



Neutral Citation Number: [2021] EWHC 1014 (Admin)

Case No: CO/4064/2020

**IN THE HIGH COURT OF JUSTICE**  
**QUEEN'S BENCH DIVISION**  
**PLANNING COURT**

Royal Courts of Justice  
Strand, London, WC2A 2LL

Date: 23 April 2021

**Before :**

**MRS JUSTICE LANG DBE**

**Between :**

**THE QUEEN**

**Claimant**

**on the application of**

**SWAINSTHORPE PARISH COUNCIL**

**- and -**

**NORFOLK COUNTY COUNCIL**  
**SOUTH NORFOLK DISTRICT COUNCIL**

**Defendant**  
**Interested Party**

**Charles Merrett** (instructed by **Hewitsons LLP**) for the **Claimant**

**Jack Parker** (instructed by **nplaw**) for the **Defendant**

The **Interested Party** did not appear and was not represented

Hearing date: 23 March 2021

**Approved Judgment**

**Mrs Justice Lang :**

1. The Claimant seeks judicial review of the consultation response (“the response”) made by the Defendant (“NCC”), in its capacity as the local highway authority, by letter dated 28 September 2020, to the Interested Party (“SNDC”), the local planning authority, which was considering a planning application for a development on land near the A140 highway in Swainsthorpe, Norfolk (“the Site”). The response gave effect to a resolution passed by NCC’s Cabinet on 7 September 2020 (“the decision”), which the Claimant also challenges.
2. The Claimant is the Parish Council for Swainsthorpe, which is a village on the A140, situated some 5 miles south of Norwich. The Site lies within the area of the civil parish. The A140 is a major highway, and part of the Major Route Network.
3. Permission to apply for judicial review was granted on the papers on 18 February 2021. SNDC has not yet determined the application for planning permission.

**Grounds of challenge**

4. The Claimant submitted that the decision of 7 September 2020 and the response of 28 September 2020 were unlawful on the following grounds:
  - i) Ground 1: the decision and the response were *ultra vires*, contrary to NCC’s Constitution (“the Constitution”) and the requirements of the statutory consultation.
  - ii) Ground 2: NCC failed to give adequate lawful reasons for the decision and response.
  - iii) Ground 3: NCC took into account immaterial considerations when making the decision and providing the response.
  - iv) Ground 4: the decision and the response were irrational.

**Facts**

5. Ben Burgess & Co. Limited (“Ben Burgess”) is a major supplier of agricultural equipment, with headquarters near Norwich. It applied to SNDC for planning permission to develop a new headquarters at the Site, to include areas for the supply, maintenance, repair and hire of agricultural, construction and grounds care machinery and equipment, offices, education hub, trade counter, sales and display areas, associated internal and external storage, and associated infrastructure. It proposed two access options from the A140 to the Site: Option 1, which was a ghost island incorporating a right hand turn; or Option 2, which was a new three-arm roundabout.
6. Prior to the application, Ben Burgess sought the views of NCC on appropriate access options, and was given advice consistent with NCC’s subsequent formal consultation response in the email of 29 May 2019.

7. On 8 January 2019, SNDC consulted NCC on the application for planning permission, in particular, the road access options, in its capacity as the local highway authority and statutory consultee.
8. A consultation response was sent to SNDC, by letter dated 29 May 2019, from Ms Liz Poole, Major and Estate Development Team Manager, for the Executive Director for Community and Environmental Services. The letter stated:

“...There has been significant dialogue regarding the impacts of the proposed development. The applicant has submitted two access proposals to serve their development. The first of these, a ghost island right hand turn lane is considered a wholly unacceptable junction form in this location in that it would be detrimental to highway safety and the strategic function of the A140 at this location, contrary to policy DM3.11 of South Norfolk’s Development Plan and the National Planning Policy Framework Paragraph 109.

The second access proposal is a roundabout towards the southern end of the site. The County Council as local highway authority has considered the information provided and has been in discussion with the applicant regarding technical aspects of the proposed roundabout and whilst there are minor issues with the modelling, in particular relating to lane usage, the highway authority considers that the submitted scheme could be technically acceptable.

However, as you may be aware the A140 has recently been enhanced in its status to that of part of the Major Road Network (MRN). By definition the MRN has a ‘movement corridor’ function and additional junctions should be minimised or rationalised wherever possible to minimise turning movements and vehicular conflict. The proposed development introduces a new junction on a route of strategic importance defined as a ‘Corridor of Movement’ and additionally, on part of the MRN where vehicle speeds are high. The junction serves no strategic or local access function and is therefore to the detriment of the A140 as a primary traffic carrying route.

Throughout discussions with the applicant and their transport consultant, the highway authority has always maintained that should the development come forward, the appropriate junction would be a roundabout at the north of the site at the location of an existing road junction which would not only enable access to the proposed development site to the A 140 but would also connect Stoke Lane. A roundabout in this location would not create an additional junction on the A 140 and would be strongly preferred, if planning permission is to be considered. However the applicant has maintained that they wish to progress with a roundabout at the proposed location and, in light of this, the

highway authority recommends refusal on the following grounds:

SHCR 04: The proposed development would lead to the creation of a new access on a stretch of classified highway of nationally strategic importance which carries significant traffic movements, usually at speed. Furthermore, the vehicular movements associated with the use of the access would lead to conflict and interference with the passage of through vehicles and introduce a further point of possible traffic conflict particularly with the introduction of slow moving traffic. Contrary to South Norfolk's Development Plan Policy DM 3.11.”

