINISTRATIVE COURT**

**BETWEEN:**

**THE KING**

**(on the application of TRANSPORT ACTION NETWORK LIMITED)**

**Claimant**

**-v-**

**SECRETARY OF STATE FOR TRANSPORT**

**Defendant**

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**DEFENDANT'S**

**DETAILED GROUNDS OF DEFENCE**

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*References in the format [CB/#] and [SB/#] are to the claim and supplementary bundles  
References in the format [SFG/#] are to the Claimant's Statement of Facts and Grounds*

**INTRODUCTION**

1. These are the Secretary of State for Transport's detailed grounds of defence in relation to the Claimant's application for judicial review of the Defendant's decision, communicated in his written ministerial statement to Parliament of 9 March 2023 ("the WMS") [CB/203-204] to reduce funding for active travel ("AT"), the principal elements of which are cycling and walking.
2. Permission to apply for judicial review was granted by Mr Justice Jay by order dated 26 October 2023.
3. The Defendant submits that none of the grounds have any substantive merit and that the claim should be dismissed.

**FACTUAL BACKGROUND**

4. A witness statement of Jessica Matthew with a bundle of exhibits is filed with these detailed grounds, which sets out the relevant factual background.

5. By way of overview, prior to 2015 funding for AT was piecemeal. This changed with the coming into force of s.21 of the Infrastructure Act 2015 which required the Government to set out a Cycling and Walking Investment Strategy (“CWIS”). The 2015 Act prescribed various requirements for a CWIS including that it should set objectives for cycling and walking to be achieved during the period to which it relates and the financial resources to be made available by the Secretary of State for the purpose of achieving those objectives. The 2015 Act also set out a process that had to be followed before the Secretary of State set or varied a CWIS, including that the Secretary of State should consult such stakeholders as he saw fit.
6. Since 2015, there have been two statutory CWISs. The first (“CWIS1”) covered the period 2016/17 to 2020/2021 and was published in April 2017 following public consultation. The second (“CWIS2”) was published in July 2022 and covered the period 2021/22 to 2024/25.
7. Between CWIS1 and CWIS2, the Government also published in July 2020 a new Cycling and Walking Plan for England, known as the “Gear Change” plan. This was not a statutory CWIS, but a policy statement which set out a long-term vision for a new “golden age” of cycling and walking, building on the changes in behaviour seen during the COVID lockdown. Elements of Gear Change, including its 2030 target for 50% of all short journeys to be walked or cycled, were later incorporated into CWIS2.
8. CWIS1 and CWIS2 have each been broadly aligned with a Spending Review period as a way of providing as much certainty in relation to funding as possible. The 2021 Spending Review (“SR21”) considered the amount of dedicated funding that should be made available for AT over the years 2022/23 to 2024/25, taking into account, among other things, the 2020 Gear Change commitments and also the amount of funding that had already been spent on AT in the first two years of the Parliament. The outcome of SR21 was published in the autumn of 2021, and confirmed that a total of £710 million would be made available for AT over the following three years. This figure informed the statement of financial resources in CWIS2.
9. The DfT undertook a process of targeted consultation on the development of CWIS2 with a range of organisations between June 2021 and February 2022. This included workshops with key AT stakeholders, as well as with a range of other stakeholders including local authority transport and public health officials, disability organisations and the private sector. A full public consultation was not carried out. This was because the Government’s policies and approach to AT had been clearly set out in Gear Change. The DfT had also carried out other public consultations since CWIS1, including on a 2018 CWIS Safety Review and on the changes to the Highway Code that came into effect in 2022. It had also regularly engaged with key cycling and walking stakeholders at quarterly meetings of the CWIS Stakeholder

Advisory Group since 2017. This approach was discussed with and agreed by the CWIS Stakeholder Advisory Group. The responses to the focused consultation informed CWSI2.

