

Set out here are four propositions showing how an inadequate preferred route choice followed on from an inadequate public consultation that resulted from an inadequate option selection process.

The essential points are that:

- The key elements of the Grey option's route were refused consent by the Secretary of State, in 2003 at a time when the legislative environment was easier than today
- In 2017, the Grey route option was discarded by National Highways as too expensive and over-budget, given that better options in the public interest were available
- The 2019 consultation was known by National Highways to have only one outcome, the preferred route choice of Grey, but nonetheless five other undeliverable options were carefully included. This was hidden from consultees who were thus disenfranchised and misled, undermining the consultation's legitimacy.
- Alternatively, if National Highways did not know that five of the options were undeliverable, and neither did consultees or the public, then the consultation was run on seriously flawed evidence and its outcome and preferred route must be disallowed

The successive steps in the process for achieving a preferred route are regulated by the Department of Transport and by National Highway's own guidances. This paper shows that something went seriously wrong with one or more of them.

1. Introduction
2. The successive time steps (with source material)
3. The four propositions as above
4. Summary

1. Introduction

The four propositions spring from inherent contradictions in National Highways' approach that arise over the time steps; swings in approach and argument appear not to follow the evidence or a transparently logical pathway. It is appropriate that National Highways remains open to new evidence and follows a reasonable and proportionate approach, and nothing in what follows seeks to undermine those principles. Proportionality has not affected the evidence involved in the propositions. However, the reliance on an iterative process entails National Highways leading its consultees, with their variously supporting and opposing views, through the scheme processes in such a way that its own stance is seen to be rooted in a fair, logical, transparent and responsible approach, with any changes in direction, judgment or evidence being carefully highlighted.

It is acknowledged that HE has a very difficult and sensitive task in balancing the competing demands of legislation and guidance but this accentuates the need for it to be transparent in its approach and to explain its decision-making processes.

The key focus of this consideration is not on the unchanged scheme objectives and unchanged budget, 2017-2020, nor on the economic case, the benefit : cost ratio, the option design work or on traffic forecasts, but instead is specifically on the planning law framework, case law and the legislative and other guidances that dictate the relevant elements in the process. In the case of elements that matter to the arguments set out here, it is important that with two noted exceptions there were no relevant evidence changes over the period Spring 2017 to Autumn 2020, and none that National Highways has included in its documentation.

2. The Time Steps

Time Step	Source	Event, with Brief Comment
Summer 2003 Step 1	¹	Secretary of State (SoS) refused consent for an off-line Arundel Bypass route across the Arun water-meadows, telling Highways Agency (that became Highways England, HE, that later became National Highways) to seek an alternative that did not damage the outstanding beauty of the area.
2011 Step 2	²	South Downs National Park becomes operational. The designation of the Park underlined the special natural value of the South Downs including the area around Arundel and Binsted. The Park boundary should not be used as a criterion for deciding the route of the proposed bypass through this area. The main criterion that should be used is the quality of the countryside, which is just as high quality outside the Park boundary as inside it, and was originally due for designation being considered by consultants as “especially desirable to designate”, yet this view was overridden and the boundary moved to suit a potential A27 Bypass route that had already been rejected by the SoS.
2014 Step 3	³	The NNNPS provides Planning Act guidance for promoters of Nationally Significant Infrastructure Projects on the national road networks in England. Parks are given special protection under it and HE’s legal team is familiar with the relevant planning legislation affecting major roads and its interaction with national parks. Building roads in Parks requires a very strong public interest reason for that road entering the Park, and a compelling case made that the circumstances in

		<p>which it does so are exceptional. The public interest includes planned economic growth and value for money, balanced as necessary against the purposes of the Park.</p> <p>The NNNPS also gives some protection for ancient woodland and this constrains almost all the possible routes, including those following the line of the existing A27, the “on-line” options, but routes outside the Park such as Grey have the least impact on ancient woodland. The SoS “should not grant development consent for any development that would result in the loss or deterioration of irreplaceable habitats including ancient woodland ... unless the national need for and benefits of the development, in that location, clearly outweigh the loss.”</p>
Spring 2017 Step 4	4 5	<p>HE rejected any route outside the Park as unaffordable and over-budget. HE discussed with lawyers the options for the 2017 public consultation, presumably involving its own legal team, and decided that three should be offered, which each routed inside the Park and affected ancient woodland.</p>
Autumn 2017 Step 5	6	<p>HE ran its public consultation on the three in-Park options. Out-of-Park options were rejected by HE and its legal advisors as too expensive and over budget while in-Park options were considered to have sufficiently compelling cases for being exceptional, and also being in the public interest.</p>
Spring 2018 Step 6		<p>HE chose a Preferred Route, 5A, and produced a Consultation Report and updated Scheme Assessment Report and Combined Modelling and Appraisal Report. Notably the preferred route:</p> <ul style="list-style-type: none"> # Ran inside the Park. # Crossed the water-meadows in very similar manner to the route the SoS had rejected in 2003. The on-line route, the only option that might have met the SoS requirement for an alternative, was rejected. # The fixed traffic model - used for the consultation - gave forecasts 35% below forecasts using a variable traffic model.
Winter 2018 Step 7	7	<p>Two Judicial Review applications succeeded. The successful grounds were:</p> <ul style="list-style-type: none"> # The traffic data was arguably wrong # The consultation did not include an out-of-Park route <p>HE was forced to conclude it needed to re-run its public consultation with conditions imposed by the High Court, including that the re-consultation was carried out lawfully and in compliance with the rules of procedural fairness, openness and transparency. The 5A preferred route was set aside.</p>

