Case No: CO/1654/2011

Neutral Citation Number: [2012] EWHC 140 (Admin)

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

Birmingham Civil Justice Centre
33 Bull Street, Birmingham, B4 6DS

Date: Friday 03rd February 2012

Before :

MR JUSTICE BEAN

- -

Between :

THE QUEEN ON THE APPLICATION OF

(1) WELCOME BREAK GROUP LIMITED
(2) ROADCHEF LIMITED
(3) BROOKTHORPE WITH WHADDON PARISH COUNCIL
(4) HARESCOMBE PARISH COUNCIL
(5) CAMPAIGN AGAINST MOTORWAY SERVICE AREA — **Claimants**

- and -

(1) STROUD DISTRICT COUNCIL — **Defendant**

- and -

(2) GLOUCESTERSHIRE GATEWAY LIMITED — **Interested Party**

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

Rhodri Price Lewis QC (instructed by **Berwin Leighton Paisner**) for the **Claimants**
Satnam Choongh (instructed by **Martin Evans solicitor, Stroud District Council**) for the **Defendant**
Martin Kingston QC and Peter Goatley (instructed by **Keystone Law**) for the **Interested Party**

Judgment
As Approved by the Court

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Mr Justice Bean :

1. The M5 motorway runs between Birmingham and Plymouth. The M50 motorway forms a spur to the west of the M5 from Junction 8 near Strensham in Gloucestershire to Ross-on-Wye. There are no motorway service areas (MSAs) on the M50. The Strensham MSA is located on the M5 a mile or so north of the junction (Junction 8) with the M50. The next service area to the south is Michaelwood, some 32 miles to the south of Junction 8. So a motorist travelling on the M5 from the West Midlands conurbation to (say) Bristol passes Strensham and then Michaelwood with a 33 mile gap in between. A motorist starting from Ross-on-Wye and travelling the whole length of the M50, which is about 22 miles, before turning north in the direction of Birmingham reaches the Strensham MSA in 23 miles from the start of the M50. But a motorist using the same starting point who turns south on reaching the M5 en route to (for example) Bristol does not reach an MSA until Michaelwood, more than 53 miles from Ross-on-Wye.

2. Gloucestershire Gateway Limited was formed to promote the creation of an MSA on the M5 at a site known as Ongers Farm, southeast of Gloucester. The company applied for planning permission to Stroud District Council, the local planning authority for the area concerned. On 10th August 2010, after a 2½ hour debate, the Development Control Committee of the Council resolved by 6 votes to 4 to grant permission, subject to some conditions to which I shall refer later in this judgment. The chairman, who was in the majority, described it as a very difficult decision, and the most contentious application to come before the Committee in his 10 years of membership.

3. The present claim challenges that decision. The first two claimants are Welcome Break Group Limited, the owners and operators of Michaelwood MSA, and Roadchef Limited, owners and operators of Strensham MSA. The third claimant is the parish council in whose area the proposed new MSA lies. The fourth claimant is an adjoining parish council. The fifth claimant is an *ad hoc* association of opponents of the proposed MSA. They have all joined forces for the purposes of this claim. As the grounds of the application put it (describing the third to fifth claimants collectively as the Local Bodies):

> "The Local Bodies' shared concern is that there will be substantial harm caused by the proposals in visual terms and, in particular, to the Cotswolds Area of Outstanding Natural Beauty. The MSA is to be situated in the third Claimant's parish and the proposals will, the local bodies believe, significantly affect the local residents who they represent. The instant application is made by all five parties because of the common interest which they share in ensuring that a development which they believe to be both unjustified and harmful is properly and adequately considered through the appropriate statutory processes. Given the extremely limited financial resources of the Local Bodies, Welcome Break and Roadchef have considered it appropriate to make themselves fully responsible for the costs of making this application."

4. The proposed site is not within the Cotswolds AONB but immediately adjacent to it. It can be seen from the escarpment at the western edge of the AONB and from an adjacent hill (Robinson's Hill) as well as from other points in the valley through which the motorway runs.

5. An application for outline planning permission for an MSA on the same site was refused in 1994 on appeal by an inspector who commented that an MSA, however well landscaped, would appear alien in the landscape and would have an adverse effect on the landscape seen from the scarp slope. In the inspector's view such harm was not outweighed by any need for an MSA.

6. The current proposal attracted large numbers of objectors as well as large numbers of supporters. The objectors included Natural England (a statutory body established under the Natural Environment and Rural Communities Act 2006), and the Cotswold Conservation Board. The fifth claimant submitted a petition signed by 1,089 local residents opposing the application.

7. Permission to seek judicial review was granted on the papers on 9th May 2011 by Lindblom J, save on one minor issue which has not been pursued. He commented that "without pre-judging whether this claim will survive the detailed scrutiny to which it will be subjected when it comes to be heard, I am satisfied that the first four grounds in it are arguable".

8. The claimant's four grounds are as follows:

> "(a) The Council failed to take into account Welcome Break Group Limited and Roadchef Limited's ("Welcome Break and Roadchef") objections on need. Further, the Officer's Report was significantly misleading in the approach which it took towards need in the light of those objections. The Report failed to deal with the substance of those objections and the Committee was deprived of the opportunity of understanding the opposing case which had been made against the need for the MSA.
>
> (b) The Council failed to take into account policy NE8 of the Stroud Local Plan and the Officer's Report was significantly misleading in so far as it dealt with landscape impacts.
>
> (c) The Council failed to consider an objection to the proposal from Natural England. The Officer's Report was significantly misleading in the approach which it took towards Natural England's representations.
>
> (d) The Council took into account as a reason for granting permission a series of obligations contained in the section 106 Agreement which failed to comply with Regulation 122 of the Community Infrastructure Levy Regulations 2010 and which were, consequently, immaterial to the merits of the proposal. Further, the Council failed to consider properly or at all Regulation 122.