10. Funding for AT comes from a wide range of dedicated and non-dedicated funds from across Government, with the dedicated funding (the subject of the changes in the WMS) making up only a relatively small percentage of the total. In practice the overall quantum of funding fluctuates over the period of a CWIS as new funding competitions are announced either by the DfT or other Government Departments or as it becomes clearer how much funding from existing wider funding streams is being spent on AT.
11. CWIS2 was reissued on 10 March 2023. This was to remove an error in the amount of funding available which had included a £225m double counting error. On 2 March 2023 a Ministerial For Information Note was sent to Minister Norman which outlined this error and sought approval to correct it. Approval was given and CWIS2 was accordingly updated on 10 March 2023. This was not a substantive change but a correction. The fact that this was done at or around the same time as the publication of the WMS was co-incidental and the two are not related.
12. Following the correction, Table 1 in CWIS2 provides a projected investment figure for the four years from April 2021 for AT revenue and capital funds (i.e. the dedicated funding for AT) of £1,073 million and total funding of £3,559 million [CB/217].
13. On 22 November 2022 the Chancellor announced in his Autumn Statement that Government Departments, including the DfT, would be required to identify savings to manage inflationary and other pressures. In response the DfT commenced a comprehensive review of all its future spending plans. The review process included a number of Ministerial meetings between December 2022 and March 2023 at which options for savings across different parts of the DfT's portfolio were discussed.
14. The final ministerial submission was dated 9 March 2023. It noted that the DfT faced very significant pressures across a number of its programmes over the next two financial years. The submission advised that a way forward had been found following discussions with HM Treasury which reduced the total amount of pressure on DfT funding through additional funding in relation to HS2 Phase 1 but which required savings to be made across a number of other DfT programmes, principally in relation to strategic roads, rail and other phases of HS2, but which also included AT.

15. Annex A to the submission set out the full package of proposed savings. It included £100m capital savings against AT funding in the years 2023/4 and 2024/25. The total DfT wide savings identified in the submission over those two years was just over £3 billion.
16. The Defendant set out his future funding plans in the WMS. He made clear that a number of factors, including inflationary pressures caused by the war in Ukraine and supply chain disruption, had made it difficult to deliver on the Department's capital programmes. He said that the Department would refocus its efforts to deliver the rest of its capital programme, as a way of placing the Department's transport investments on a sustainable footing and allowing it to support the Government's priorities of halving inflation, growing the economy and reducing debt. The Defendant outlined reductions in spending on, and deferrals of, many schemes and programmes across a wide range of departmental spending programmes, in particular, in relation to strategic roads, rail and HS2.
17. On AT, the Defendant said:

*“We remain committed to supporting all forms of transport and have invested over £850m in active travel between 2020/21 and 2022/23. Despite the need to deliver efficiency in all areas of our budget, we will still commit to spend at least a further £100m capital into active travel over the remainder of the spending period, as part of a total of around £3bn investment in active travel over this Parliament, including from City and Region Sustainable Transport settlements and National Highways. We will review these levels as soon as practically possible.”*
18. The DfT's revenue funding budgets were under particular pressure in March 2023 as a result of the support package for the bus sector which was announced at that time. This support package comprised a three-month extension to the £2 bus fare initiative and to the Bus Recovery Grant programme. The DfT had to identify other revenue funding programmes that could be reduced to pay for this, and AT funding was one of several areas that saw its revenue budget. It was reduced by £25 million in 2023/24.
19. Taken together, the reduction of up to £200 million in dedicated capital funding for AT over the two years 2023/24 and 2024/25 and the reduction of £25 million in dedicated revenue funding for AT in the year 2023/24 amounted a total reduction in dedicated funding for AT of up to £225 million compared to the SR21 baseline. However, at the start of the financial year 2022/23, budgets had evolved across the DfT. This included a £40 million uplift to capital funding that the DfT 'flexed' from 2021/22 into 2022/23 through the annual budget management process. Taking this with the changes announced by the Defendant on 9 March 2023 and the reduction in revenue funding needed to meet the unforeseen pressure caused by

the extension in support for the bus sector, the total reduction in funding across the three remaining years of the SR21 period compared to the baseline was £179 million.

20. The DfT has committed to reviewing the AT capital funding as soon as possible as part of its normal budgetary processes, and the actual size of the reduction will therefore depend on whether it is able to identify further funding for active travel over the course of the 2023/24 and 2024/25 financial years.