<p>Spring 2019 Step 8</p>	<p>8 The choosing of options is a regulated process. The DfT's Transport Analysis Guidance, Transport Appraisal Process, May 2018, Option Development (Stage 1) para 2.11 states "Step 8: Produce Option Assessment Report, or similar ... document ... the process of option development and selection ... document the process of option generation ... sifting ... and assessment. Decisions made on discarded options should be recorded, along with supporting evidence. The initial supporting evidence for feasible options, ... should also be summarised".</p>
<p>Spring 2019 Step 9</p>	<p>9 HE's Project Control Framework (PCF) Handbook requires something similar. It states "Traffic modelling and economic assessment is undertaken on a number of options ... to assess whether the proposed solution will mitigate an identified problem and whether there are any consequential impacts, for example on the environment. Economic appraisal of transport schemes is required in order to assist decision-makers prioritise between schemes and options and ensure that value for public money is achieved. A key output is the Technical Appraisal Report which ensures decisions on which options to consult the public on are supported by robust assessment and data."</p> <p>HE's Licence requires it to be "Open and transparent – involving relevant stakeholders, ensuring that essential information is available to affected and interested parties, and that the processes for engagement and communication are clear."</p>
<p>Summer 2019 Step 10</p>	<p>10 Solution Review and Validation. This is another PCF requirement. HE has to assess options in terms of environmental impact, traffic forecasts and economic benefits. Options on which the public will be consulted are checked as being supported by robust assessment and data.</p> <p>11 Within these various HE and DfT requirements for assessments and re-assessments the legal advice and evidence was necessarily sought and reviewed for each potential option. This would cover the 2003 SoS decision and the High Court conditions. Likewise, Nolan and Gunning Principles would be relevant to consider so as to ensure that "intelligent consideration" of the options could be given by the public, and by statutory consultees such as Arun DC and West Sussex CC who have a legal and professional duty to do so, at public expense, and involving democratic debate and voting.</p>
<p>Summer 2019 Step 11</p>	<p>13 Through this preparatory period, HE discussed the options with lawyers and QC, clearing those suitable for public consultation. Presumably this involved its own legal team.</p> <p>Six fully vetted options were agreed for consultation - one was an out-of-Park option and five were in-Park options. Two of those five in-Park options were on-line, following the existing A27 route, and their inclusion was presumably, as in 2017, on the grounds of compelling public interest and exceptionality. But</p>

		<p>the three remaining options were to be additional, new, roads in the Park, off-line, and these ignored the 2003 SoS refusal of consent, as indeed did the single out-of-Park option.</p> <p>The Elected Representatives' Forum discussed the option choice issue at its meeting in September, just before the Further Consultation.</p>
<p>Autumn 2019 Step 12</p>	<p>14</p> <p>15</p>	<p>HE ran its Further Consultation on these six options. During the consultation itself, HE confirmed to an Arun DC councillor that it was too early and was inappropriate for it to have “concluded on the consentability of any route and the impact of consentability on its eventual preferred route selection”.</p> <p>HE says in its public consultation document that after a fresh look at possible routes and a sifting exercise according to “compliance with the scheme objectives and legal and national planning policy tests”, it concluded six options should be considered by the public. It warns there are “significant environmental constraints and national planning risks that affect all six options”, and that “Any scheme that conflicts with the NNNPS policy carries a greater risk of being refused consent” and also that HE will “consider the NNNPS when selecting the preferred option.” The consultation eventually closed not in October 2019 as indicated but on 1st March 2020.</p> <p>It should be noted that if the procedures at Steps 8-11 were carried out robustly and rigorously, then HE knew that only one of the options could actually pass the planning law tests and be chosen as preferred route (Step 13 below) but it nonetheless offered five others as well with no warning note about their undeliverability.</p> <p>The single deliverable option, Grey, was the only out-of-Park option and arguably it alone should have been consulted on because all the others were in-Park options and were not, now, considered sufficiently exceptional or in the public interest to be deliverable. Alternatively, if included as options, a clear very-high-risk warning was needed for each of them.</p> <p>All this would make the Autumn 2019 letter to the Arun district councillor untrue.</p> <p>The knowledge that only the Grey option was legally deliverable is notwithstanding the fact that the three in-Park options of the 2017 consultation, including the 5A preferred route choice, had each been deemed deliverable two years earlier. There was no change in circumstances, or proportionately-uncovered new evidence, or in the processes that can account for this HE somersault.</p>
<p>Spring 2020 Step 13</p>	<p>16</p>	<p>No materially relevant further evidence was produced during the consultation extension to 1st March. HE states that information and evidence produced after the close of the consultation should not be used in its decision-making for the preferred route alongside its consideration of the public and statutory consultee responses.</p>