9. On 16 July 2020, consulting engineers on behalf of Ben Burgess prepared a document headed “Access Options Consideration – Technical Note”, describing a range of access options which had been extensively explored.
10. By a letter dated 10 August 2020, the planning consultants on behalf of Ben Burgess (K. Garnham Design) formally submitted revised access proposals to SNDC, referring to the Technical Note. In the light of NCC’s objections, they withdrew Option 1 (the ghost island right turn). They advised that it was “not possible to deliver a roundabout to bring into one junction, access to the site, north and south bound lanes of A140, Stoke Land and Hickling Lane” because of “constraints of third party land” and “legal issues”. Having regard to the advice in the Technical Note, they proposed a revised version of Option 2, comprising a “three-arm roundabout (with Stoke Lane Ghost Island) and provision of an optional removal of right turns out of Stoke Lane and Church Road”.
11. In August 2020, SNDC consulted NCC on the revised access proposal submitted by Ben Burgess. NCC officers discussed the proposal, as evidenced by their email exchanges below.
12. On 19 August 2020, Ms Poole emailed Mr Tom McCabe, the Executive Director for Community and Environmental Services and Head of Paid Service, and four other officers, as follows:

“..... Ben Burgess have submitted an amendment to their planning application. This amendment includes a minor change to the original access scheme which is a new 3-arm roundabout on the A140 with the potential to ban right turn movements from Church Lane and Stoke Road. I have attached the submitted plan for information as well as site plan.

Unfortunately the applicant has decided not to progress with the 4-arm roundabout on which we were consulted recently and which we had said we were happy with (subject to detailed design).

I am taking the amended scheme to Development Team on Monday (24<sup>th</sup>) to obtain the view of the Highway Authority as technical consultee. Previously Development Team had

recommended refusal of the application with the 3-arm roundabout on the following grounds:

*The creation of a new access on a stretch of classified highway of nationally strategic importance which carries significant traffic movements usually at speed. Furthermore the vehicular movements associated with the access would lead to conflict and interference with the passage of through vehicles and introduces a further point of possible traffic conflict particularly with the introduction of slow moving traffic. Contrary to South Norfolk's Development Plan Policy DM3.11.*

I will let you know what the view of Development Team is after Mondays meeting.”

13. On 20 August 2020, at 12:08, Mr McCabe replied to Ms Poole and four other officers stating:

“A number of cabinet members, inc. Cabinet Member for Growth and Development, are keen to consider whether we should follow this normal response or, when considering the specifics of this application (esp. around economy, jobs etc) they would want to go against our normal response. As such, I have been asked that we draft a report for Cabinet with the options and let them decide.

I'd envisage that this sets out 2 options:

1. What our standing policy is and the rationale behind it – which would lead to an objection.
2. What the economic and job aspects of the proposal are and how the development would enable these – which would lead to no objection.

They have agreed that the report will be under Cabinet Member for Growth and Development – as it is looking at the proposal through this lens rather than a traditional highways perspective.

Can you advise me where the actual policy was decided – was it in a report to Cabinet or Full Council – or has it 'evolved' through custom and practice. If you could let Helen and me have a copy of it so we can decide if we do need to go to Full Council – hopefully not. Also, what is the deadline for responding to South Norfolk?

Sarah – we haven't got anything on the Forward Plan for this – can you give some thought as to whether this is a key decision and any actions etc depending on how long we've got.

Finally, Vince can you get somebody to assist Liz on drafting the economic development aspect of the report.

Liz – do come back to me if there are any things that we need to talk through.

Thanks. Tom”

14. On 20 August 2020, at 14:35, Ms Sarah Rhoden, Assistant Director for Performance and Governance, emailed Mr McCabe, Ms Poole, and two other officers requesting further information on the relevant NCC policies, and expressing the preliminary view that it was probably not a key decision as there was no budget implication, and there was no relevant item in the Policy Framework.

15. On 20 August 2020, at 16:01, Mr Matt Tracey, Growth and Infrastructure Manager, replied to Ms Rhoden’s email, copying in Mr McCabe, Ms Poole, and another officer, saying:

“Can we speak on this as I’m anxious this has the potential to effectively create precedent which could be seen to undermine our role as Highways consultee relative to unrelated considerations that lie with the LPA to come to a balanced decision on...”

16. On 21 August 2020, at 10:25, Mr Tracey sent an email to Ms Poole, Ms Middleton and another officer, which said:

“Liz

A first draft of the Cabinet paper will need to be circulated by Monday. This will need to have distinct and separate input from your perspective as the highways planning consultee, together with a section on Ec Dev benefits if the proposed development is consented (I’ve copied in Jo as this will need to be covered off by a different officer and she may be able to offer up some help). Grahame Bygrave’s view on safety as the relevant service head will also need to be incorporated (presumably referencing Safety Audit etc).

Sarah is happy that the supporting technical stuff (detailing planning discussions, concerns etc from a highways and transport perspective) is drafted first, which can then be reflected on and ‘finessed’. So no need to worry too much at this stage as it how it hangs together.

Can you also confirm to Sarah asap what the paper is to be titled...something like: ”County Council planning consultation response to .....”.”

17. On 21 August, at 10:49, Ms Jo Middleton, Economic Strategy and Policy Manager, sent an email to Ms Hannah Grimes, Economic Policy Officer, asking her to identify the economic benefits of the scheme for Ms Poole’s Cabinet paper.
18. On 21 August 2020, at 11:56, Ms Grimes sent Ms Poole a summary of the economic benefits taken from the planning statement, which was copied to three other officers.
19. The Officer Report (“OR”) was signed by Mr McCabe. It began with an introduction from Councillor Graham Plant, Cabinet Member for Growing the Economy, which stated that the relocation of the Ben Burgess headquarters would provide clear economic benefits to the Norfolk economy.
20. The OR advised members that the purpose of the meeting was “[t]o determine the County Council’s statutory consultee response to this planning application, as highway authority i.e. to support or object to the proposal, and to set out the reasons for this determination”. The OR did not recommend an outcome.
21. Under the heading “1. Background and Purpose”, the OR advised that NCC had a statutory duty, as local highway authority, to respond to consultations on planning applications from local planning authorities. The OR noted that “[i]n this case, Cabinet wanted to ensure that they had the opportunity to consider the economic benefits of the proposal alongside the highway considerations....”.
22. Under the heading “2.3 Officer highway authority consideration”, the OR referred to the earlier consultation response, in the letter of 29 May 2019, and advised that the access arrangements did not address the points made in it. At paragraph 2.3.6, the OR stated:

“Officers considered the relevant guidance (see Appendix A<sup>1</sup>) in formulating the view that the introduction of new junction on the A140 as set out in the planning application would have a detrimental impact on the free flow of traffic on the A140 between the new Hempnall roundabout and the A140/A47 junction at Harford. Considering the investment in the A140 which seeks to improve journey times and reduce accidents along this section of MRN, officers consider that a new junction would undermine efforts to improve the A140 relative to a proposal that offers little highway benefit by reason of not being located at an existing junction.”
23. Under the heading “2.3 Safety and view of the Head of Profession”, the OR stated at paragraph 2.4.2:

“...irrespective of the specific guidance considered above, the Director of Highways and Waste has reviewed the planning application and considered whether the proposed access arrangements via the roundabout configuration proposed can be considered as safe. The view of the Director of Highways and

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<sup>1</sup> Appendix A comprised extracts from “Safe, Sustainable Development: Aims and Guidance notes for Local Highway Authority requirements in Development Management”, paragraphs 7.1 and 7.2

Waste is that the correct form of junction on this type of road ...is a roundabout junction. Provided this roundabout can be designed to comply with the latest national requirements specified in the national Standards for Highways, then it can be considered safe. As highlighted earlier in this report, the preference remains to have a single roundabout junction serving the proposed development and the Stoke Lane junction, both in terms of network management, road safety and to comply with the Council's current Safe and Sustainable Guidance for developers. However, if this cannot be achieved, on balance a stand-alone roundabout constructed to the current design standards will be a safe form of junction."

24. At paragraph 2.5, under the heading "Economic benefits", the OR summarised the economic benefits of the application:

“• Agri-food is a key sector in a number of key local strategies and plans:

o The New Anglia Economic Strategy and Local Industrial Strategy, its Covid19 Restart Plan and the Norfolk Rural Strategy

o Ben Burgess are a key player in the agri-food sector and wider rural economy, and so are represented on the Board of the New Anglia Agri-Food Industry Council, which oversees delivery of actions to grow and develop the sector.

o Ben Burgess supports the agricultural sector, and wider Norfolk rural economy, both of which are even more important in light of Brexit and the post-Covid19 recovery of the county.

• There would be a number of economic benefits of Ben Burgess moving from their current location, both to the company and the wider economy:

o A move would allow the business to expand and attract new customers and retain the current skilled workforce.

o The proposal may also provide an increase in the number of jobs from 95 to approximately 122, with an opportunity to expand apprenticeships.

o Expansion would strengthen the supply chain that supports farmers and producers in close proximity to their operations, which is vital to the future competitiveness of the agricultural sector in Greater Norwich.

o The business will be able to fully embrace new technology and train and demonstrate to existing and potential customers the



capabilities of the new machinery and technologies – a key objective of the Norfolk Rural Strategy.

o Linked to this, a new innovation and education hub is proposed, to enable Ben Burgess to assist rural businesses in south Norfolk to fulfil their competitiveness and achieve the most out of new technologies.

o The proposed location also has good access to the A11, and fits with the aims of the Norwich-Cambridge Tech Corridor strategy, to drive clean, efficient, technology-based economic activity

• In summary, Ben Burgess provide significant services to the sector, both regionally and nationally. If they are not able to successfully relocate within Norfolk there is a risk that they have to seek a location outside Norfolk, meaning that the jobs and economic benefits of the operation will be lost.”

25. The OR added that:

- i) Ben Burgess maintained that the economic benefit of the proposal outweighed the concerns of the highway authority; and
- ii) “Economic benefit is not a direct consideration for the highway authority but is a consideration for Cabinet”.

26. At the Cabinet meeting on 7 September 2020, the following resolution was passed:

“Cabinet considers that the economic impact of the proposals alongside the safety and appropriateness of a roundabout on the A140 overcome objections as a highway authority and we therefore raise no objections to the planning proposal.”

27. The reasons for the resolution were set out in the Minutes as follows:

“14.2 .....

The Executive Director highlighted that the decision on the planning application remained with South Norfolk District Council and that the report was to determine the County Council’s consultation response. Cabinet was asked to weigh up the relatively narrow highways view on the junction, versus the broader impact of the development on the Norfolk economy.

The Cabinet Member for Growing the Economy introduced the report, during which the following points were noted:

• Cabinet was being asked to determine Norfolk County Council’s statutory consultee response to the planning application as the Highway Authority, i.e. to support or object the proposal as set out its reasons for the determination.

- A planning application had been submitted by Ben Burgess, a farm machinery company, to relocate their headquarters from Norwich to Swainsthorpe, with direct access onto the A140.
- As statutory highway authority, Norfolk County Council had responded to the original application recommending refusal in 2019. Since the refusal, an amended application had been submitted and Cabinet was being given the opportunity to consider the economic benefit of the proposal, alongside the highway considerations.
- the Highway Authority had been engaged in discussion with Ben Burgess before the application was submitted, during the application process and after the formal response had been made.
- The application was submitted for a new junction on the A140 part of the MRN serving the development only.
- The Highways Authority had recommended refusal.
- An amended application had been submitted and officers had considered the revised information and felt the application did not overcome the original recommendation of refusal and that an additional junction on the A140 would not be welcome. Officers had acknowledged that a roundabout was the only form of acceptable junction for the site.
- Cabinet had been asked to consider the proposal from an economic benefit to Norfolk viewpoint, which was not a consideration for highways officers, but was a consideration for Cabinet.
- Ben Burgess was a key participant in the agrifood sector and supported the agriculture sector and the wider economy of Norfolk and there would be a number of economic benefits of the company moving from its current location, including:
  - Expanding and attracting new customers, whilst maintaining its current workforce.
  - Increasing jobs and apprenticeships.
  - The business would be able to fully embrace new technology as the location was on the A140, connected to the A47 and A11, part of the Norwich-Cambridge tech corridor.
- The economic benefit of an application was not a direct consideration for the highways authority, although it was a consideration for Cabinet. Economic Development officers in Community & Environmental Services had considered the

implications and for the purpose of the report, considered the economic benefits viable.

In summing up, the Cabinet Member for Growing the Economy said that Ben Burgess provided significant services to the farming sector, both regionally and nationally and if they were not able to successfully relocate in Norfolk, there was a risk they would seek another location outside Norfolk, leading to job losses. He considered Cabinet should not allow this to happen.