## **RESPONSE TO THE CLAIMANT’S GROUNDS OF CHALLENGE**

### **The decision under challenge**

21. The claim is a challenge to the budgetary decision communicated in the WMS made on 9 March 2023: see SFG/1. It is not a challenge to the CWIS2 and any such challenge would be well out of time. The decision communicated in the WMS is a department wide funding decision in light of budget pressures. Dedicated AT funding is a small part of the DfT overall budget and the £179 million AT savings are in turn a small part of the £3 billion in savings identified in the WMS over the years 2023/24 and 2024/25.
22. High-level resource allocation decisions of this sort involve the exercise of a broad discretion involving numerous and competing policy and public interest considerations. They are inherently less susceptible to judicial review as a result. As Lord Neuberger observed in *R (Rotherham MBC) v Secretary of State for Business, Innovation and Skills* [2015] PTSR 322 (a case concerning distribution of European Union funding between different parts of the UK) at [62-63]:

*“62. The importance of according proper respect to the primary decision-making function of the executive is particularly significant in relation to a high level financial decision such as that under consideration in the present case. That is because it is a decision which the executive is much better equipped to assess than the judiciary, as (i) it involves an allocation of money, a vital and relatively scarce resource, (ii) it could engage a number of different and competing political, economic and social factors, and (iii) it could result in a large number of possible outcomes, none of which would be safe from some telling criticisms or complaints.*

*63. Therefore, like Lord Carnwath JSC, I agree with the Court of Appeal that the Secretary of State's decision under consideration in this case is in the “classic territory” where the courts afford the decision-maker “a wide margin of discretion” ... .”*

23. Similarly, in *Friends of the Earth v SSBEIS* [2022] EWHC 1841 at [194] Holgate J observed that the Court’s response to a rationality challenge to policy decisions involves “a low intensity of review, or a “light touch”, a fortiori in relation to policies of a high level, strategic nature”.

24. The Claimant’s allegations of legal error, both in respect of s.21 of the 2015 Act under Grounds 1 and 2 and various material considerations under Ground 3, fail to recognise this context and attempt to draw the Court into issues which are plainly for the Defendant alone.

**Ground 1: “Decision unlawfully inconsistent with the CWIS”**

25. Section 21 of the 2015 Act provides (bold emphasis added):

*“21 Cycling and Walking Investment Strategies*

*(1) The Secretary of State may at any time—*

*(a) set a Cycling and Walking Investment Strategy for England, or*

*(b) vary a Strategy which has already been set.*

*(2) A Cycling and Walking Investment Strategy is to relate to such period as the Secretary of State considers appropriate; but a Strategy for a period of more than five years must be reviewed at least once every five years.*

*(3) A Cycling and Walking Investment Strategy must specify—*

*(a) objectives to be achieved during the period to which it relates, and*

*(b) the financial resources to be made available by the Secretary of State for the purpose of achieving those objectives.*

*(4) The objectives to be achieved may include—*

*(a) activities to be performed;*

*(b) results to be achieved;*

*(c) standards to be met.*

*(5) Before setting or varying a Cycling and Walking Investment Strategy the Secretary of State must consult such persons as he or she considers appropriate.*

*(6) In considering whether to vary a Cycling and Walking Investment Strategy the Secretary of State must have regard to the desirability of maintaining certainty and stability in respect of Cycling and Walking Investment Strategies.*

*(7) A Cycling and Walking Investment Strategy must be published in such manner as the Secretary of State considers appropriate.*

*(8) Where a Cycling and Walking Investment Strategy has been published the Secretary of State must from time to time lay before Parliament a report on progress towards meeting its objectives.*

*(9) If a Cycling and Walking Investment Strategy is not currently in place, the Secretary of State must—*

*(a) lay before Parliament a report explaining why a Strategy has not been set, and*

*(b) set a Strategy as soon as may be reasonably practicable.”*

26. The extent of what statute requires the CWIS to specify is set out in s.21(3). It is no more prescriptive than that. It is also important to note that the CWIS remains an investment strategy: see *Transport Action Network v SST* [2022] PTSR 31 at [126].

27. CWIS2 stated the following in respect of total funding [**CB/216-217**] (with underlining added):

**“Total government funding for active travel**

Table 1 provides an estimate of the total financial resources across government that may be invested in active travel over the 4-year CWIS2 period between April 2021 and March 2025. Many of the decisions on the allocation of these funds will be made by the relevant local body in line with local priorities, while ATE will ensure that relevant quality standards are met.

The projected investment has been calculated using a range of evidence and data sources. This includes funding allocations previously announced, successful funding proposals from local bodies, previous research, historical trends and an assessment of the proportion of investment into active travel projects and programmes from wider government funds.

This follows previous approaches to estimating the financial resources available in CWIS1 and the CWIS report to Parliament published in February 2020.