Crucial under this constraint is that HE had not warned the public nor given the public the information that only one option was consentable and deliverable, the single out-of-Park option, Grey.

17 After the consultation had closed and over the period April – June 2020, two QCs confirmed that only the single option that ran outside the Park, Grey, could succeed under the NNNSP. Specifically rejected by the QCs was the Magenta option favoured by WSCC, ADC and the local MP, on the grounds that by a whole order of magnitude its route disturbed too few people to pass a test of being sufficiently exceptional to be allowed to run through the Park. (In an exceptionally compelling public interest case, if a road would otherwise disturb thousands, not hundreds, of residents, it could be allowed to run through the Park).
18 Magenta could not be seen as sufficiently in the public interest and was not deliverable.

On the same basis the remaining four options, two on-line and two off-line, were also legally unviable as they too ran inside the Park. They did not create materially more noise than Magenta, nor provide a sufficiently greater public interest boost. The QCs said that Grey alone could succeed in planning terms.

Although it had elsewhere implied it knew of this legal view, HE also implies that it did not know; its statements support either and both positions. The QCs' opinions call into question the multi-faceted and thorough option choice procedures taken at Steps 8 -11 above.

In its Outline Business Case to the DfT in September 2020 HE says "Detailed examination of various options over a number of years has identified that there is no single solution that is clearly better or can easily be differentiated from all others ...". This statement, like the letter to the Arun DC councillor, also suggests HE chose its six options without knowing five were legally unviable, as indeed does the offering of all six for consultation without five very-high-risk warnings.

June
2020
Step 14

19 HE's Transport Planning Group issued new guidance that excluded the Worthing Lancing scheme from the core scenario but left the Lyminster bypass scheme included. This reduced the Grey benefit : cost ratio (BCR) from 1.95 to 1.46.

The 2017 consultation had been run on guidance that excluded both the Worthing Lancing and Lyminster bypass schemes from the core scenario. The guidance changed in 2018 so that both schemes were included for the 2019 consultation. It changed again in 2020 to remove Worthing Lancing only.

The 2020 guidance was issued after the 2019 consultation had closed but before the preferred route option was chosen in Autumn 2020, although none of the guidance changes were in the public domain - even after the close of the 2019 consultation; they were revealed under Freedom of Information Act inquiries.

		<p>The change in the BCR and the value for money for all options that results from the 2020 guidance, following the removal of Worthing Lancing, meant that DfT consent had to be obtained to the preferred route choice; it is only needed if the BCR is below 1.5.</p> <p>But, uncomfortably for HE, the guidance change and fall in BCR were not in the public domain during the consultation and therefore should not feature in the preferred route choice.</p> <p>This was awkward because the fall is considerable and potentially removed much of the BCR and value for money advantage that supported the on-line routes. HE does not refer to any lessening of their public interest argument however. It seems, then, that HE must have considered that the fall in BCR did not affect the public interest potential of on-line options. In any event, not being in the public domain or in the consultation documentation, any fall in BCR could not form part of the preferred route choice.</p>
July 2020 Step 15	20	HE and its Investment Committee decided that Grey was the “only deliverable route” and so it had to be selected as preferred route.
August 2020 Step 16	21	HE briefed the DfT (because BCR was < 1.5) that its Outline Business Case, to follow, would report that legal advice it had received meant it could only choose, as preferred route, and recommend to the DfT the out-of-Park Grey option, and that there were no exceptional circumstances allowing the choice of any of the other five options, including the online options that already ran through the Park as well as the three that would be planned to do so. The full legal advice is not in the public domain, requests for its release having been refused by HE.
September 2020 Step 17	22	HE presented its Outline Business Case to DfT. HE said Grey must be the preferred route to replace the earlier preferred route of 5A. It reported that the Grey BCR had now reduced to 1.37 and asked for consent to announce Grey. The DfT obliged.