14.4 The Cabinet Member for Growing the Economy proposed the following recommendation, which was seconded by the Cabinet Member for Commercial Services & Asset Manager:

- Cabinet considers that the economic impact of the proposals alongside the safety and appropriateness of a roundabout on the A140 overcomes objections as a highways authority and we therefore raise no highways objections to the planning proposal.

14.5 The Cabinet Member for Commercial Services & Asset Management supported the proposed recommendation, adding that Ben Burgess was a Norfolk company which had expanded its business to cover a large slice of East Anglia. He added that there was a danger that if they weren't allowed to develop the site, they would move their headquarters outside Norfolk, which would damage the Norfolk economy.

14.6 The Cabinet Member for Communities & Partnerships supported the proposal as it would support the local economy and safeguard the employment of staff in Norfolk. With the current situation, proposals that enabled people to keep their jobs should be supported. She added that she considered the roundabout was a suitable option.

14.7 The Cabinet Member for Innovation, Transformation & Performance also supported the recommendation as he felt it was important to keep the company headquarters in Norfolk.

14.8 The Chairman summed up that a recommendation had been made and seconded and asked Cabinet to agree the recommendation.

14.9 RESOLVED:

- Cabinet considers that the economic impact of the proposals alongside the safety and appropriateness of a roundabout on the A140 overcome objections as a highway authority and we therefore raise no objections to the planning proposal.

14.10 Evidence & Reasons for Decision.

See section 2 of the report....”

28. Following the Cabinet meeting, Ms Poole sent a formal consultation response from NCC to SNDC, by letter dated 28 September 2020. The material parts read as follows:

“Thank you for the latest consultation regarding the above application.

Please find enclosed the formal response of the County Council as Highway Authority as confirmed by NCC Cabinet.

It has been confirmed that a roundabout, appropriately designed to recognised national standards (as detailed in the Design Manual for Roads & Bridges) is the only form of junction considered safe and correct for this location. The roundabout will also need to act as the construction access and will therefore be required to be fully constructed and open for use prior to any work commencing on site. This is to prevent slowing and stopping traffic accessing the site from the A140 without the benefit of a safe form of access.

Whilst an indicative roundabout scheme has been submitted, a detailed scheme will need to be developed in accordance with the suggested planning condition, if the proposals are permitted, which may result in alterations to the indicative scheme.

In light of the above, the highway authority recommends no objection subject to the following conditions:

.....”

29. Ms Poole confirmed in her witness statement dated 23 March 2021 that she enclosed with the letter the OR and the minutes of the Cabinet meeting.

### **Policy and guidance**

30. Although NCC’s internal emails revealed some uncertainty as to which policies applied, it was common ground before me that the relevant policy was Policy DM3.11 of the South Norfolk Local Plan (2015), as stated in the consultation response of 29 May 2019. It provides:

#### **“Policy DM 3.11 Road Safety and the free flow of traffic**

(1) On all sites development will not be permitted that endangers highway safety or the satisfactory functioning of the highway network.

(2) Planning permission will be granted for development involving the formation or intensified use of a direct access onto a Corridor of Movement providing it would not:

- (a) Prejudice the safe and free flow of traffic or planned proposals for sustainable transport initiatives along the Corridor of Movement;
- (b) Be practical to gain access from the site to the Corridor of Movement via a secondary road; and
- (c) Facilitate the use of the Corridor of Movement for short local journeys.”

31. The reasoned justification for Policy DM 3.11 provides:

“3.73 Whilst the planning and transport authorities work together to plan for development and transport in a way that reduces the need to travel and encourages use of sustainable transport modes, the private car will remain an important means of travel in most rural areas in the district. Car ownership and traffic levels continue to rise and congestion and road safety problems will inevitably rise without firm action.

3.74 Furthermore, the Council’s approach will be to assess the impact of traffic generated by necessary new development as it impacts on the character and levels of traffic intensity found in rural South Norfolk, rather than against typical urban levels. In decision making the Council will also be aware of rural travel constraints, safety issues and the opportunities for transport solutions that address the circumstance in rural areas.

3.75 Proposals for development that create new access / egress points (or intensify the use of existing access / egress points) onto the local highways network should ensure the safe and satisfactory functioning of the highway network. Planning permission is required to form a new access onto any main roads; further information is available from the Norfolk Highways Authority.

3.76 The function of the principal routes and some main distributor routes is particularly important to the strategy for sustainable transport to serve the current and future needs and new development in the towns and villages of South Norfolk, and their function should be protected. These routes are identified as **Corridors of Movement** – see the **Key Diagram** (at Policy DM 1.3) The Key Diagram shows the spatial strategy for South Norfolk, with locations for growth where the need to travel can be minimised and the use of sustainable modes of transport can be maximised, and the protected areas of restraint.

3.77 The Norfolk County Council Guide for Developers (and other documents) referred to in the Notes below provide the detailed requirements of new accesses, new roads and layouts to create safe and secure layouts which minimise conflicts between

traffic and cyclists and pedestrians, avoid street clutter, set standards for safe and suitable accesses for all people, and that manage the free flow of traffic.

*Notes*

□ Ensuring the safe access and protecting of the free flow of traffic and function of the **Corridors of Movement** will be a consideration in many development proposals, in particular development that would generate significant movement.

□ The **National Planning Policy Framework** (section 4) requires development to provide for safe and suitable access and the protection of routes that would be critical in developing infrastructure to widen transport choice – such as the defined Corridors for Movement and other projects identified in the *Norwich Area Transportation Strategy*.

□ The **Joint Core Strategy** recognises that in most rural areas the private car will remain important .....”

32. NCC issued guidance called “Safe, Sustainable Development: Aims and Guidance notes for Local Highway Authority requirements in Development Management”, which was revised in November 2019. It sets out a series of development management aims, with accompanying guidance.