These figures will be updated in future statutory reports to Parliament to reflect further investment from a range of emerging funding streams from policy areas including public transport, housing and sport.

**Table 1: total government funding**

<b>Funding source</b>	<b>Projected investment from April 2021 to March 2025</b>
Active travel revenue and capital funds	£1,073 million
Wider DfT programmes <small>[footnote 8]</small>	£1,328 million
Other central government funding <small>[footnote 9]</small>	£1,158 million
<b>Total</b>	<b>£3,359 million</b>

[Footnotes]

8. Includes National Highways Designated Funds and estimates of the proportion of spend on active travel from the CRSTS fund, Integrated Transport Block (11%) and Highways Maintenance Fund (9%).

9. Includes estimates of the proportion of spend on walking and cycling from other central government funding sources including the Levelling Up Fund, Future High Streets Fund and Towns Fund. Estimates are based on a review of successful funding proposals.”

28. It is clear from the above that what is provided is an estimate based on projections which will be updated in reports under s.21(8) to Parliament. Two such reports to have been published to date, the first in February 2020 and the second in July 2022 [SB/95-112]. They are based on the best information available at the time of publication.

29. CWIS1 similarly set out “*Estimated Government investment in walking and cycling*” (Table 4 and para. 2.43), based on a range of cross-government funds and programmes (paras. 2.11 – 2.47) [CB/55-65].
30. The Claimant does not and could not allege that CWIS2 fails to comply with the requirement in s.21(3) of the 2015 Act to specify the financial resources to be made available for the purpose of achieving the objectives.
31. Ground 1 alleges that the budgetary decision under challenge is inconsistent with CWIS2. It is not. CWIS2 is very clear that the financial resources that it sets out are an estimate which may be invested in AT up to March 2025. It is self-evident that funding over a medium-term period such as the CWIS2 period might change. This is recognised in CWIS2 itself. Indeed, for the CWIS1 period the financial resources far exceeded the projection in CWIS1. CWIS1 projected that around £1.2 billion would be spent on cycling and walking; in the event, it is estimated that around £3.245 billion was actually spent (see Cycling and Investment Strategy Report to Parliament 2022 para. 3.1 – 3.6 [SB/105]). Accordingly, a change in the level of funding is not inconsistent with CWIS2. Given that there is no inconsistency, the statutory scheme in relation to variation is not engaged.
32. The Claimant focuses on dedicated AT funding in isolation and suggests that CWIS2 identifies the level of dedicated funding as necessarily fixed. That represents an obvious misreading of CWIS2. CWIS2 states that “*Table 1 provides an estimate of the total financial resources across government that may be invested in active travel*”, i.e. the table as a whole is an estimate, including row 1 regarding dedicated funding and not just rows 2 and 3. The table also refers to “*Projected investment*”, i.e. an estimated sum.
33. This approach in CWIS2 reflects the reality of AT funding, which is complex. It is cross-governmental in nature, more so than is the case in respect of, for example, rail or road funding<sup>1</sup>. Accordingly, section 2 of CWIS2 identifies various AT funding streams: “*dedicated DfT Funding for active travel*”; “*wider DfT programmes*”; and “*other central government funding, which delivers active travel infrastructure or behaviour change*”. Section 2 also lists various funds and programmes from across government which contribute to AT funding and delivery<sup>2</sup>. The Cycling and Walking Investment Strategy Report to Parliament 2022 likewise refers to a “*range of funds from across Government*” supporting AT (para. 3.3), itemises them

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<sup>1</sup> By way of comparison, the budget for the Road Investment Strategy comes largely from one dedicated funding stream, Designated funds - National Highways.

<sup>2</sup> Including: the City Region Sustainable Transport Settlements (CRSTS); National Highways designated fund; Integrated Transport Block funding; Highways Maintenance Block funding; Levelling Up Fund; Future High Streets Fund; Towns Fund.



for the period April 2016 to March 2021 (Tables 1 and 2) and explains that (para. 3.1) [SB/105-107]:

*“The Department has worked closely with other government departments to ensure that relevant place-based funds can be used to support walking and cycling, as well as assisting with assessing bids for funding to ensure proper consideration is given to these elements of the bids.”*