3. The Four Propositions

Proposition 1. Previous Secretary of State Refusal of Grey’s Route. The Grey route includes key sections that were refused consent by the SoS in 2003, on the grounds of the damage it would do to countryside of outstanding beauty; HE was told to seek a less damaging alternative. Specifically, the SoS referred in 2003 to the Arun water-meadows, which the four 2019 consultation off-line options, including the preferred route Grey, will damage as badly as did the 2003 preferred route that was turned down. Since 2003 however, planning

law and society have both moved to enshrine greater - not less - protection to the inheritance of our successors. The establishment of the Park in 2011 reinforced that protection, as did the NNNPS in 2014. Together they underline how, in the last 20 years since the SoS 2003 A27 Arundel Bypass refusal, societal change has been towards ever-greater safeguards for the environment as a response to climate change and in recognition of our responsibilities for landscape, biodiversity and the safeguarding of the natural world.

As a result, a refusal of the Grey route should be significantly more likely now, in 2022/3, than it was in 2003. But National Highways has rejected the concept the SoS proposed, of finding a less damaging option. It rejected the two on-line options that avoided further damage to the water-meadows and has chosen one of the four off-line options with the same deficiency as before. For Grey now to succeed where it previously failed would mock the progress society thinks it has made in the past twenty years and seriously undermine the reputation of our planning regime under the SoS for being dispassionate, rigorous and fair.

Proposition 2. Previous National Highways Rejection of Grey Route. As National Highways decided in 2017, out-of-Park routes such as Grey are too expensive, above budget and unaffordable. But, since 2019, Grey's costs have risen and its BCR has fallen 30% from 1.95 to 1.37. It will almost certainly fall further if National Highways monetises the route's Landscape, Cultural and Heritage disbenefits. It would no longer be in the public interest to proceed on financial grounds when cheaper, more beneficial and better value for money options are available, as in 2017. The question becomes whether the public interest is still sufficiently compelling in value for money terms now to outweigh the planning law advantage of taking the route outside the Park.

In 2017, at the three-option consultation that was later annulled, National Highways decided that the public interest argument in favour of routing through the Park and compromising ancient woodland was sufficiently compelling that it was an exceptional case, on the grounds of the budget, costs and value for money. So strong was this case that a route outside the Park, such as Grey, was not even offered for consultation. National Highways clearly decided that it would not be in the public interest at all to include an out-of-Park option like Grey, notwithstanding the planning law protection given to Parks.

By 2019, on no evidence and for no reasons given to the public, National Highways had changed its position completely; Grey, the expensive and over-budget option outside the Park that was not in the public interest and not offered to the public in 2017, was offered at the 2019 consultation and was then selected because it "must be the preferred route" and had become "the only deliverable option". The planning law and guidance regime predated the 2017 option selection, consultation and preferred route choice, so this was not the cause of National Highways' somersault. Likewise relative BCR and value for money changes between options are not the cause. Nothing had changed over the two years since National Highways excluded from consideration the very route that had now become the only deliverable one.

There is therefore a strong case to be made, as in 2017, that, with Grey's poor BCR and poor value for money and with the countryside being unchanged since 2003, this out-of-Park

option is undeliverable. The reasons are the same as in 2017, since when there has been no change in planning law, case law or relevant guidance. Relative cost, affordability, value for money and budget criteria have not changed materially. Taken with Grey's failure (along with the three in-Park, off-line, options) to meet the SoS 2003 grounds for rejection, it cannot be in the public interest now to proceed with Grey at DCO. The public has been given no reasons why the other options do not - still - perform compellingly better and more in the public interest than Grey, as they did in 2017. A full 93% of the public did not support Grey, nor did any statutory consultee. As the longest route, and the only one that is out-of-Park, it is an unsupported and extreme route, and cannot even be a compromise option.

Proposition 3. Inadequate Selection of Consultation Options. National Highways states that for the 2017 and the 2019 consultation option selections, QC advice was being taken throughout, as well as specialist solicitors' advice, both additional to National Highways' own in-house legal expertise on major road planning law. National Highways also states that in the year prior to the 2019 consultation it "took a fresh look at the full range of possible route alignments. ... sifted according to compliance with the scheme objectives and legal and national planning policy ..." (stress added). It was well known that the Park Authority was active in defending its legal rights as per the judicial review of six months previously, those rights including the protections in the NNNPS. Exceptional circumstances and compelling reasons are needed for any in-Park route option. National Highways' PCF Handbook requires it to produce a Technical Appraisal Report which ensures that decisions on which options to consult the public are properly supported by robust assessment and data. The DfT's Transport Appraisal Process requires that an Options Assessment Report or similar is produced; this requires that evidence for feasible options is recorded after the options have been sifted and assessed. The options have to pass yet another acceptance test, the PCF Handbook's Solution Review and Validation.

The five options apart from Grey challenged the NNNPS by passing through the Park and were required to show exceptional or compelling cases to be selected for consultation. Two of these five options, the on-line routes, followed the line of the current A27, though with a new link between Ford Road roundabout and the Crossbush junction. In following the current road-line through the Park they had arguably the strongest environmental case, they had the highest BCR and best value for money and they conformed with the SoS 2003 requirement to leave undamaged an area of outstanding beauty. They could once again make a compelling case for being in the public interest, as they did in 2017, and might again be assumed to be viable options.