33. Aim 7 states:

**“Aim 7**

**To ensure the Major Road Network and Principal Road Network can safely cater for sustainable development, which, if not suitably addressed, would otherwise cause fundamental road safety and accessibility concerns.”**

34. The guidance to Aim 7 provides as follows:

**“7.1 Need**

Outside of urban areas with high connectivity, the Major Road Network (MRN) and Principal Road Network (PRN) have a strategic role to play in carrying traffic, usually at speed. Development in the vicinity of these roads or their junctions can compromise the ability for people to travel more sustainably whilst also prejudicing the ability of strategic routes to carry traffic freely and safely. For these reasons the MRN and PRN are additionally designated 'Corridors of Movement' (CoM) where development is normally resisted. The emergence of the MRN gives an additional weight to these issues as a formalise tier of nationally recognised inter urban/regional routes.

On CoM outside of urban areas, drivers do not generally expect to encounter slowing; stopping; turning; manoeuvring or parked vehicles; nor do they expect to encounter pedestrians. This lack of expectancy increases the hazards caused by an access that exists in isolation. Furthermore, the generally more rural location dictates that the opportunity to provide high quality access to public transport and safe walking/cycling routes is severely curtailed.

## **7.2 Requirements**

Development needs to be located in accessible locations recognising the needs and travel patterns of patrons, avoiding the need to create new accesses, or to increase or change the use of an existing access onto a CoM. Development contrary to this aim is likely to attract a recommendation of refusal from the LHA unless well founded reasons exist to permit development. This is strictly applied.

Exceptions may be made where the development is of overriding public/national need or the access is required to serve essential development where it has been proved incapable of being sited elsewhere. In such instances the development must be served by a safe means of access.

Where improvements to transport infrastructure are necessary developers may be required to enter into agreements to secure their provision.”

## **Ground 1**

35. The Claimant submitted that the decision and the response were *ultra vires*, because they were contrary to (a) the Constitution and (b) the requirements of the statutory consultation. Both parties agreed that it was convenient to consider the two limbs of this ground separately.

### **(a) The Constitution**

36. The Constitution establishes the process of decision-making to be followed by NCC. Section 1 of the Executive Summary to the Constitution provides:

“This Constitution reflects the Council’s decision on 10 December 2018 to adopt a Leader and Cabinet form of Executive. It came into effect on 07 May 2019.

This Constitution sets out how the Council operates, how decisions are made and the procedures which are followed to ensure that these are efficient, transparent and accountable to local people. Some of these processes are required by the law, while others are a matter for the Council to choose.”

37. The heading ‘How Decisions are Made’ in the executive summary provides:

“The Executive is part of the Council which is responsible for most day-to-day decisions. The Executive is made up of a Leader and up to nine other Councillors whom the Leader appoints. Together they are known as the Cabinet. When major decisions are to be discussed or made, these are published in the Cabinet's forward plan in so far as they can be anticipated. If these major decisions are to be discussed with council officers at a meeting of the Cabinet, this will generally be open for the public to attend except where personal or confidential matters are being discussed. The Cabinet has to make decisions which are in line with the Council's overall budget and the policy framework. If it wishes to make a decision which is outside the budget or policy framework, this must be referred to the Council as a whole to decide.”

38. NCC must act in accordance with the Constitution. Article 1.1 provides:

“Norfolk County Council will exercise all its powers and duties in accordance with the law and this Constitution.”

39. Article 7 of the Constitution relates to the Executive (known collectively as the Cabinet). Article 7.1 defines the role of the Executive as being to carry out functions which are not the responsibility of other parts of NCC. Article 7.1 provides:

“The Executive will carry out all the Council's functions which are not the responsibility of any other part of the Council, whether by law or under this Constitution.”

40. The terms of reference of the Cabinet are set out in Article 7.9. Importantly, the Cabinet cannot exercise executive functions of NCC which are exercisable to, *inter alia*, officers under delegated powers (Article 7.9(i)(a)).

41. Article 12.1 of the Constitution provides:

“The Council will issue and keep up to date a record of what part of the Council or individual has responsibility for particular types of decisions or decisions relating to particular areas or functions. This record is set out in Appendices 2, 2A, 3, 4 and 5.”

42. Appendix 5 sets out the scheme of delegated powers to officers. Section A sets out the general conditions applying to all delegated powers, including those matters which are delegated (paragraph 2) and those matters which are not delegated (paragraph 4). Paragraph 1 provides:

“Chief Officers (which for the purpose of this Scheme includes the Heads of Service listed in Section B of this Scheme) are authorised within the scope of this Scheme to exercise the powers and duties of the County Council in relation to the service



and activities for which they are responsible, and the professional and managerial responsibilities of their posts. They are accountable to the elected Members of the County Council for the efficient and economic discharge of these responsibilities. Members are accountable to the public and are responsible for all major matters which impact upon the public in the course of the County Council exercising its powers and duties.”

43. Paragraph 3 provides:

“Officers can only act within delegated powers and there are exercisable subject to:

.....

b) referral to the Executive for consultation or decision on all matters of public controversy or undecided matters of policy or substantial change from previous practice or which involve difficult or major issues where custom and practice or initial consultation with elected Members indicates that such referral should take place;

.....”

44. Paragraph 5 provides that Chief Officers “need not exercise their delegated power in any particular matter and must not do so if in their opinion the matter involves questions of policy as yet undecided by the Council or Committee or any substantial change from previous practice”.
45. Paragraph 6 makes provision for the withdrawal of delegations (other than functions which are not to be the responsibility of the Executive) , by notice in writing, from the Leader, following consultation with the Executive and the Head of Paid Service.
46. Section B of Appendix 5 provides summaries of Chief Officers’ delegations, details further exceptions and provides clarification. The scheme of delegation provides, insofar as relevant, that the following actions are delegated to the Executive Director of Community and Environmental Services:

“(2) Responding to District Council consultations on planning applications or to development proposals by Government departments, statutory undertakers, local authorities or other decision-making bodies provided that the proposal is consistent with County Council policy, is unlikely to raise controversial issues of a strategic nature and the Local Member has been informed of the proposed response.

(3) Giving advice or making recommendations to local planning authorities on behalf of the County Council as local highway authority, minerals and waste planning authority and county planning authority.”