34. The obligation in section 21(3)(b) is to specify financial resources to be made available “by the Secretary of State”. The office of the Secretary of State is one, notwithstanding the division of responsibilities between government departments: see *Halsbury’s Laws of England, Constitutional and Administrative Law* (Volume 20 (2023)), para. 152 (Office of Secretary of State). Accordingly, cross-government funding falls within section 21(3)(b).
35. The Claimant appears to concede that a change to one of the various funding sources having an impact on AT which are covered by the second or third rows in Table 1 of CWIS2 would be permissible without requiring CWIS2 to be formally varied. That is obviously right, and there is no reason why it should be different for funding falling within the first row. Indeed, if other projected investment goes up over the period of a CWIS (e.g. with new funding competitions being announced either by the DfT or other Government Departments), a reduction in dedicated funding may mean that the total sum does not go down.
36. Accordingly, the Claimant is wrong to isolate dedicated funding and treat its projected level identified in CWIS2 as fixed. There is no basis to suggest that the Defendant’s funding decision is inconsistent with CWIS2.

**Ground 2: “available funding inconsistent with Strategy”**

37. Ground 2 does not materially add to Ground 1. Ground 2 is that the available funding is inconsistent with CWIS2. That is not so given that CWIS2 provides an estimate based on projections to be updated in reports to Parliament.
38. There is also no evidential basis on which to conclude that the available funding is inconsistent with CWIS2 and its objectives, given:
  - (a) The relatively modest extent of the reduction, i.e. a reduction of £179m of total CWIS2 projected investment of £3,559m, which amounts to a reduction in AT funding of 5%;
  - (b) The fact that the funding is an estimate;
  - (c) The fact that the Defendant has said he will review AT funding as soon as practically possible;

- (d) The historic example of CWIS1 funding far exceeding the CWIS1 projection;
  - (e) One of the main reasons for establishing ATE was to deliver better value for money in programme delivery.
39. The Claimant focuses on dedicated AT funding in isolation. As stated above, that is inappropriate. But even taking that approach, the reduction of £179m is only 16.7% of the total dedicated AT funding in CWIS2 of £1,073m.
40. Less funding does not necessarily make objectives unobtainable. The Claimant bases Ground 2 on a “*stark and inevitable inconsistency between the objectives and the resources to be made available*” (SFG/40). That is just assertion.

### **Ground 3: “Failure to take into account necessarily material considerations”**

#### Overview

41. None of the four considerations alleged at SFG/42a-d were left out of account, contrary to Ground 3. Nor can there be any suggestion that the Defendant’s consideration of them was legally inadequate. It appears from the Claimant’s Reply/15 – 19 that the Claimant is no longer alleging that the matters at SFG/42a-d were actually left out of account, but only that the consideration of them was insufficiently comprehensive. Where a decision maker takes a matter into account, however, it is for the decision maker to decide how far to go into the matter, and the extent and intensity of the inquiry to undertake, subject only to the supervisory jurisdiction of the court (*R (Transport Action Network) v Secretary of State for Transport* [2022] PTSR 31 at [12]).
42. To the extent that it is alleged that any further matter needed to be taken into account, that requires the Claimant to show that it was “*so obviously material*” that it would be *Wednesbury* unreasonable not to take it into account: *R (Friends of the Earth Ltd) v Heathrow Airport Ltd* [2020] UKSC 52 at [116-119]. As Lord Sales held at [120]:
- “There is no obligation on a decision-maker to work through every consideration which might conceivably be regarded as potentially relevant to the decision they have to take and positively decide to discount it in the exercise of their discretion.”*
43. Further, as observed in *Friends of the Earth v SSBEIS* [2022] EWHC 1841 at [199], “*a minister cannot be expected to read for himself all the material in his department relevant to the matter. It is reasonable for him to rely upon briefing material*”.
44. The Claimant does not come close to showing *Wednesbury* unreasonableness in the range of matters which the Defendant took into account. The process of consideration and review between December 2022 and March 2023 included express consideration of all the matters

wrongly alleged to have been left out of account at SFG/42a-d. Nor can the extent of the Defendant's consideration and inquiry be said to be *Wednesbury* unreasonable. It cannot be said that the Defendant was obliged as a matter of law, notwithstanding the absence of any express or implied statutory duty, to undertake further analysis.