DfT Circular 1/2008

9. In April 2008 the Department for Transport issued its Circular 01/2008 entitled "Policy on Service Areas and other Roadside Facilities on Motorways and All-Purpose Trunk Roads in England". Its provisions include the following:

> "6. MSAs and other roadside facilities perform an important road safety function by providing opportunities to the travelling public to stop and take a break in the course of their journey. Government advice is that motorists should stop and take a break of at least 20 minutes every two hours. Drivers of heavy goods vehicles (HGVs) are subject to a regime of statutory breaks and such facilities offer the opportunity for this.
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> …
>
> 9. New and existing roadside facilities are subject to the provisions of the Town and Country Planning Act 1990 and the Planning and Compulsory Purchase Act 2004 which together set the framework under which local planning authorities are to consider applications for such developments. The Secretary of State for Transport is designated as a statutory consultee and the Highways Agency exercises this function on his or her behalf, giving advice on applications in respect of road safety and traffic management issues.
>
> …
>
> 14. The primary function of the SRN [Strategic Road Network] is to facilitate long distance transportation of people and goods. Service areas are signed from the SRN on the basis that they will provide essential services to road users. The potential risk to safety that is created by additional accesses and egresses is balanced by the increase to safety offered by refreshed and alert drivers.
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> …
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> 31. The Highways Agency will continue to assess the impact of any roadside facilities proposal on traffic flow and safety. It may oppose particular developments when the location is considered unsuitable, where, for instance, there are existing capacity or infrastructure constraints. Roadside facility proposals may also be weighed against the achievement of other policy objectives for the SRN. However the LPA [local planning authority] will continue to determine the planning merits of any proposal.
>
> …
>
> *Spacing of Roadside Facilities on Motorways*

52. Policy on the spacing of roadside facilities on motorways needs to balance the road safety benefit of allowing drivers regular access to services with the potential detriment to safety, traffic flow and the environment of developments alongside motorways and at motorway junctions.

53. Drivers are encouraged to stop and take a break of at least 20 minutes every two hours. Drivers of HGVs are required by drivers' hours' legislation to take a break at specified intervals. Research has shown that up to 20 per cent of accidents on monotonous roads (especially motorways) are caused by tiredness. However, roadside facilities introduce new on-and-off motorway movements that have their own safety implications and may disrupt the free flow of traffic.

54. There is also a need to limit developments alongside motorways and motorway junctions to mitigate the impact of strategic roads on the environment. This applies particularly, though not exclusively, to open countryside and areas of planning restraint such as National Parks, Areas of Outstanding National Beauty (AONBs), the Green Belt and sites that either are themselves, or may affect, Sites of Special Scientific Interest (SSSIs). Finally, any development accessed from a motorway (including roadside facilities) risks the creation of additional local journeys that would not previously have been made.

55. The existing network of MSAs has evolved around the long-standing spacing criterion of 30 miles. This was based on the premise that drivers should be given the opportunity to stop at intervals of approximately half an hour. However, at peak hours, on congested parts of the network, travel between MSAs can take longer than 30 minutes. Further, 90km/h (56 mph) speed limiters for HGVs limit the distance they can travel in 30 minutes to a maximum of 28 miles (45km). Any new application for a core MSA should therefore be considered on the basis of a 28 miles (45km) distance, or 30 minutes travelling time, from the previous core MSA, whichever is the lesser.

56. The absolute minimum acceptable distance between facilities on the same route is 12 miles.

57. All existing MSAs and new facilities that have been registered in the planning systems prior to the date of publication of this document (which subsequently receive planning consent) and any future sites that fill existing gaps in the core network must provide the required features of a site having that status.

58. Where a clear and compelling need and safety case can be demonstrated, applications for an infill service area may be considered. Individual cases will need to be treated on their merits, and it is not possible to prescribe a comprehensive list of the factors which it might be appropriate to consider in every case. There are, nevertheless, a number that are likely to be of importance in virtually all cases. Planning authorities therefore will be expected to have considered at least:

- The distance to adjoining roadside facilities;

- Evidence (such as queuing on the roadside facility approach roads or lack of parking spaces at times of peak demand) that nearby existing roadside facilities are unable to cope with the need for services;

- Evidence of a genuine safety-related need for the proposed facilities (such as, for example), a higher than normal incidence of accidents attributable to driver fatigue;

- Whether the roadside facility is justified by the type and nature of the traffic using the road; the need for services may, for example, be lower on motorways used by high percentages of short-distance or commuter traffic than on those carrying large volumes of long-distance movements.

59. Where infill sites are proposed, the Government's preference will be that they should be located roughly halfway between MSAs, unless it can be shown that an off centre location is more suitable in either operational, safety or spatial planning terms or in its ability to meet a particular and significant need. The Government will not agree to more than one infill site between any two core MSAs. Where the spacing between two existing MSAs is 40 miles or greater, any infill site that might be permitted will also be designated as a core site and must provide the required range of facilities.

……….

Social and Environmental Responsibility

158. The Highways Agency expects operators of roadside facilities to conduct business in a socially and environmentally responsible manner and to act in the best interest of their customers, staff and the wider community. Operators should encourage their customer and staff to behave in an environmentally responsible manner by providing recycling litters bins where appropriate, promoting sustainable waste practices and ensuring the premises and surrounding

environments are clean safe and secure. Customers should be able to choose from a range of healthy options with products sourced from local providers where possible."

The Officer's Report to the Committee

10. The substance of the Officer's Report consisted of 32 pages preceded by details of the terms of the permission which it was recommended should be granted together with long lists of objectors and supporters, and followed by appendices extending to 245 pages. I shall cite some of its more significant passages;

"*Policy Considerations*

7.1 Since the previous appeal decision on the site in 1994 there have been other significant changes in planning legislation and policy that must be considered.

7.2 The principal change is with the publication of Circular 01/2008. This Circular replaces previous guidance contained in Road Circular 01/94, the MSA Policy Statement of 1998 and Annex J to Circular Roads 04/94. The dismissed 1994 appeal relied on the previous guidance and the Inspector's decision letter needs to be carefully considered. This scheme is also considerably different as the detailed design is substantially different from the 1994 proposal.

…

7.4 The Stroud District Local Plan was adopted in November 2005. The policies of the Local Plan expired on 10 November 2008 unless they were saved by a Direction made by the Secretary of State under the provisions of the Planning and Compulsory Purchase Act 2004. This led to the deletion of many Policies, including NE9 (which relates to 'special landscape areas'), in deference to paras. 24 & 25 of PPS7 and the need to apply landscape character assessment. Accordingly PPS7 is particularly relevant. NE9 related to "special landscape areas". One of these was the area between Robinswood Hill and the Cotswolds AONB, which included the application site.