47. Appendix 5 makes provision for members of the Community and Environmental Services Management Team to exercise functions which have been delegated to their Chief Officer. It also lists specific delegations to officers, including responding to District Council consultations.
48. It was not in dispute that, typically, a statutory consultation by a district council on highways matters arising from a planning application, fell within the delegated powers of the Executive Director of Community and Environmental Service and his senior staff, and ought not to be dealt with by Cabinet.
49. NCC submitted that, on this occasion, the statutory consultation was appropriately referred to Cabinet, pursuant to paragraph 3(b), section A, Appendix 5, since it was a matter of “public controversy” and/or involved “difficult or major issues where ...initial consultation with elected Members indicates that such referral should take place”.
50. NCC relied upon the witness statement of Mr McCabe, made for the purpose of these proceedings, in which described the circumstances which led to the referral, as follows:

“5. This matter concerns an application for planning permission by Ben Burgess & Co Limited (“Ben Burgess”) to South Norfolk Council (“SNC”), as the local planning authority. SNC sought the views of the Council in its capacity as the highway authority, among others. The application was initially dealt with at officer level, pursuant to the delegated powers prescribed by the Council’s Constitution.

6. Subsequently, an amended application for planning permission was submitted by Ben Burgess to SNC. By this time, it had become clear that the application was generating significant local interest. This included correspondence from residents in Swainsthorpe to a range of stakeholders, including Members of the Council’s Cabinet.

7. I was subsequently approached by a number of Cabinet members who indicated to me that they were keen to consider the issues raised by the application for planning permission by Ben Burgess. The Council’s Constitution (at paragraph A.3(b) of Appendix 5) provides that powers delegated to officers are subject to “referral to the Executive for consultation or decision on all matters of public controversy or undecided matters of policy or substantial change from previous practice or which involve difficult or major issues where custom and practice or initial consultation with elected Members indicates that such referral should take place”.

8. I was of the view that the matter was one of public controversy and would involve a difficult issue where consultation with elected Members indicated that referral to Cabinet should take place. I therefore took the decision on 20 August 2020 that the matter should be referred to Members.

9. A report to Cabinet on the application was therefore prepared by the Growth and Development Team and considered by Cabinet on 7 September 2020.”

51. The Claimant submitted that the referral was not in fact made pursuant to the terms of paragraph 3(b), section A, Appendix 5. Referral on these grounds was not recorded in the OR nor the Cabinet minutes. It was clear from the internal emails, the OR and the Cabinet minutes that the reason why the consultation was referred to the Executive was to enable the Cabinet to consider the economic benefits of the scheme, to see if they outweighed the negative highway impacts.
52. In my judgment, the Claimant was entitled to submit that Mr McCabe’s statement had to be scrutinised with care because of the reluctance of the courts to rely upon *ex post facto* evidence, which is self-serving. However, the Claimant did not oppose the statement’s admission in evidence. Nor did the Claimant challenge the veracity of Mr McCabe’s evidence that “the application was generating significant local interest” and that Mr McCabe had been approached by Cabinet members who indicated that they were keen to consider the issues raised by the application. Indeed, the Claimant’s counsel relied upon the “significant local interest” in the application, referred to in paragraph 6 of Mr McCabe’s witness statement, as a reason why there was a common law duty to give reasons for the decision (paragraph 59 of the Claimant’s skeleton argument).
53. Moreover, I consider that there was contemporaneous evidence which supported Mr McCabe’s witness statement.
54. In the email of 20 August 2020, Mr McCabe said:

“A number of cabinet members, inc. Cabinet Member for Growth and Development, are keen to consider whether we should follow this normal response or, when considering the specifics of this application (esp. around economy, jobs etc) they would want to go against our normal response. As such, I have been asked that we draft a report for Cabinet with the options and let them decide.”
55. The OR, at paragraph 1.2, stated:

“In this case, Cabinet wanted to ensure that they had the opportunity to consider the economic benefits of the proposal alongside the highway considerations. Therefore, Cabinet will consider the proposals and determine the response.”
56. This evidence that at least some Cabinet members disagreed with the officers’ proposed response and did not want NCC to object to the proposal was confirmed by the contributions made by members at the meeting. The Minutes of the Cabinet meeting reveal that Councillor Plant introduced the OR emphasising the proposal’s clear economic benefits to Norfolk. Councillor Plant proposed the resolution to the effect that the economic impact of the proposal overcame the objections as a highways authority. Other members spoke in favour of the resolution. It appears that the resolution had the unanimous support of the Cabinet.

57. The Minutes state, at paragraph 14.3. that Cabinet had been “asked to consider the proposal from an economic benefit to Norfolk viewpoint, which was not a consideration for highways officers, but was a consideration for Cabinet”. Under the Constitution, it was for Mr McCabe to make the referral. However, I accept that there is plausible evidence that Mr McCabe made the referral because one or more Cabinet members raised their concerns about the application with him, in particular, because NCC’s objections on highways grounds could jeopardise the economic benefits of the proposal.
58. Therefore, I am satisfied on the evidence that the criteria for a referral to Cabinet under paragraph 3(b) ), section A, Appendix 5, were made out as the application had become a matter of “public controversy” which raised a “difficult” issue and the initial consultation between Mr McCabe and elected Members indicated that a referral should take place. It follows that the first limb of Ground 1 does not succeed.

**(b) The requirements of the statutory consultation**

59. The Claimant submitted that NCC was consulted in its capacity as local highways authority, not in any other capacity. NCC was required to provide its expert view on the highways impact of the application, so that SNDC could reach a decision on whether to grant planning permission, balancing the benefits and harms of the application, in the exercise of its planning judgment as local planning authority. NCC failed to discharge this duty and instead improperly sought to exercise its own planning judgment on the application.
60. In response, NCC submitted that, although it was required to give a substantive response to the consultation, there was no legal constraint on the content of its response. It was entitled to respond by expressing its view that the economic benefits of the proposed development would outweigh the highways objection that had been expressed by its highways officers. It was a matter for SNDC to decide whether or not it agreed with NCC.
61. The legal framework for the statutory consultation is to be found in section 54 of the Planning and Compulsory Purchase Act 2004 (“PCPA 2004”) and Town and Country Planning (Development Management Procedure)(England) Order 2015 (“the 2015 Order”).
62. Section 54 PCPA 2004 makes provision for a prescribed requirement to consult a statutory consultee, and by subsection (5) imposes a duty on the consultee to give a “substantive response”. It provides:
- “(1) This section applies to a prescribed requirement to consult any person or body (the consultee) which exercises functions for the purposes of any enactment.
- (2) A prescribed requirement to consult is a requirement–
- (a) with which the appropriate authority or a local planning authority must comply before granting any permission, approval or consent under or by virtue of the planning Acts;

(b) which is prescribed for the purposes of this subsection.