#### CWIS2 objectives (SFG/42a)

45. On 6 December 2022 the Defendant attended a local transport deep dive with officials, which included the following.

(a) It was explained that:

*“The second statutory Cycling and Walking Investment Strategy committed to increasing walking and cycling to 50% of journeys in towns and cities by 2030, building from 41% in 2019.”* (slide 10)

(b) An option was put to the Defendant of a 13% reduction in funding for AT totalling £40m across the two remaining years of the spending period. The relevant slide stated:

*“We will focus funding on authorities that maximise our ability to achieve the targets set out in the statutory CWIS, this will mean funding is cut in 44 of 78 authorities with lower levels of capability.”* (slide 23)

(c) A slide entitled *“Impact of saving options on £2 billion active travel commitment”* stated, inter alia:

*“The savings option on slide 22 to cut CRSTS funding by 18% explains that this would lead to a c.25% cut in funding for new transport infrastructure. If this leads to a 25% reduction in the £700m of active travel investment expected from CRSTS, it would reduce active travel investment by £175m which is likely to lead to a shortfall on the £2bn funding commitment.*

*The two saving options for dedicated active travel funding on slide 23 would also have an impact on the £2bn funding commitment for active travel. The saving options to reduce funding for the National Cycling Network by 40% (first row on slide 23) and the option to cut funding for Local Authorities with lower levels of capability (second row on slide 23) would each reduce funding by £20m (£10m in both 23/24 and 24/25).*

*Reductions to SR21 funding will also impact on our ability to meet the 2030 target (50% of journeys walked and cycled in towns and cities) set out in the statutory CWIS, necessitating higher levels of funding in 2025 onwards to make up shortfalls.”* (slide 28)

46. Certain of those matters were also covered in a decarbonisation deep dive attended by the Defendant with officials on the same day.

47. A submission dated 13 February 2023 to the Defendant considered greater savings in AT funding than those proposed in the deep dives in December 2022. The submission was

accompanied by slides entitled “*DfT CDEL Scenario Options to address DfT pressures*”. They set the context as follows (emphasis in the original):

*“The Department has significant CDEL pressures in the next two financial years of £5.6bn (23/24) and £5.1bn (24/25). These are primarily driven by high inflation across the economy, and particularly in the construction sector. HS2 presents the largest pressure to the Department, driven by a combination of inflationary and non-inflationary pressures.*

*At Autumn Statement 2022, the Chancellor confirmed that Departments must live within existing control totals for the SR period and beyond, although the budget for the post SR period (25/26 – 27/28) are yet to be set through a formal SR. Given the significant HS2 pressures, this new position would require the stopping or deferring of planned expenditure.”* (slide 2)

48. Three scenarios were put before the Defendant. Option 3 considered cutting all DfT funding for AT for 2023/24 (£154m) and 2024/25 (£154m). In accompanying slides, it was stated under the heading “*Impacts*”:

*“Cycling & Walking (Local Transport): Stopping Active Travel England will mean stopping funding to Local Authorities, reducing the quality of integrated cycling and walking networks and not meeting the public commitments for half of all journeys in towns and cities being cycled or walked by 20230. Stopping Active Travel England will not be in line with previously stated Government ambitions on sustainable transport, reduces visible upgrades to local infrastructure in the next 2 years and compromises the sustainable transport strategy by reducing modal shift to more environmentally sustainable modes of transport.”* (slide 9)

49. The final position was in between the above two scenarios and was described in the final submission dated 9 March 2023 as “*difficult*”.
50. Accordingly, the Defendant plainly did take into account the impact of the reduction of funding on CWIS2 objectives.

#### Transport Decarbonisation Plan (“TDP”) and Net Zero Strategy (“NZS”) (SFG/42b)

51. Far from decarbonisation issues being left out of account, there was a decarbonisation deep dive which the Defendant attended with officials on 6 December 2022. The slides explained the decarbonisation role which AT plays and the carbon savings involved (slide 15). AT funding reductions were included in the saving options discussed (slides 24 and 26). The read out from the decarbonisation deep dive records that the Defendant was told that the general picture was that “*reducing funding would mean less carbon reduction*”. The Defendant specifically asked about AT. The main areas and types of scheme were explained to the Defendant and he was told about the commitment in the TDP to AT journeys.