7.5 On 20 May 2010, the Cotswolds Conservation Board adopted a position statement on "Development in the setting of the Cotswolds AONB". This Statement provides guidance to regional and local planning authorities, landowners and other interested parties regarding the consideration of the impact of development and land management proposals which lie outside the AONB but within its "setting". It has been taken into account in considering the MSA proposal.

7.6 In considering this application, the provisions all national, regional, county level and local planning policies have been considered. These are listed below and detail firstly whether they are relevant and if so in what capacity."

[*The report proceeded to list a number of national planning policy statement, national planning policy guidance documents and county structure planning policies. The latter category included the following*:]

"Policy NHE.4 In Areas of Outstanding Natural Beauty the conservation and enhancement of the natural beauty will be given priority over other considerations. Regard will also be had to the economic and social well-being of the AONB. Provision should not be made for major development within the AONB unless it is in the national interest and the lack of alternative sites justifies an exception.

Policy NHE.5 Provision should not be made for development that would detract from the particular landscape qualities and character of Special Landscape Areas. The broad locations of Special Landscape Areas are as follows: the north eastern fringes of the Cotswolds; on the southern fringes of the Cotswolds near Cirencester, Tetbury and Fairford; the upland western and southern parts of the Forest of Dean District between Gloucester urban area and the Cotswolds, including Robinswood Hill; and Chosen Hill in Churchdown. The precise boundaries of, and additions to, the Special Landscape Areas will be identified in local plans."

11. A list of potentially relevant local planning policies in paragraph 7.10 included "NE8 – Protection of Cotswolds AONB". "Other material considerations" listed in paragraph 7.11 included DfT Circular 01/2008, and the Cotswold Conservation Board position statement "Development in the Setting of the Cotswolds AONB".

12. Under the heading "The Need" the report stated:-

"*Policy Context*

8.1 DfT Circular 01/2008 titled "Policy on service areas and other roadside facilities on motorways and all-purpose trunk roads in England' issued in April 2008 sets out the standards and guidelines for the provision of on-line service areas. It supersedes previous guidance contained in Road Circular 01/94, the MSA Policy Statement of 1998 and Annex J to Circular Road 04/94. This new Circular is the principal material change since the dismissed appeal in 1994.

8.2 When the Stroud District Local Plan (SDLP) was adopted in November 2005 there was no identified need for a MSA, and no specific policies or land allocation relating to an MSA are

contained in the Plan. Therefore the SDLP cannot be wholly relied upon as the basis for this decision. Indeed Section 38 (6) of the Planning and Compulsory Purchase Act states that development should be in accordance with the development plan unless material planning considerations indicate otherwise.

…

8.5 Many of the statutory consultee comments have relied upon guidance that has been superseded. They have not commented on Circular 01/2008 or any other more recent Highways Agency publications. To comment that the SDLP does not stipulate a requirement for an MSA is correct. However it ignores the fact that planning policy at national level has evolved to respond to current national requirements. In taking local planning policy forward now it is necessary to consider the appropriateness of an on-line core MSA facility.

…

8.12 A core MSA is defined as one that allows drivers to take adequate rest breaks in line with the 28 mile/30 minute drive time and drivers are encouraged to take a rest break of 20 minutes every two hours. HGV drivers are subject to their own restrictions.

8.13 Core facilities are therefore required in the interests of highway safety and full facilities need to be offered. Circular 01/2008 stipulates that infill services would need to demonstrate a clear and compelling safety need; core facilities do not. The Highways Agency has confirmed that a core MSA is required along the M50 Ross-on-Wye to the M5 (Michaelwood services) and this is designated as a priority need. It is not listed as a "high priority" but is a priority nonetheless.

8.14 Paragraphs 52-61 of Circular 01/2008 discuss the spacing of roadside facilities on motorways. Research has shown that up to 20% of accidents on monotonous roads (especially motorways) are caused by tiredness. This however needs to be offset against the safety implications introduced by the provision of additional on and off motorway movements, which may disrupt the free flow of traffic.

8.15 The existing network of MSAs has evolved around a spacing criterion of every 30 miles. This was based on the premise that drivers would be given the opportunity to stop at intervals of approximately half an hour. At peak times and due to road congestion, travel time between MSAs can take longer than 30 minutes. In addition, HGVs can have speed restrictions (maximum of 56mph) which would allow them to travel 28

miles in 30 minutes. Therefore a core MSA should be considered every 28 miles (45km) distance or 30 minutes travelling time from the previous MSA; whichever is the lesser.

8.16 Circular 01/2008 states a presumption in favour of on-line sites over MSAs situated at junctions (off-line) as the latter are more likely to generate undesirable trips from the surrounding area. In addition, sites that are located further away from the motorway network might discourage drivers from stopping to rest. On-line provision creates fewer vehicle manoeuvres and therefore reduces the risk of accidents occurring.

8.17 The stretch of motorway that relates to this application with regard to the strategic road network is the M50 from Ross-on-Wye to Michaelwood on the M5. This has one of the greatest deficiency of on-line MSAs. The gap between Ross-on-Wye and Michaelwood is 53.5 miles. People travelling the M50 eastbound and then heading south along the M5 have no on-line access to an MSA until Michaelwood, as Strensham services are situated to the north of junction 8. Whilst some objectors question how many drivers use this route, it is nonetheless a substantial gap in the network. Indeed, in March the Highways Agency confirmed that vehicle flow and journey choices were not applicable in the assessment of need as identified in the circular. HGV drivers in particular may favour this route. Climatic conditions also sometimes cause problems on the Severn Bridge.

8.18 In respect of the route between the M50 and the M5, it exceeds the 28 miles distance or 30 minutes travelling time to a core MSA, therefore a core MSA needs to be provided."

13. The report went on to consider potential alternative sites.

"9.5 The previous appeal Inspector commented that this site was not an appropriate place to site an MSA. However in light of the changes in policy and guidance, it is considered that a core MSA is now required and any site would potentially have a landscape impact along the 3.34 mile stretch. Indeed the AONB follows Gilberts Lane, but to the north follows the M5, which would take in any potential sites north of this application site.

9.6 Circular 01/2008 states at paragraphs 52-61 the regulations on the spacing of roadside facilities. Only infill MSAs need to have a clear and compelling case and not core on-line MSAs. The requirement for a core on-line MSA is regulated by the 28 mile/30 minutes drive time criteria.