(3) At any time before an application is made for any permission, approval or consent mentioned in subsection (2) any person may in relation to a proposed development consult the consultee on any matter in respect of which the appropriate authority is or the local planning authority are required to consult the consultee.

(4) The consultee must give a substantive response to any consultation mentioned in subsection (2) or by virtue of subsection (3) before the end of—

(a) the period prescribed for the purposes of this subsection, or

(b) such other period as is agreed in writing between the consultee and the appropriate authority or the local planning authority (as the case may be).

(5) The appropriate authority may also prescribe—

(a) the procedure to be followed for the purposes of this section;

(b) the information to be provided to the consultee for the purposes of the consultation;

(c) the requirements of a substantive response.

.....”

63. Article 22 of the 2015 Order sets out the statutory “duty to respond to consultation” and defines a “substantive response” as follows:

“(5) For the purposes of this article and article 23 and pursuant to section 54(5)(c) of the 2004 Act, a substantive response is one which —

(a) states that the consultee has no comment to make;

(b) states that, on the basis of the information available, the consultee is content with the development proposed;

(c) refers the consultor to current standing advice by the consultee on the subject of the consultation; or

(d) provides advice to the consultor.”

64. Article 18 of the 2015 Order sets out the requirement to consult prior to determining an application for planning permission for development:

“(1) Subject to paragraph (1A), granting planning permission for development which, in their opinion, falls within a category

set out in the Table in Schedule 4, a local planning authority must consult the authority or person mentioned in relation to that category, (emphasis added)

.....

(7) The local planning authority must, in determining the application, take into account any representations received from any consultee.”

65. The relevant categories in the Table in paragraph 1 of Schedule 4 are (k), (l), (m) and (n):

**“Description of Development**

(k) Development likely to result in a material increase in the volume or a material change in the character of traffic entering or leaving a classified road or proposed highway

**Consultee**

The local highway authority concerned”

**“Description of Development**

(l) Development likely to prejudice the improvement or construction of a classified road or prescribed highway

**Consultee**

The local highway authority concerned”

**“Description of Development**

(m) Development involving –

the formation, laying out or alteration of any means of access to a highway (other than a trunk road); ....

**Consultee**

The local highway authority concerned”

**“Description of Development**

(n) Development which consists of or includes the laying out or construction of a new street

**Consultee**

The local highway authority concerned”

66. In my judgment, the statutory scheme set out above required:

- i) the local planning authority (SNDC) to consult the local highways authority (NCC) in relation to the relevant categories in the Table in Schedule 4, and no other matters;
- ii) the local highways authority (NCC) to give a substantive response to the local planning authority (SNDC) in relation to the relevant categories in the Table in Schedule 4, and no other matters.

67. Therefore I do not accept NCC's submission that there was no legal constraint on the way in which it responded to the consultation. The proper response required of NCC in this context was an expert response in its capacity as highways authority, not its wider views on the benefits of the development to the local economy.

68. This position is consistent with the general requirements of a lawful consultation, in which the consultee is expected to express its views about the matter on which it is being consulted. In *R v Secretary of State for Trade and Industry, ex parte UNISON* [1996] ICR 1003, Otton LJ said, at 1015F:

“Under our domestic law fair consultation involves giving the body consulted a fair and proper opportunity to understand fully the matters about which it is being consulted and to express its views on those subjects, with the consultor thereafter considering those views properly and genuinely: see *Reg. v. British Coal Corporation, Ex parte Price* [1994] I.R.L.R. 72 , 75, per Glidewell L.J.”

Thus, the lawful scope of a consultation response is context-specific.

69. If NCC wished to make representations to SNDC about the merits of this application for planning permission, it could have done so otherwise than in its capacity as highways authority.

70. In my view, statutory consultees play an important part in ensuring that planning decision-making is informed, fair and effective. The importance of the role of a statutory consultee is demonstrated by the fact that a decision-maker is required to give the views of statutory consultees great or considerable weight. In *Shadwell Estates v Breckland DC* [2013] EWHC 12 (Admin), Beatson J. stated, at [72] that:

“a decision-maker should give the views of statutory consultees, in this context the “appropriate nature conservation bodies”, “great” or “considerable” weight. A departure from those views requires “cogent and compelling reasons”: see *R (Hart DC) v Secretary of State for Communities and Local Government* [2008] EWHC 1204 (Admin) at [49] per Sullivan J, and *R (Akester) v Department for the Environment, Food and Rural Affairs* [2010] EWHC 232 (Admin) at [112] per Owen J”.

71. Furthermore, in *R v North and East Devon HA, ex parte Coughlan* [2001] QB 213, Lord Woolf MR said, at [108]:

“To be proper, consultation must be undertaken at a time when proposals are still at a formative stage; it must include sufficient reasons for particular proposals to allow those consulted to give intelligent consideration and an intelligent response; adequate time must be given for this purpose; and the product of consultation must be conscientiously taken into account when the ultimate decision is taken.”

72. If the product of consultation has to be conscientiously taken into account and given great weight, it follows that it must be an intelligible response which is adequately reasoned, bearing in mind its purpose of providing advice to the decision-maker, and informing its decision.
73. Paragraph 15 of the Planning Practice Guidance ‘Consultation and Pre-Decision Matters’ explains that a statutory consultee must give reasons for its view so as to ensure that the local planning authority’s decision is transparent. It states:

**“What should local planning authorities expect from a statutory consultee in terms of a response?”**

When consulted in the circumstances set out in Article 22 of the Development Management Procedure Order, consultees are under a duty to provide a “substantive response” (as defined in that Article). Local planning authorities must provide such consultees with the information that will enable them to provide a substantive response.