The position in planning law terms of the three remaining options that were neither on-line nor out-of-Park is less clear. This is in spite of their being deliverable according to the 2017 National Highways' option selection process, 2017 consultation, and 2018 preferred route choice in the case of option 5A. With neither of the two on-line options' environmental case in following an existing in-Park route, nor their BCR and value for money case, nor - importantly - their avoidance of the SoS strictures and refusal in 2003, then arguably there was less of a compelling and exceptional case to be made for these options. Nonetheless, with the out-of-Park Grey and the two on-line options, these three off-line but in-Park options were deemed viable and deliverable options.

In 2020 National Highways made a point of informing the DfT of its QCs' opinion that the five in-Park options, including Magenta, were undeliverable: the five had a level of noise disturbance that was just one-tenth or less of that needed for a compelling case that these options are exceptional to the NNNPS rule of not developing roads in the Park. A discrepancy of a whole order of magnitude is not one of fine legal judgement that QCs might differ over, or of a marginal outcome to a noise study, but is a very clear-cut difference. No new noise disturbance study was required to show this. Therefore, though the five options meet the scheme objectives, they lack Grey's advantage of not needing to meet the NNNPS guidance.

The five unviable option choices included in the 2019 consultation, if selected at all, should then necessarily have carried a prominent warning of their very high risk of planning failure, of undeliverability, but they carried no such warning. Those choosing to support any of the five were misled and disenfranchised. The April 2020 consultation report became valueless.

As it happened, the local Highway Authority, West Sussex CC, and the Local Authority Arun DC and the current and former MP had all voiced a strong preference for the Magenta option and many had followed their lead. These parties certainly were not aware of the high risk that the option carried; they had not been told Magenta and another four were unviable but on the contrary for good reason saw Magenta in particular as being as satisfactorily deliverable as the 2017 consultation's 5A preferred route. West Sussex CC is a Highway Authority with a national park running through its area, and yet on officer advice it still chose, knowledgeably and democratically, to support Magenta.

On undeliverability, there is no way an option that was economically, or in planning terms, or financially, or practically deficient - or for any other reason had become unviable - could or should have passed all the considerations, robust assessments and checks referenced above and still then be offered at consultation without a clear warning of the very strong likelihood of their not being deliverable options. To do so would suggest a deliberate intent to mislead the public, statutory consultees and others. There was no warning about the undeliverability of these options. There was no mention of a reliable legal opinion that only Grey was capable of being the eventual preferred route. Even cognate consultees were misled because the consultation options had been inadequately selected and presented.

The consultation therefore was not open and fair. It transgressed the judicial reviews' High Court Order. It did not comply with DfT guidance. It did not comply with National Highways' own guidance. National Highways transgressed its licence (para 5.19) in respect of openness and transparency and transgressed the Nolan Principles for the same reasons. It prevented intelligent consideration and so transgressed the Gunning Principles, which National Highways stated would be followed. The April 2020 consultation report that resulted from the flawed consultation is therefore entirely unreliable and will be of no use to the Planning Inspectorate.

Proposition 4. Inadequate Preferred Route Choice. National Highways confirmed during the course of the 2019 consultation that it was too early and was inappropriate for it to have concluded on the consentability of any route – an extraordinary claim given the circumstances set out above. It separately stated in its Outline Business Case to the DfT that

“Detailed examination of various options over a number of years has identified that there is no single solution that is clearly better or can easily be differentiated from all others;” (stress added). Both of these are remarkable since Grey, being outside the national park strictures of the NNNSP, was supposed now to be the only viable option. The fact that no warnings were included in the public documentation about the undeliverability of five of the six options is another indication that National Highways did not know of their unviability.

Grey’s rejection as a possible option in 2017 shows National Highways certainly had no idea at that stage that in-Park options were undeliverable. Another indication of its ignorance about undeliverability is the statement made at the Elected Representatives’ Forum, whose September 2019 Minutes record that “The forum discussed the different route options and their affordability. HE explained that the purpose of the further consultation is to present and proceed with viable route options and that all options are to be treated as if they were broadly affordable. ... HE explained that online options are part of the scope of the scheme since they have been considered at consultation before and have some support locally. It would therefore be wrong to ignore them. Additionally, HE needs to demonstrate to the Planning Inspectorate that all viable options have been looked at when they seek to get authority to proceed. ... HE explained that no conclusions have yet been formulated on the planning likelihood for each option. The facts and assessments have been presented in the various documents and it is for people to make their own conclusions. It would not be appropriate for HE to be presenting conclusions at this stage ” (stress added) Clearly, at this point just before the 2019 consultation, National Highways considered all the six route options to be deliverable, and viable in the non-financial sense.