9.7 The existing southbound site has an extant planning permission for use as an off-road racetrack and therefore has ceased as agricultural land.

9.8 The current proposed scheme is significantly different to the 1995 scheme that was dismissed at appeal. Firstly, this is a full application, the 1994 scheme was an outline application with all matters reserved. The 1994 appeal decision was based on the policy framework outlined in PPG13 (Transport) which was issued in March 1994. However this was subsequently revised, updated and reissued in March 2001. A substantial difference being that Annex A (Motorway and road side service areas) was deleted.

9.9 On balance it is therefore concluded that planning policy has significantly changed since the 1994 appeal decision and the most relevant national policy framework is found in DfT Circular 01/2008.

9.10 It is considered that through a strict interpretation of policy and through the applicants submitted highway safety information that there is a need for an additional on-line motorway service area. The proposed site appears to comply with the requirements of DfT Circular 01/2008."

14. The next heading was "Landscape, Appearance and Impact on Area". The report said:

"10.2 The overriding thrust of the policies seek to protect the rural landscape and land designated as Areas of Outstanding Natural Beauty or special landscape interest.

10.3 The site is at the bottom of a valley with landmark viewpoints on the hills above. The Cotswolds Area of Outstanding Natural Beauty boundary line runs along the east site of the southbound site. The application site itself is not within the Cotswolds Area of Outstanding Natural Beauty.

…

10.6 Views of the site are easily obtained from Robinswood Hill and from along the Cotswold escarpment. However, most of these views are long range and higher level and take in most of the extensive panoramic view available out towards the Severn Valley and beyond. When looking down into the site, the motorway is clearly visible. The motorway is less obtrusive in the pleasant overwhelmingly green landscape. This is partly because the motorway is recessed into a slight cutting. This suggests that there may be more scope for the landscape to absorb a new MSA than is thought to be the case by some third parties.

…

10.8 Whilst it is considered that the immediate site is rural; however this is severely interrupted by the existing M5 motorway and the urban fringe of Gloucester to the north.

10.9 A further requirement for proposals in the countryside is for planning policies to provide a positive framework for facilitating sustainable development. The provision of an on-line MSA is considered to be sustainable; the traffic is already passing and on route to a terminal destination.

10.10 It is an inescapable fact that an MSA will have an adverse impact on the landscape. It is therefore necessary to examine how adverse that effect might be. In this respect consideration must be given to the comments from the CPRE, Natural England and the Cotswold Conservation Board.

10.11 In this regard SDC commissioned an independent landscape assessment by Nicholas Pearson Associates. They were required to undertake a review of the landscape assessment prepared as part of the Environmental Statement.

10.12 At paragraph 2.31 of their report, Nicholas Pearson Associates comment that;

"It can be seen that the impact are generally slight adverse or negligible/slight adverse with only a few character types having a negligible impact. This is consistent with the fact that the development is being proposed within a rural area, away from the settlement boundary, and adjacent to the sensitive landscape of the Cotswold AONB and areas of sensitive high ground of Robinswood Hill."

A full copy of the final written report from Nicholas Pearson Associates is attached at Appendix C. Plans are available on the website.

10.13 This site presents an unusual situation. The MSA does not constitute farm diversification or any other sort of enterprise requiring a countryside base. However, motorways as elements of strategic transport infrastructure inevitably pass through the countryside. It has already been noted that an MSA cannot easily be accommodated within urban areas. Therefore it is a matter of necessity that they are located within the countryside.

10.14 The proposed MSA will cause the landscape to be disrupted by spoiling its continuity. However it is considered that the building's grass roof and form allow blending in with the landscape……and it will not appear as a continuation of the

motorway. Moreover substantial new tree/shrub planting is proposed to address the public viewpoints. The substantial new earth mounding allows the buildings to follow natural contours, and does help reduce the prominence of the motorway from some existing viewpoints. Photomontages and photographs from viewpoints will be displayed after the meeting.

10.15 As landscaping takes time to mature it is accepted that the parking areas and access roads would be hard to screen in the short term, especially when viewed from higher ground. Therefore the short-term impact will be greater. However, it is considered that the adverse impacts will diminish in the medium to long term as planting grows, matures and blends into the landscape.

10.16 On balance it is considered that there will be some adverse impact on the landscape but this will be limited."

15. After dealing with a number of other topics (including that of regeneration, to which I shall return when dealing with Ground 4) the writers summarised the responses of consultees:-

> "21.13 CAMSA (Campaign Against Motorway Service Area) submitted a 1089 signature petition against the scheme. The volume of responses from members of the public has been substantial and in order to accurately evaluate the responses, SDC commissioned Jeff Bishop of BDOR to undertake an independent evaluation/audit of the consultation undertaken.
>
> The primary aims of the commission were to:
>
> 1. assess the soundness of the plans for all the consultation;
>
> 2. relate this to what was actually delivered and comment on the soundness of that;
>
> 3. consolidate and summarise the responses received;
>
> 4. evaluate the appropriateness of how the responses were dealt with;
>
> 5. draw overall conclusions about what took place.
>
> A copy of the final report is attached at Appendix B.
>
> 21.14 BDOR Limited concludes that many of the changes to the proposed scheme relate to consultation responses regarding design and layout, not the principle of development. The need or principle has not been altered due to the outlined requirement for the provision of an additional core on-line MSA by the Highways Agency.

21.15 The main areas of objection from the public relate to need, visual impact, biodiversity/wildlife, pollution and traffic generation. These are very different to the reasons for support; local sourcing and quality design. BDOR Limited identified that the only shared issue was regarding economic benefits with the supporters seeing a genuine local benefit and the objectors querying the likelihood of the applicants delivering the benefits.

21.16 In addition, an objection from Savills and legal opinion of Rhodri Price Lewis QC, submitted on behalf of Welcome Break and Roadchef has also been received. It is considered that this is an objection from a commercial competitor and relates solely to the provision of an additional MSA and not to the protection of the countryside. The Opinion has been carefully considered in light of S38(6), relevant planning policies at every level and specific regard to the physical need as outlined in Circular 01/2008. In addition, the conclusions raised by the Highways Agency with regard to need have also been highlighted as a material planning consideration.

A full copy of Mr Lewis QC's legal opinion appears at Appendix D.

