

The Stonehenge case – assessing alternative schemes



Heather Sargent



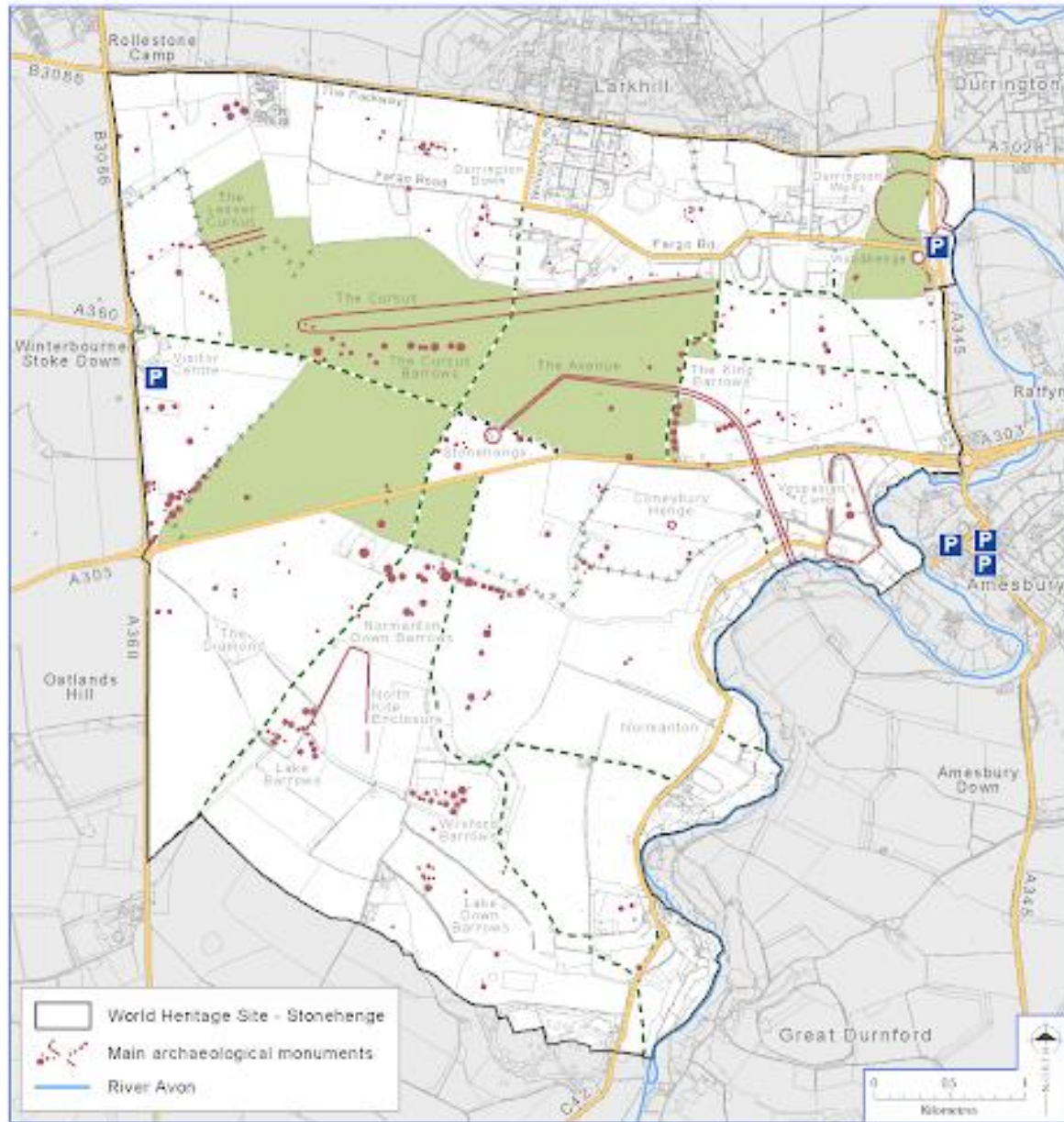
***R (Save Stonehenge
World Heritage Site
Ltd) v Secretary of
State for Transport***

[2021] EWHC 2161
(Admin)

Holgate J

30 July 2021

WHS boundary and existing route of A303





Proposals

“[t]he Panel pithily described it as the greatest physical change to the Stonehenge landscape in 6000 years and a change which would be permanent and irreversible, unlike a road constructed on the surface”



Western tunnel entrance

Ground 5(iii): unlawful failure to consider the merits of alternative schemes for addressing the harm resulting from the western cutting and portal

Upheld by Holgate J

The approach taken by the ExA to alternatives

- “[C]onsiders that the Applicant has correctly identified all legal and policy requirements relating to the assessment of alternatives applicable to this project”
 - On the facts: alternatives do not have to be assessed under Habitats Directive or Water Framework Directive
 - Sequential and exception tests for flood risk satisfied; scheme is not within a National Park or AONB

- The **only** considerations of alternatives that ExA considers to be relevant:
 - Para. 4.27 of the NPSNN
 - Para. 4.26 of the NPSNN – EIA & reasonable alternatives
 - Alternatives to the compulsory acquisition of land

The approach taken by the ExA to alternatives

- NPSNN para. 4.27
 - “All projects should be subject to an options appraisal. The appraisal should consider viable model alternatives and may also consider other options (in light of the paragraphs 3.23 to 3.27 of this NPS. Where projects have been subject to full options appraisal in achieving their status within Road or Rail Investment Strategies or other appropriate policies or investment plans, option testing need not be considered by the examining authority or the decision maker. **For national road and rail schemes, proportionate option consideration of alternatives will have been undertaken as part of the investment decision making process. It is not necessary for the Examining Authority and the decision maker to reconsider this process, but they should be satisfied that this assessment has been undertaken.**”