The evidence above is clear that Grey was selected to be an option because an out of Park option had legally to be offered and certainly not because it was the only deliverable option. Then, subsequent to receipt of the 2020 QCs’ advice Grey was chosen as preferred route precisely because it was the only viable option; it suddenly came to be seen as the sole option wholly outside the Park and thus deliverable.

QC advice was clear that Grey must be the preferred route as there are no foreseeable exceptional circumstances to permit a route inside the Park. Grey was chosen by National Highways as preferred route in Summer 2020, on the basis of that advice, which was - at that point - fresh information to National Highways. Yet as seen in Proposition 3 above, if its own and DfT guidance and due process had been followed, it would not have been. National Highways was simultaneously in two mutually exclusive and contradictory positions; it gives the appearance of somersaulting so as to face both ways at once.

As National Highways states, the choice of the preferred route must be taken “on the basis of information that was in the public domain at the time of the consultation between 30 August 2019 and 1 March 2020”. This is critical because the consultation material made no mention of the planning law issues regarding the unviability of options running in the Park, and it gave no high-risk warnings in line with the legal opinion it subsequently followed. The choice of Grey rested on the 2020 legal opinion. But that opinion was inadmissible as the reason for its choice, and without that opinion Grey – as in 2017 – would not have been the preferred choice.

The Spring 2020 QCs' advice was - and is - not in the public domain. Only a Freedom of Information Act request in 2021 revealed a summary of it; National Highways is refusing its release. Since the preferred route choice was predicated on just that QC advice, delivered after the consultation, and seemingly unknown even to National Highways at the time of the 2019 consultation, then the preferred route choice was flawed, and should not have received DfT approval.

Just as in 2017, on cost, budget and value for money grounds, it is not in the public interest for Grey to be chosen when a compellingly better case can be made for other options. The process might revert back to a fresh choice of preferred route. While it is possible that Grey might be re-chosen, it needs to be kept in mind that Grey fails to accord with the SoS's 2003 decision (unlike on-line options), its BCR and value for money are not in the public interest (unlike on-line options), it was declared as unaffordable in 2017 (unlike on-line options), and it is still some 60% over budget (unlike on-line options).

4. Summary

Each of these propositions requires a cogent response from National Highways. Propositions three and four were put to them directly and to the DfT as well. No meaningful reply has been received from either party.

The points in propositions three and four were put to both of them because the NNNPS (para 4.27) gives guidance that "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." Implicit here is that the Examining Authority might reconsider the process if it was not satisfied and considered a review of the process to be necessary.

There are very deep concerns that the decision-making process that was undertaken was flawed both in its procedures and in its outcome. It is considered imperative that the Examining Authority validate the process and outcomes of the 2019 Further Consultation options' consideration and assessment phase, and the resulting consultation and preferred route choice, either at the DCO application stage or at the subsequent examination. The issues will certainly be raised in representations.

Source Material

1. Step 1 Alistair Darling statement 9th July 2003 House of Commons “ ... on the south coast, the Arundel bypass would cut across water meadows damaging an area of outstanding beauty. I am rejecting that proposal, as well as proposals to expand junctions with flyovers on the Chichester bypass and the proposal for a tunnel at Worthing. Each, in my view, has environmental consequences that are unacceptable and avoidable. ... I am therefore asking the Highways Agency to identify alternative solutions, recognising the need to support planned economic growth”.
2. Step 2 See article by Dr E Tristram. “Bypass-related factors influenced the creation of the South Downs National Park boundary so that countryside recommended for inclusion was omitted. The decision to choose the Grey route for the Arundel bypass appears to have been guided mainly by the fact that it is almost wholly outside the South Downs National Park. But the National Park boundary in this area is erroneous. It does not reflect the true quality of the countryside. The ongoing bypass plans influenced the boundary of the Park, and decisions about the boundary influenced the subsequent bypass plans.”
3. Step 3 National Policy Statement for National Networks 2014 is guidance under Section 9(8) and Section 5(4) of the Planning Act 2008 4.27 “All projects should be subject to an options appraisal. The appraisal should consider viable modal alternatives and may also consider other options 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.⁶¹ 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”.
5.32 “Ancient woodland is a valuable biodiversity resource both for its diversity of species and for its longevity as woodland. Once lost it cannot be recreated. The Secretary of State should not grant development consent for any development that would result in the loss or deterioration of irreplaceable habitats including ancient woodland and the loss of aged or veteran trees found outside ancient woodland, unless the national need for and benefits of the development, in that location, clearly outweigh the loss. Aged or veteran trees found outside ancient woodland are also particularly valuable for biodiversity and their loss should be avoided. Where such trees would be affected by development proposals, the applicant should set out proposals for their conservation or, where their loss is unavoidable, the reasons for this.”
5.150 “Great weight should be given to conserving landscape and scenic beauty in nationally designated areas. National Parks, the Broads and Areas of Outstanding Natural Beauty have the highest status of protection in relation to landscape and scenic beauty.”
5.152 “Great weight should be given to conserving landscape and scenic beauty in nationally designated areas. National Parks, the Broads and Areas of Outstanding Natural Beauty have the highest status of protection in relation to landscape and scenic beauty. Each of these designated areas has specific statutory purposes which help ensure their continued protection and which the Secretary of State has a statutory duty to have regard to in decisions.”
5.188 “the proximity of the proposed development to quiet places and other areas that are particularly valued for their tranquillity, acoustic environment or landscape quality such as National Parks, the Broads or of Outstanding Natural Beauty;”
4. Step 4 Interim Scheme Assessment Report August 2019 para 7.8.1.2 “Option 5B was rejected prior to the 2017 consultation because it performed least well in terms of value for money, possessing the highest cost to deliver the Scheme. The cost was assessed to be above the Scheme affordability range. This option is the longest route which has been considered and would avoid the SDNP and areas of ancient woodland.”