21.17 It is considered that the DfT policy must be taken into account, as well as more other local issues such as landscape, employment and regeneration etc. DfT policy is a significant material consideration which attracts considerable weight in the overall planning balance. The legal opinion has also been fully considered in accordance with all relevant policies and guidance documented in the planning policy section of this report.

21.18 It is considered that the DfT policy advice is a significant consideration. However [it is agreed that this should read "Moreover"] the Highways Agency has stated that there is a need for an additional core MSA in this location and they have not stated that this proposal would be contrary to the DfT policy. As there is no doubt that there is a core gap in the provision of MSAs in this location, a safety need does not need to be justified in terms of meeting the objectives of the DfT Circular.

21.19 It is concluded that there is a requirement for a core on-line MSA on the M50/M5 stretch of motorway and it is noted that the Highways Agency has not objected to the proposal on either a need or highway safety basis." [emphasis in the original]

16. The conclusion and recommendation of the report were in these terms:-

“22.1 The need for the MSA is implicit in the Highways Safety Spatial Planning Framework. Review of Strategic Network Service Areas and within the policy framework set out in Circular 01/2008, and the Highways Agency’s response. It is concluded that there is a clear gap in motorway provision between the M50 and M5 route. This is a priority stretch of motorway and a core MSA can only reasonably be located within a small part of the motorway. On balance it is considered that the application site is appropriate and conforms to the policy requirements as set out in Circular 01/2008.

22.2 The Highways Agency is the national road network consultee and it is their responsibility and area of expertise. They have stated that there is a need for the provision of a core MSA facility and that the proposed MSA would help fulfil the policy aspirations and need.

22.3 It is concluded that the proposed development will affect the rural setting, however it is considered that the proposed landscaping scheme will help to mitigate any medium to long term effect. The site is not within the Cotswold Area of Outstanding Natural Beauty, however it does border it. It is concluded that the proposal is sensitive to its landscape setting and it will have a slight adverse impact on the landscape designation. This has been supported by the independent landscape assessment as carried out by Nicholas Pearson Associates Ltd.

22.4 The design of the buildings and site layout has been landscape led and has been congratulated by the South West Design Panel. It is considered that the detailed design reflects sustainable concepts alongside landscape mitigation measures that will seek to minimise adverse impacts on the landscape setting.

22.5 It is also significant that the scheme will provide considerable employment opportunities [sic] needed jobs, with measures to target areas of greatest need. The Section 106 agreement also provides control over local/regional food which should support local/regional agriculture.

22.6 On balance is it concluded that the regeneration and highway safety benefits of the scheme outweigh the slight concerns over landscape impact and that this application is clear and soundly based.

Recommendation

23.1 The application is therefore considered to comply with Policies indicated in the planning policy section above. Permission is recommended subject to a Section 106

agreement: covering local/regional food sourcing, employment co-ordinator, minibus/travel plan and monitoring cost contribution."

17. Appendix A to the report contained the responses from statutory consultees. These included the third, fourth and fifth claimants, Natural England, CPRE, and the Cotswold Conservation Board.

The Law

18. With the exception of ground 4 there was no dispute between counsel as to the law applicable to the present case. Section 70 of the Town and Country Planning Act 1990 provides:-

> (1) Where an application is made to a local planning authority for planning permission-
>
> a) … they may grant planning permission either conditionally or subject to such conditions as they think fit;
>
> or
>
> b) they may refuse planning permission.
>
> (2) In dealing with such an application the authorities shall have regard to the provisions of the development plan, so far as material to the planning application, and to any other material consideration."

19. By section 38(6) of the Planning and Compulsory Purchase Act 2004:-

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

20. In a well known passage in *Tesco Stores Ltd v Secretary of State for the Environment* [1995] 2 All ER 636 at 657 Lord Hoffmann said:-

> "The law has always made a clear distinction between the question of whether something is a material consideration and the weight which it should be given. The former is a question of law and the latter is a question of planning judgment, which is entirely a matter for the planning authority. Provided that the planning authority have regard for all material consideration, they are at liberty (provided they do not lapse into *Wednesbury* irrationality) to give them whatever weight the planning authority thinks fit or no weight at all. The fact that the law regards something as a material consideration therefore involves no view about the part, if any, which it should play in the decision-making process.

> This distinction between whether something is a material consideration and the weight which it should be given is only one aspect of a fundamental principle of British planning law, namely that the courts are concerned only with the legality of the decision-making process and not with the merits of the decision. If there is one principle of planning law more firmly settled than any other, it is that matters of planning judgment are within the exclusive province of the local planning authority or the Secretary of State."

21. As Mr Martin Kingston QC for the Interested Party rightly observes, a key plank in the Claimants' challenge is criticism of the Officer's Report. There is a formidable body of authority on the proper approach of the courts to such reports. In *Oxton Farms v Selby DC* [1997] EGCS 609 Judge LJ (as he then was stated:

> "The report by a planning officer to his committee is not and is not intended to provide a learned disquisition of relevant legal principles or to repeat each and every detail of the relevant facts to members of the committee who are responsible for the decision and who are entitled to use their local knowledge to reach it. The report is therefore not susceptible to textual analysis appropriate to the construction of a statute or the directions provided by a judge when summing a case up to the jury.
>
> From time to time there will no doubt be cases when judicial review is granted on the basis of what is or is not contained in the planning officer's report. This reflects no more than the court's conclusion in the particular circumstances of the case before it. In my judgment an application for judicial review based on criticisms on the planning officer's report will not normally begin to merit consideration unless the overall effect of the report significantly misleads the committee about material matters which thereafter are left uncorrected at the meeting of the planning committee before the relevant decision is taken."

22. In *R v Mendip ex p Fabre* (2000) 80 P&CR 500 at 509 Sullivan J (as he then was) stated, in respect of the Officer's Report to committee:

> "Its purpose is not to decide the issue, but to inform the members of relevant considerations relating to the application. It is not addressed to the world at large but to council members, who, by virtue of that membership may be expected to have substantial local and background knowledge. There would be no point in a planning officer's report setting out in great detail background material, for example in respect of local topography, development plan policies or matters of planning history if the members were only too familiar with that material. Part of a planning officer's expert function in reporting to the committee must be to make an assessment of

> how much information needs to be included in his or her report in order to avoid burdening a busy committee with excessive and unnecessary detail."