52. On the same day decarbonisation was also considered at the local transport deep dive. The Defendant was told, inter alia, that a 13% reduction in AT funding would lead to lost carbon savings of 0.009 MtCO<sub>2</sub>e (slide 24; see also slide 32).
53. The final submission to the Defendant dated 9 March 2023 expressly referred to Net Zero and did so in the context of the final AT funding reductions. The submission stated:
- “10. Active Travel: HMT asked for Active Travel England’s CDEL to be reduced by 65% per annum. This is difficult due to the high VfM of the schemes and lack of support from the Commissioner, in particular given the Government’s Net Zero moment at end March. We are working through the implications of this (as other active travel funding may also be reduced) and the final saving figures for SR21 years will be agreed through business planning. There will be a minimum savings amount of £50m per annum in SR21 years.”<sup>3</sup>*
54. The Claimant’s Statement of Facts and Grounds relies on the NZS and TDP in a generalised way and does not allege incompatibility between the AT funding reduction in the WMS and any specific part of either document. That is plainly correct: neither document relies on a specific level of AT dedicated funding. That further underlines that the extent of the Defendant’s consideration of these matters during the funding review process cannot be said to have been *Wednesbury* unreasonable. To the extent that the Claimant relies on ‘Table 10: Deployment assumptions underpinning pathway’ of the NZS, an extract of which the Claimant has included in the claim bundle at CB/144, that table needs to be read with its introductory text (omitted by the Claimant), which emphasises that *“Given ongoing uncertainties, the policy mix that will meet carbon budgets, and related deployment assumptions, are subject to change; these are illustrative and should not be interpreted as government targets”* (para. 52, page 324).
55. The Claimant at SFG/10 refers to the Government’s Carbon Budget Delivery Plan (“CBDP”) published on 30 March 2023. This post-dated the WMS of 9 March 2023 and it cannot give rise to any legal error in respect of the earlier decision. Indeed, the Claimant only alleges that it is *“informative”* (SFG/10 footnote 11). It does not feature in any of the pleaded grounds (see SFG/42). In any event, it takes matters no further given that decarbonisation was taken into account by the Defendant as set out above. Further, the nature of the CBDP needs to be properly understood. It makes clear in terms that the Government *“will continue to keep the proposals and policies under review and update and amend the package as appropriate”*, and that *“it is an extremely difficult process precisely to forecast those proposals and policies that will be in effect so far in the future, for example those intended to take effect in Carbon Budget*

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<sup>3</sup>The reference to £50m should have been £100m, as was correctly shown in Annex A to the submission.

6, and there is considerable fluidity in the final delivery” (para. 4 [CB/227]). Holgate J noted the fluidity built into the statutory scheme in *R (Friends of the Earth Ltd) v Secretary of State for Business, Energy and Industrial Strategy* [2023] 1 WLR 225 at [165].

#### Air quality (SFG/42c)

56. The local transport deep dive attended by the Defendant and officials considered air quality and AT. The following was explained in slide 10 entitled “*Active travel schemes have impact and can be delivered quickly*” (also in slide 15 in the decarbonisation deep dive):

*“BCR: Investment is very high value for money, with a BCR of 4.3 for the £508m cycling and walking programme (CDEL). The majority of benefits are health benefits from increased life years and reduced absenteeism, followed by improved journey quality and benefits from mode shift such as reduced greenhouse gas emissions, traffic congestion, and improved air quality.”*

57. The decarbonisation deep dive also considered air quality and AT. It was explained that:

*“Joint Air Quality Unit<sup>4</sup> funding is primarily used to award grants to local authorities for them to develop and implement local air quality schemes to reduce NO<sub>2</sub>. Examples include traffic management, speed limits, retrofit buses, active travel measures and Clean Air Zones.”* (slide 13)

58. The Claimant now concedes that impacts on air quality were taken into account (Reply/18), but seeks to suggest that further consideration needed to be given to revised air quality targets contained in the Environmental Targets (Fine Particulate Matter) (England) Regulations 2023 and the Environmental Improvement Plan 2023. The argument is without merit. CWIS2 does not quantify the contribution of AT to existing or new air quality targets. While AT has positive air quality implications as recognised by CWIS2, the Claimant produces no evidence to show that any new targets are dependent on CWIS2 and as explained in the witness statement of Jessica Matthew, they are not. As with decarbonisation, consideration of the wider policy implications of a reduction in AT funding in respect of air quality was undertaken in proportion to their impact (which was unquantified).

59. Further, the reference to “*proposed targets*” in CWIS2 (dated July 2022) was to targets that were still at that point in draft and subject to a consultation which had only just closed. The consultation on the proposed first suite of Environment Act 2021 targets for England, including air quality targets, ran between 16 March 2022 and 27 June 2022<sup>5</sup>, a response to

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<sup>4</sup> The Joint Air Quality Unit is a joint DfT/ DEFRA unit which works across both Departments to improve air quality through funding and policies.