5. Step 4 (see 13)
6. Step 5 Scheme Assessment Report 2018 para “5.3.3 The performance of the five options were assessed by the Project Board in April 2017 with the aim of recommending options to be taken forward to public consultation in PCF Stage 2. 5.3.4 The differences between the options were highlighted and discussed in order to present justifications for shortlisting options for further consideration in PCF Stage 2. This was achieved via the following considerations: # How well does each option fit with the Road Investment Strategy (RIS) requirements? # How well does each option fit with the project objectives (as set out in the Client Scheme Requirements)? In particular, how do the options help achieve the objectives on environment and journey times? # How well does each option fit with the NNNPS? # How affordable is each option?¹⁴ # How well do the options perform in terms of providing value for money? 5.3.5 At the Board meeting a series of recommendations were made based on the overall performance of each option: # Though Option 0A performs well in terms of value for money, it does not meet the RIS requirements and does not adequately meet project objectives. It was therefore not recommended that Option 0A be taken forward to public consultation. # Options 3, 5A and 5B meet the RIS requirements. Option 5B performs marginally better in terms of environmental impacts and significantly better on compliance with two of the four key NNNPS clauses. However, it performs least well in terms of value for money, possessing the highest cost to deliver the scheme. This cost was assessed as above the scheme affordability range. Option 5B was therefore not recommend to be taken forward to public consultation, while both Options 3 and 5A were. # Option 1 out-performs Options 3 and 5A in overall value for money, compliance with two of the four key NNNPS clauses and has a lower overall environmental impact. Though it does not meet the stated RIS policy of providing a bypass it was assessed as performing well against some of the project objectives. Option 1 was therefore recommended to be taken forward to public consultation. 5.3.6 In summary, it was recommended that Options 1, 3 and 5A were taken forward to public consultation and Option 0A and 5B were not.”
Outline Business Case PCF Stage 2 September 2020 (OBC) para 2.22 “for any options within the SDNP there will be a need to demonstrate ‘exceptional circumstances’ and ‘compelling reasons’, with any benefits outweighing the costs, and demonstration that the scheme is in the public interest.”
7. Step 7 High Court Judicial Review Nov 2018 Schedule: “1. The Defendant will conduct a fresh non-statutory public consultation process in relation to its selection of the preferred route for the proposed A27 Arundel Bypass. 2. The further consultation will be full and open, and carried out lawfully and in compliance with the rules of procedural fairness. 3. The further consultation will allow consultees to comment on all three route options consulted upon in 2017: namely Option 1, Option 3 and Option 5a. 4. The Defendant will ensure that a comprehensive suite of documents is published, including a main consultation document, an updated Environmental Assessment Report, an updated Combined Modelling and Appraisal Report and an interim Scheme Assessment Report. This material will be supplemented by materials prepared for and displayed in a series of public exhibitions. 5. The Claimant will have the opportunity to make substantive representations on the options as part of the new consultation exercise. 6. The further consultation will give the Claimant and the public the opportunity to consider the new traffic figures based on the Defendant's PCF Stage 2 traffic model; relevant corrections to materials published in the previous consultation; and full Stage 2 assessments of Options 4 and 5B. 7. Following the end of the further consultation process, the Defendant will make a new Preferred Route Announcement (PRA) in respect of the selected route option, including if that is Option 5A. The new PRA will have the same status as is usually afforded to PRAs.”
8. Step 8 DfT's TAG, Transport Appraisal Process, May 2018 “1.1.1 This TAG Unit builds on the overview of the transport appraisal process described in Guidance for the Technical Project Manager. This Unit gives more detail on the process of appraisal and associated requirements for transport interventions – from initial intervention genesis to the detailed appraisal required to

support preparation of business or investment cases to support subsequent approval stages and through to post implementation evaluation.