23. In *BT plc v Gloucester CC* [2001] EWHC Admin 1001; [2002] 2 P&CR 33: Elias J (as he then was), observed (at paragraph 118):

> "It is important that the principal issues and the key information are put to them, but it is not necessary, or indeed desirable, that the report should be exhaustive. Plainly there will always be room for dispute as to whether the report should in certain respects have been fuller, or whether certain guidance should have been expressly referred to, particularly in a development which is as large and significant as this one. But it is not for the court to second guess the officers. …"

24. In *Morge v Hampshire County Council* [2011] 1 All ER 744 Baroness Hale of Richmond said:

> "Democratically elected bodies go about their decision-making in a different way from courts. They have professional advisors who investigate and report to them. Those reports obviously have to be clear and full enough to enable them to understand the issues and make up their minds within the limits that the law allows them. But the courts should not impose too demanding a standard upon such reports, for otherwise their whole purpose will be defeated: the councillors either will not read them or will not have a clear enough grasp of the issues to make a decision for themselves. It is their job, and not the court's, to weigh the competing public and private interests involved."

25. As Pill LJ said in *R(Lowther) v Durham County Council* [2001] EWCA Civ 781, the officer's duty is broader than a duty not actively to mislead. It includes a positive duty to provide sufficient information and guidance to enable the members to reach a decision applying the relevant statutory criteria. But in the end the decision is a matter of fact and degree for the members.

Ground 1: Objections on the issue of need

26. It will be seen from paragraphs 55, 57 and 58 of Circular 01/2008 that a distinction is drawn between core and infill MSAs. If one were looking at the M5 alone the proposed site would be described as an application for an infill MSA, not a core one. This is because it is about half way between Strensham to Michaelwood, a total distance of only 33 miles. But once one takes the M50 into account the position is different.

27. The Claimants obtained a detailed report from Savills, planning consultants, which treated the application as being for an infill MSA and thus requiring a "clear and compelling need and safety case" to be demonstrated, with consideration being given to the factors listed in paragraph 58 among others. Savills did not address themselves

to whether the proposed site was to be treated as a core MSA because of the distance between Ross-on-Wye and Michaelwood for a driver travelling east on the M50 and turning south at the junction with the M5 (or, of course, making the reverse journey from Michaelwood to Ross-on-Wye).

28. In July 2010 Mr Philip Skill, Head of Planning at the Council, wrote to the Highways Agency to ask whether they considered the proposal to be a core or an infill MSA; and, if it was a core MSA, whether the Agency considered that such a facility at or near the proposed location was required for the satisfactory functioning of the strategic road network. On 16th July Mr Wray, Network Manager at the Agency, replied:

> "As the gap in service provision (from the end of the M50 at Ross to Michaelwood) is in excess of 50 miles, this proposal constitutes a core MSA. This gap in core provision on the SRN is one of half a dozen nationally which have been recognised by ministers, so this MSA would help fulfil the policy aspirations and need by filling one of these accepted gaps on our network…."

29. Savills included in their report some traffic flow figures relating to the M50 and the relevant sections of the M5. These showed that, as any member of the Defendant Council might be expected to know, the M5 is busier than the M50; and that a majority of drivers travelling along the M50 to its junction with the M5 turn north rather than south (and similarly in reverse). The annual average daily traffic flow (adding both directions together) on the M5 to the north of the junction in 2008 was approximately 90,700; to the south of the junction 78,700, which reduces to 74,500 at Michaelwood itself. The flow along the section of the M50 nearest to the M5 was just short of 31,600 and the estimated total flow between the M50 and the M5 south of the junction was in the region of 10,800 to 11,000, most but not all of which came from or went to Michaelwood. Similarly on the M50 most but not all of the traffic had started from or would continue to the Ross-on-Wye terminus. Savills drew the conclusion that only some 8,000 vehicles per day made the journey in either direction between Ross-on-Wye and Michaelwood, this being about 10% of the traffic flow at Michaelwood itself.

30. For the Claimants Mr Price Lewis QC now accepts that the Highways Agency were correct in their view that the proposed MSA would be a core MSA within the meaning of Circular 1/2008; and that the Council cannot be criticised for accepting that advice. He submits, however, that it was wrong to treat need as a binary question and to disregard the extent of the need. He argues that it was highly material that the need only existed in respect of some 8,000 drivers per day and that this significant matter contained in the Savills report was not drawn to the attention of the committee. Instead, he submits, the Officer's Report and the committee decision itself effectively treated the designation as a core MSA "as the sole determinant of the need for the proposal" and proceeded on the basis that, if the guidance was met, "any other considerations on whether a need in fact existed did not fall to be considered".

31. I do not accept that the issue of need was treated in such a binary or over-simplified way. Mr Price Lewis' opinion, appended to the report, argued issues of need, and emphasised the point about the traffic passing daily between Michaelwood and Ross-

on-Wye being perhaps as little as 8,000 vehicles. The Council's response to the letter before claim made it clear, as Mr Choongh on their behalf has submitted to me, that once it was concluded that under the Circular 1/2008 a core MSA was needed it was not necessary to decide whether there was a "clear and compelling need and safety case", because such a case is only required for an infill MSA, not a core one. But the Council did not go on to treat the question of need as being settled by the Circular to the exclusion of other material considerations. Plainly the need for a core MSA was itself a material consideration: Mr Price Lewis does not suggest otherwise. The Committee were correctly advised that the weight to be given to that consideration was a matter for them and that they had to balance it against the points raised by the objectors.

32. The transcript of the meeting illustrates this. At page 758 of the bundle we find John Longmuir, the Development Control Manager of the Council, reporting on letters from Savills and the Claimants' solicitors. He says, "They are making a point [that] the Council's got to balance the need against its own planning policies". The letter from Savills, he said, accepts that if all the indicators of need identified in the Circular are examined then there is the need for an additional MSA; but it questions whether that need is actually compelling and whether or not this MSA would close the gap in the M50 provision. The writer (Mr Dixon of Savills) is suggesting that it is a low-level need; and this, coupled with the ineffectiveness of closing the core gap, and this has to be weighed against landscape harm.