<sup>5</sup> *Consultation on environmental targets*, DEFRA, 6 May 2022.

consultation was published by the Government on 16 December 2022<sup>6</sup>, and the 2023 Regulations were made on 30 January 2023. The Environment Plan 2023, which contains interim targets, was also not published until 31 January 2023.

60. For all those reasons, there is no basis to find that it was *Wednesbury* unreasonable for the Defendant not to undertake further consideration of revised air quality targets contained in the Environmental Targets (Fine Particulate Matter) (England) Regulations 2023 and the Environmental Improvement Plan 2023.

#### Public Sector Equality Duty (SFG/42d)

61. The final submission to the Defendant dated 9 March 2023 expressly dealt with the public sector equality duty (“PSED”) under the Equality Act 2010, stating:

*“14. **Public Sector Equalities Duty (PSED):** The saving options presented to date across rail, road and HS2 have been considered in line with the PSED. The legal risks of cancelling or delaying schemes have also been considered - including, for example on HS2, the risks of delaying construction of 2a, but not delaying compulsory purchase of land. Further advice can be provided for each mode, where required. There has been a limited opportunity to make assessments on the additional saving options from HMT.”*

62. The Claimant’s suggestion at Reply/19 that there was no consideration of the PSED in respect of AT reductions is incorrect. The reference to ‘road’ in the PSED section of the final submission quoted above incorporates AT, as capital funding for AT would have been spent on the public highway (which includes footways and cycleways). The PSED consideration set out above responded to the submission as a whole, which included AT.
63. Briefing documents also had regard to potential impacts on those with protected characteristics. In the local transport deep dive, it was noted that active travel schemes included “*tackling 5,000 critical issues to address accessibility for disabled road users*” (slide 10; also included in slide 15 in the decarbonisation deep dive). It was further noted that cutting 40% of funding for upgrade work to the shared-use pathways “*will lose around 30 miles per year of new or upgraded shared-use pathways to national design standards. The biggest impact would be on connectivity between rural communities and accessibility of the network to disabled people*” (slide 26; also included in slide 23 of the local transport deep dive).
64. The nature and context of the funding decision is also important. As held in *Powell v Dacorum BC* [2019] EWCA Civ 23 at [44]:

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<sup>6</sup> *Environmental targets consultation summary of responses and government response*, DEFRA, 16 December 2022.

*“The impact of the PSED is universal in application to the functions of public authorities, but its application will differ from case to case, depending upon the function being exercised and the facts of the case.”*

65. Further, “*due regard*” within s.149 means appropriate in all the circumstances: *Luton Community Housing Ltd v Durdana* [2020] EWCA Civ 445 at [17].

66. CWIS2 explains:

*“An Equality Impact Assessment (EqIA) has been carried out as part of the development of CWIS2 in tandem with an EqIA for the creation of ATE. These EqIAs consider equality and inclusion at the national scale, while ATE will oversee the development and application of EqIAs at the local level as part of its remit to examine applications for funding and inspect finished schemes.” [CB/211]*

67. Accordingly, EqIA had already been carried out in respect of CWIS2. That is relevant to the extent of what “*due regard*” under s.149 required in relation to the funding decision under challenge, which did not purport to vary CWIS2.

68. The EqIA dated 10 March 2022 for CWIS2 explained (section 1.1, page 4):

*“The CWIS is a high level strategic document and so its primary role in relation to PSED will be to set out a strong Government statement of commitment to equality and inclusion, and to commit to investment and programme delivery that fulfils the requirements of the PSED. This will then feed into DfT and Active Travel England’s plans and programme delivery. A detailed EqIA is already in development for Active Travel England.”*

69. Accordingly, it is envisaged that EqIA will take place at the local level in respect of considering AT schemes, which process will be overseen by ATE. At that stage more detailed EqIA will be possible than is the case in respect of the production of CWIS2, and certainly more so than in respect of the high level funding decision at issue in this challenge. That again weighs in favour of no more being required at the stage of making the funding decision.

70. Ground 3 is without merit.

## **CONCLUSION**

71. For the reasons given above, the Court is invited to dismiss the claim.

**HUGH FLANAGAN**

**30 November 2023**

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