The substantive response will need to include reasons for the consultee’s views so that where these views have informed a subsequent decision made by a local planning authority the decision is transparent (emphasis added). A holding reply would not be acceptable as a substantive response.”

74. Unclear, incomplete or misleading advice from a consultee may have serious consequences (e.g. *Sullivan v Warwick DC & Ors* [2003] EWHC 606 (Admin), per Pitchford J. at [46], [76], [84], [96], [97]).
75. Regrettably, I have come to the conclusion that NCC did not give adequate and intelligible reasons for its advice in its consultation response letter of 28 September 2020.
76. The way in which the response letter was drafted gave the impression that the highway authority did not object to the access proposals because a roundabout was “considered safe and correct for this location”. However, although the roundabout proposal was technically acceptable, there were significant objections from officers to a new junction because the A140 is a route of strategic importance, defined as a Corridor of Movement and part of the Major Road Network. The letter did not refer at all to the advice from officers that the access road proposal was contrary to Policy DM 3.11, as had been previously explained in the first consultation response dated 29 May 2019, and confirmed again in paragraph 2.3.5 of the OR. Nor did it refer to the advice from



officers that the access road proposal was inconsistent with Aim 7 in the “Safe, Sustainable Development” guidance (see paragraph 2.3.6 of the OR).

77. At the hearing, Mr Parker, counsel for NCC, confirmed that Cabinet did not dispute the officers’ objections. In its resolution it decided that the economic benefits of the proposal, together with the advice that a roundabout was a safe and appropriate form of junction, “overcame objections as a highway authority and we therefore raise no objections to the planning proposal”.
78. The response letter made no mention of the balancing exercise which the Cabinet had carried out, concluding that the economic benefits of the development outweighed the highways objections. Thus, SNDC and any interested member of the public, would only be aware of NCC’s true reasons by reading the Cabinet Minutes, which were enclosed with the letter and referred to as the “formal response”, though not identified as the Minutes. In my view, as the letter purported to summarise NCC’s view, and did not alert the reader that the content of the formal response was significantly different to the summary in the letter, there was a real risk that readers would not be aware that they needed to check the Minutes as well.
79. But even reading the letter and the Minutes together as a whole, I consider that the response was inadequately reasoned and incomplete. It did not provide SNDC with the information which it required, and which could be conscientiously taken into account in deciding whether to grant planning permission. Instead of being made aware of the expert highway authority’s detailed views on the highways impact of the application, SNDC was sent a response which bypassed the highways issues and sought to perform the balancing exercise to be carried out by the local planning authority. Importantly, it failed to explain what weight, if any, SNDC should give to the objection made on 29 May 2019 and the conflict with Policy DM 3.11, and the application of Aim 7 in the “Safe, Sustainable Development” guidance (including the exceptions in paragraph 7.2). As the Claimant submitted, the response was functionally useless for SNDC.
80. In conclusion, NCC improperly took into account the economic benefits of the proposed development when responding to the consultation by SNDC, and submitted an incomplete and inadequately reasoned consultation response. For these reasons, the claim succeeds on the second limb of Ground 1.

## **Ground 2**

81. The Claimant submitted that NCC failed to give adequate lawful reasons for the decision (including the referral to Cabinet) and the consultation response. The Claimant relied upon the well-known authorities of *R (CPRE Kent) v Dover DC* [2017] UKSC 79 and *South Buckinghamshire District Council v Porter (No 2)* [2004] 1 WLR 1953.
82. In my judgment, Mr McCabe was not required in law to make a formal record of his decision to refer the matter to Cabinet. Regulation 7 of the Openness of Local Government Bodies Regulations 2014, which imposes a duty on officers to give reasons for delegated decisions, including grants of planning permission, does not extend to a decision of this type. As this was an internal decision, which did not affect the rights of members of the public, I do not consider that Mr McCabe was under any common law duty to give reasons.

83. Cabinet was under a duty to keep a record of its proceedings and decisions, which it did in the Minutes. The Minutes, supplemented by the OR where appropriate, stand as the reasons for any decision.
84. In my view, it was sufficiently clear from the Minutes, supplemented by the OR, that the consultation request had been referred from officers to Cabinet because some members of Cabinet wished to have the opportunity to take into account the economic benefits of the proposal, which officers had no power to do, and did not consider it appropriate. Although it would have been good practice for the Cabinet and/or the OR to have made express reference to the terms of paragraph 3(b), section A, Appendix 5 of the Constitution, I do not consider that the failure to do so was of sufficient importance to amount to a failure to give reasons.
85. I have already found under Ground 1(b) that the reasoning in the decision and the response did not meet the standard required of a consultation response. Therefore, it is unnecessary to consider this ground of challenge further under Ground 2.

### **Ground 3**

86. The Claimant submitted that NCC took into account immaterial considerations when making the decision and providing the response.
87. For the reasons given under Ground 1(b), I consider that NCC erred in law in taking into account economic benefits when responding to the statutory consultation in its capacity as highways authority. It follows that it thereby took into account an immaterial consideration.

### **Ground 4**

88. In the light of my findings under Ground 1(b), it is not necessary to determine the rationality challenge.

### **Alternative remedy and discretion**

89. NCC submitted that the Claimant has an alternative remedy and therefore the claim should be dismissed, since judicial review is a remedy of last resort. The alternative remedy relied upon is that the Claimant can make representations direct to SNDC as to whether or not the balance of considerations weighs in favour of the grant of planning permission.
90. I cannot accept this submission. The remedy required is a lawful consultation response by NCC, in its capacity as highways authority, to the planning decision maker, SNDC. Representations by the Claimant to SNDC are no substitute for a statutory consultation response by an expert highways authority.
91. In the light of my finding that economic benefits were unlawfully taken into account by NCC when formulating its consultation response, I do not consider that it is highly likely that the outcome for the Claimant would not have been substantially different if

the conduct complained of had not occurred. Therefore section 31(2A) of the Senior Courts Act 1981 does not apply.

**Conclusion**

92. For the reasons set out above, the claim for judicial review is allowed.