33. The need to weigh up competing material considerations was repeatedly emphasised. In answer to a question from Councillor Stephens Mr Longmuir replied at page 764 "as ever, you have got to balance things up … you have to weigh up landscape impact and the need and certainly the need aspects have changed to tip that balance in terms of the DFT Circulars". In answer to a question from Councillor Marjoram he said,

> "…You have also got to weigh in the previous guidance in terms of journey times [and] in terms of the aspirations to have only a 28 mile distance, so there is a lot for you to consider in terms of need and it is for your judgment today… I think at the end of the day you have got to say to yourself who is responsible for highway safety in the county on motorways and that falls within the Highways Agency and their advice, and the advice to you this morning, is that this is a core MSA and you have got to weigh that up … So that's the advice we've given [about why the proposal constitutes a core MSA]; you have got to mull that over and come to a judgment and as I say you have got to be advised by what the objectors have said but equally you have to be advised by what the Highways Agency are saying."

34. Mr Price Lewis complains that the Savills Report was not analysed in detail. In particular he says, the Officer's Report to committee failed to make clear the extent to which Savills made a series of points capable of undermining the alleged need for the MSA identified by the Highways Agency. The one on which he laid emphasis in oral argument was the relatively small number of drivers making the journey between Ross-on-Wye and Michaelwood. But that point, which is hardly a technical one, was spelt out in his own opinion appended to the report and referred to in bold type in the

important section 21. The Savills Report itself was not appended, but it was, with respect, so flawed by the error in treating the proposal as being one for an infill MSA that it might have been misleading to the committee. I also bear in mind Baroness Hale's advice in *Morge*. There is a limit to how much material elected councillors, even applying themselves conscientiously to an important decision, can be expected to absorb. The main issues were fairly and thoroughly summarised in the Officer's Report and there is nothing in the debate to indicate that members were unaware of them.

35. At paragraph 41 of his skeleton argument Mr Price Lewis complains that on road safety issues the Highways Agency identified "a potential negligible to slight benefit in accident reductions", which was misleadingly reported to the members as a "slight benefit". Mr Price Lewis engagingly admitted that this was not a pivotal point. In my view it is one of no substance.

36. The central issue for the Committee was whether the need for an MSA at or very close to the proposed location was outweighed by its likely impact on the landscape. This was a difficult matter on which reasonable people might come to different conclusions, as illustrated by the fact that the proposal was only approved by six votes to four. But it was a decision for the Committee, not for the court. I do not consider that either the Officer's Report or the Committee itself failed to take account of the Claimant's arguments on need.

Ground 2: Policy NE8 and Landscape Impact

37. Policy NE8 of the Stroud Local Plan states as follows:

> "Within the Cotswolds AONB, priority will be given to the conservation and enhancement of the natural beauty of the landscape over other considerations, whilst also having regard to the economic and social well-being of the AONB. Development within, or affecting the setting of, the AONB will only be permitted if all the following criteria are met:
>
> a) The nature, siting and scale are sympathetic to the landscape;
>
> b) The design and materials complement the character of the areas; and
>
> c) Important landscape features and trees are retained and appropriate landscaping measures are undertaken.
>
> Major development will not be permitted unless it is demonstrated to be in the national interest and that there is a lack of alternative sites." [emphasis added]

38. Policy NE8 is listed in the Officer's Report but not specifically analysed. However, there is a good deal of material in the report consisting of an assessment of the impact of the proposal on the landscape. Indeed, the Council commissioned an independent landscape assessment by the firm of Nicholas Pearson Associates. Mr Price Lewis

complains that this assessment is inaccurately or at least selectively quoted. The report cites its conclusions that the likely effect of the proposed MSA on the character of the landscape is "generally slight adverse or negligible/slight adverse with only few character types having a negligible impact". But the report does not go on to mention the conclusion that the visual effects of the proposed development, including from viewpoints within the AONB, are expected to be "moderate/substantial/adverse" from four viewpoints in the AONB in the short-term, and still "moderate/adverse" even after 15 years.

39. The Claimants argue that the Council failed to take into account a material consideration, namely whether the proposals contravened policy NE8 of the Local Plan and, if they did, whether they should nevertheless be permitted; and further, by omitting to consider the terms of policy NE8 in the context of landscape impact, the Officer's Report was significantly misleading. Its assessment that the proposal would cause limited adverse impact on the AONB was, Mr Price Lewis submits, "effectively left in a policy vacuum".

40. It is correct that policy NE8, though listed in the Report to Committee as material, was not set out in full. There is no reason why it should have been. As Sullivan J observed in the *Mendip* case, members may be assumed to be familiar with local planning policies. The transcript of the debate shows that Councillor Marjoram, one of those who voted against the proposal, referred to "NE8" in the course of his remarks without anyone seeking an explanation. The impact of the proposal on the landscape of the site adjoining the Cotswolds AONB was plainly one of the material considerations which had to be , and was, taken into account.

41. Although the assessment by Nicholas Pearson Associates was appended to the Officer's Report, it is a fair point that, if the Officer's Report was going to quote *verbatim* the consultants' assessment of the likely effect on landscape character, it ought preferably to have quoted their less favourable assessment of the visual effects from viewpoints within the AONB. But I consider that as a criticism of the report to the committee this falls fairly and squarely within what Judge LJ in *Oxton Farms* regarded as inappropriate. Visual impact is classically a matter of opinion. The Committee had available to it montages of the proposed development and photographs from a variety of viewpoints. A members' site visit had been arranged for the Thursday before the meeting and, although it is not recorded who attended on that occasion, one would surely expect a conscientious committee member, particularly on a decision as important as this one, to go and see for himself or herself either then or on another convenient occasion before the crucial meeting. With all these pieces of evidence in play it seems inconceivable to me that whether a consultant regarded the likely visual impact as "slight adverse" or "moderate/substantial adverse" could be a decisive factor in any councillor's decision. The report, read as a whole sets out clearly the potential for visual impact on the landscape adjacent to the AONB. I reject ground 2 of the Claimants' challenge.

Ground 3: Failure to consider the objection from Natural England

42. Natural England is a statutory body charged with the responsibility to ensure the protection of England's unique natural environment including its landscapes. In a letter of objection Natural England argued that the development would have a significant effect on the landscape setting of the Cotswolds AONB, and a detrimental

effect on the landscape of the AONB. They considered that there would be a "significant impact on the surrounding landscape character and open countryside [caused] by this major development". The letter referred to policy NE8 of the Local Plan and other policies and stated that the development was contrary to the Local Plan in the context of landscape issues. The letter was part of Appendix A to the report. Reference was made in paragraph 10.10 of the text of the report to the comments from Natural England but their letter was not analysed. During the debate Councillor Marjoram suggested that more notice should have been given to the Natural England letter in the Officer's Report and that its contents should have been addressed in more detail.