The approach taken by the ExA to alternatives

- ExA: “...the ExA is content that the Applicant’s approach to the consideration of alternatives is in accordance with the NPSNN. It is satisfied that the Applicant has undertaken a proportionate consideration of alternatives as part of the investment decision making process. **Since that exercise has been carried out, it is not necessary for this process to be reconsidered by the ExA or the decision maker.**”

The approach taken by the ExA to alternatives

- NPSNN para. 4.26
 - “Applicants should comply with all legal requirements and any policy requirements set out in this NPS on the assessment of alternatives. **In particular:**
 - The EIA Directive requires projects with significant environmental effects to include an outline of the main alternatives studied by the applicant and an indication of the main reasons for the applicant’s choice, taking into account the environmental effects...”
 - ExA is satisfied that the ES meets legal requirements in relation to EIA
 - ExA also considers alternatives in the context of assessing whether the guidance on compulsory purchase has been complied with (this consideration doesn’t address alternatives to the western cutting)

The approach taken by the ExA to alternatives

- ExA's conclusion (PR 7.2.28):

“The ExA is satisfied that the Applicant has carried out a proportionate option consideration of alternatives as part of the investment decision making process which led to the inclusion of the scheme within RIS1. It concludes that the Applicant has complied with the NPSNN, paragraphs 4.26 and 4.27. There are no policy, or legal requirements that would lead the ExA to recommend that consent be refused for the Proposed Development in favour of another alternative.”

SST: the impact of alternatives is “neutral”; relies upon PR 7.2.28 and sees “no reason to disagree with the [Panel’s] reasoning and conclusions on these matters”

The flaw in the approach

- Holgate J
 - “The Panel did not make its **own** appraisal of the relative merits of the proposed scheme and alternatives [...] despite the fact that [it] went on to make a number of strong criticisms of the proposed western section which subsequently drove its recommendation that the application for development consent be refused.” ([252])
 - HE said in the Examination that it had rejected 2 longer tunnel options **not** purely on the grounds of cost but also because they would provide “minimal benefit in heritage terms”
 - Neither Panel nor SST expressed any conclusions on whether a longer tunnel would achieve only “minimal benefits”

The flaw in the approach

- The requirement within para. 4.26 of NPSNN to comply with “all legal requirements” includes any arising from judicial principles set out in case law
- Para. 4.27 of NPSNN does not override para. 4.26:
 - Satisfaction of para. 4.27 of NPSNN (e.g. through full options testing for the purposes of a RIS) does **not** excuse the applicant from meeting any (additional) requirements arising from para. 4.26
 - Cannot circumvent obligations to which para. 4.26 relates (e.g. Habitats Directive) by reliance upon para. 4.27

The flaw in the approach

- There might have been a change in circumstance since the RIS full options appraisal was carried out (e.g. the “additional and controversial” “minimal benefit” issue here)
- “The options testing for a RIS may rely upon a judgment by [HE] with which the Panel disagrees and which therefore undermines reliance upon that exercise and paragraph 4.27 of the NPSNN”
 - On the facts: the Panel disagreed with HE’s assessment of whether there would be harm to the WHS
 - So it was **irrational** for the Panel to treat the options testing carried out by HE as rendering it unnecessary for the Panel to assess the relative merits of alternatives

The flaw in the approach

- In light of the Panel’s conclusion that **substantial** harm would be caused to the WHS, it had to be demonstrated that the substantial harm was **necessary** in order to deliver substantial public benefits outweighing the harm (NPSNN para. 5.133)
 - Holgate J: “In such circumstances, it is obviously material for the decision-maker (and any reporting Inspector or Panel) to consider whether it was unnecessary for that loss or harm to occur in order to deliver those benefits. The test is not merely a balancing exercise between harm and benefit. Accordingly, relevant alternatives for achieving those benefits are an obviously material consideration”

The flaw in the approach

- The SST considers the western section of the scheme would cause **less than substantial** harm – so the necessity test is not engaged – but the SST relies upon the need for the scheme and the benefits that it will bring in striking the overall planning balance
- Holgate J: “The relevant circumstances of the present case are **wholly exceptional**. In this case the relative merits of the alternative tunnel options compared to the western cutting and portals were an obviously material consideration which the SST was required to assess. It was irrational not to do so. This was not merely a relevant consideration which the SST could choose whether or not to take into account. I reach this conclusion for a number of reasons, the cumulative effect of which I judge to be overwhelming”

Lessons for future projects?

- Para. 4.27 NPSNN does not override para. 4.26 NPSNN
- The judicial principles that are included within the para. 4.26 “legal requirements” include the *Trusthouse Forte* principles on consideration of alternatives:
 - Where there are clear planning objections to development upon a particular site then “it may well be relevant **and indeed necessary**” to consider whether there is a more appropriate site elsewhere
 - “This is particularly so where the development is bound to have significant adverse effects and where the major argument advanced in support of the application is that the need for the development outweighs the planning disadvantages inherent in it”
- The facts in *Stonehenge*: wholly exceptional but still relevant to future projects?

Thank you for listening

© Copyright Landmark Chambers 2021

Disclaimer: The contents of this presentation do not constitute legal advice and should not be relied upon as a substitute for legal counsel.

London

180 Fleet Street
London, EC4A 2HG
+44 (0)20 7430 1221

Birmingham

Cornwall Buildings
45 Newhall Street
Birmingham, B3 3QR
+44 (0)121 752 0800

Contact

✉ clerks@landmarkchambers.co.uk
🌐 www.landmarkchambers.co.uk

Follow us

🐦 @Landmark_LC
📘 Landmark Chambers
📺 Landmark Chambers