43. The letter from Natural England consisted principally of references to policies to which it considered the proposed development would be contrary. It was not necessary for the Officer's Report to deal with the letter line by line or paragraph by paragraph. If it had done so even with the objections raised by statutory consultees, let alone those raised by individual objectors, the report would have been interminable. The report engaged with the substance of the issues referred to by Natural England and dealt with them carefully and thoroughly. Ground 3 of the challenge therefore fails.

Ground 4: Regulation 122 of the Community Infrastructure Levy Regulations 2010

44. As a condition of the grant of planning permission the Committee required the developers to enter into an agreement with the Council under section 106 of the 1990 Act. This provided among other things for a proportion of the food to be served at the MSA to be sourced locally. The Claimants submit that at least some of the obligations contained in the agreement failed to comply with regulation 122(2) of the Community Infrastructure Regulations 2010 and were therefore not a legitimate reason to be taken into account when granting permission.

45. Regulation 122 provides as follows:-

> "**Limitation on use of planning obligations**
>
> (1) This regulation applies where a relevant determination is made which results in planning permission being granted for development.
>
> (2) A planning obligation may only constitute a reason for granting planning permission for the development if the obligation is-
>
> > a) necessary to make the development acceptable in planning terms;
> >
> > b) directly related to the development; and
> >
> > c) fairly and reasonably related in scale and kind to the development.

> (3) In this regulation – "planning obligation" means a planning obligation under section 106 of TCPA 1990 and includes a proposed planning obligation; and "relevant determination" means a determination made on or after 6th April 2010 –
>
> > a) under section 70 ……. of TCPA 1990 of an application for planning permission…"

46. By provisions in the s 106 agreement the developer and the site owner agreed during the occupation of the development to use reasonable endeavours to stock retail goods and produce for sale in the shop to be sourced from at least forty local producers and twenty regional producers and in the café (in respect of certain items) as to half from local producers. The document also required a local employment and training policy to be submitted for the approval of the Council.

47. Mr Price Lewis submits that "whether an obligation contained in a section 106 agreement which has amounted to a reason for granting permission satisfies the tests in regulation 122(2) is a matter of law for the Court. The question for the Court is whether the obligations in question meet the statutory tests contained in regulation 122." In other words, he submits that it is for me to say whether the obligations such as local food sourcing were "necessary to make the development acceptable in planning terms", (as well as being directly related to the development and fairly and reasonably related to it in scale and kind).

48. There is nothing novel in regulation 122 except the fact that it is contained in a statutory instrument. Its wording derives from Departmental Circular 05/05, which in turn was the successor to previous circulars such as 16/91. Circular 16/91 required that the obligation to be imposed as a condition should be "necessary to the grant of permission" or that it "should be relevant to planning and should resolve the planning objections to the development proposal concerned."

49. In the *Tesco* case Lord Hoffmann dealt with a submission by counsel for Tarmac, the developer in competition with Tesco, that Tesco's offer to build a link road if permission were granted was not material within the terms of Circular 16/91 "because it did not have the effect of rendering acceptable a development which would otherwise have been unacceptable". Lord Hoffmann went on:

> "The test of acceptability or necessity suffers in my view from the fatal defect that it necessarily involves an investigation by the court of the merits of the planning decision. How is the court to decide whether the effect of a planning obligation is to make a development acceptable without deciding that without that obligation it would have been unacceptable? Whether it would have been unacceptable must be a matter of planning judgment. It is, I suppose, theoretically possible that a Secretary of State or local planning authority may say in terms that he or it thought that a proposed development was perfectly acceptable on its merits but nevertheless thought that it was a good idea to insist that the developer should be required to undertake a planning obligation as the price of obtaining his permission. If that should ever happen, I should think the courts

> would have no difficulty in saying that it disclosed a state of mind which was *Wednesbury* unreasonable. But in the absence of such a confession, the application of the acceptability or necessity test must involve the courts in an investigation of the planning merits. The criteria in Circular 16/91 are entirely appropriate to be applied by the Secretary of State as part of his assessment of the planning merits of the application. But they are quite unsuited to application by the courts."

50. In my judgment this passage remains good law under the 2010 Regulations. So too does the ratio of the *Tesco* case. An offered planning obligation which has nothing to do with the proposed development apart from the fact that it is offered by the developer is plainly not a material consideration and can only be regarded as an attempt to buy planning permission. However, if it has some connection with the proposed development which is more than *de minimis* then regard must be had to it. The extent, if any, to which it affects the decision is a matter entirely within the discretion of the decision-maker.

51. Mr Price Lewis submits that "the requirements to ensure that local produce and local employment opportunities are provided for are not matters which satisfy a policy that must be complied with in order to enable the development to proceed". But it is not for me to say whether they are necessary to make the development acceptable. Subject to the requirement that they must be "directly related" to the development, which is the next point, that decision was for the committee.

52. On the "directly related" issue Mr Price Lewis prays in aid a paragraph in Circular 05/05 which provides:

> "Obligations must also be so directly related to proposed developments that the development ought not to be permitted without them – for example, there should be a functional or geographical link between the development and the item being provided as part of the developer's contribution."

53. I accept the submissions of Mr Choongh and Mr Kingston that the planning obligations relating to local food sourcing and local employment are directly related to the development and fairly and reasonably related to it in scale and in kind. The planning statement submitted with the application referred to paragraph 158 of Circular 01/2008 (see above) and Regional Planning Policy EC1 which deals with support for the sustainable development of the regional economy. The Committee were correctly advised that certain other proposed section 106 obligations, for royalty payments and an ethical food sourcing policy were not in accordance with the requirements for section 106 agreements; these were duly removed. The Council's solicitor correctly explained the appropriate tests to the Committee in the course of the debate. The reference to a "functional or geographical link" in Circular 05/05 is not a statutory test; but, even if it were, I consider that it is plainly met in the present case.

Conclusion

54. In the result I do not uphold any of the grounds of challenge to the lawfulness of the Council's decision to grant planning permission for the proposed MSA. The application for judicial review is therefore dismissed.