1.1.2 The three stages in the Transport Appraisal Process are as follows:

- Stage 1 – Option Development. This involves identifying the need for intervention and developing options to address a clear set of locally developed objectives which express desired outcomes. These are then sifted for the better performing options to be taken on to further detailed appraisal in Stage 2. See Section 2.
- Stage 2 – Further Appraisal of a small number of better performing options in order to obtain sufficient information to enable decision-makers to make a rational and auditable decision about whether or not to proceed with intervention. The focus of analysis is on estimating the likely performance and impact of intervention(s) in sufficient detail. See Section 3.
- Stage 3 – Implementation, Monitoring and Evaluation. See Section 4.

2.11.1 The Option Assessment Report, or similar, should document the Stage 1 process of identifying the need for intervention and the process of option development and selection. In general, the structure of the OAR should be consistent with Steps 1 to 8 set out in this Unit.

2.11.2 The Option Assessment Report, or similar, should address the following requirements:

- ... • Document the process of option generation (Step 5), sifting (Step 6), and assessment (Step 7). Decisions made on discarded options should be recorded, along with supporting evidence. The initial supporting evidence for feasible options, as facilitated by EAST6, should also be summarised. Analysts should also document how environmental considerations have been taken into account in this process, particularly during the initial sifting stage;
- Document the results of the subsequent assessment of potential options against the Option Assessment Framework. Evidence against the 5 cases should be presented (see Tables A.1 to A.5 for details of the requirements for each case);
- Provide a clear explanation for any neutral assessments which have been made;
- Summarise the headline results across all options considered and provide conclusions on the comparative performance of options; and
- Identify the better performing options (including a low cost solution) to be taken forward for further, more detailed appraisal in Stage 2.

3.4 Step 11: Public Consultation on Appraised Options

3.4.1 A consultation exercise should be undertaken before the decision makers reach a conclusion about the preferred option. Consultation with Environmental Bodies (Natural England, English Heritage, and the Environment Agency) and the public is legally required at the draft plan/programme stage where a Strategic Environmental Assessment is undertaken.

3.4.2 Public consultation on the appraised options will inform the detailed design process.”

9. Step 9 PCF Handbook v4 2018 # “1 Option identification - Prior to non-statutory public consultation. Traffic modelling and economic assessment is undertaken on a number of options (i.e. potential road solutions to the transport problem). A robust traffic assessment is needed to tell whether a scheme will work now and in the future, to assess whether the proposed solution will mitigate an identified problem and whether there are any consequential impacts, for example on the environment. Economic appraisal of transport schemes is required in order to assist decision-makers prioritise between schemes and options and ensure that value for public money is achieved. A key output is the Technical Appraisal Report which ensures decisions on which options to consult the public on are supported by robust assessment and data. # 2 Option selection - Prior to the preferred route announcement. A variety of online and public events are held at which the public are consulted and their views on the potential options are taken into account. Further refinements will be made to the traffic modelling and economic assessment and by the end of the stage, a decision on which option to progress is made and a public announcement is made on this preferred route.”

Highways England: Licence April 2015 Cooperation. 5.17 In complying with 4.2(f) and its general duty to cooperate under section 5(1) of the Infrastructure Act 2015, the Licence holder should co-operate with other persons or organisations in order to: a. Facilitate the movement of traffic and manage its impacts; b. Respond to and manage planned and unplanned disruption to

the network; c. Take account of local needs, priorities and plans in planning for the operation, maintenance and long-term development of the network (including in the preparation of route strategies, as required at 5.13); d. Provide reasonable support to local authorities in their planning and the management of their own networks. 5.18 In complying with 5.17, the Licence holder should cooperate with, consult and take reasonable account of the views of: a. Local authorities and devolved administrations; b. Other transport network operators (including local highway authorities, Network Rail, port and airport operators); c. Operational partners (including, but not limited to, the emergency services); d. Road users; e. Local communities; f. Other relevant stakeholders with a significant stake in the long-term development of the network. 5.19 In complying with 5.17 and 5.18, the Licence holder should co-operate with other persons or organisations in a way which is demonstrably: a. Open and transparent – involving relevant stakeholders, ensuring that essential information is available to affected and interested parties, and that the processes for engagement and communication are clear; b. Positive and responsive – seek to build trusting and effective working relationships with key partners and stakeholders, engaging with due efficiency and economy and in a timely manner; c. Collaborative – working with others to align national and local plans and investments, balance national and local needs and support better end-to-end journeys for road users

10. Step 10 PCF Handbook v4 2018 “Projects requiring a Development Consent Order (DCO) or Highways Act Orders - A solution review and validation event should take place in PCF Stage 2 (recommended to be a minimum of 2 to 3 months prior to the non-statutory options consultation) to facilitate a review and validation of the emerging options and to be clear why these are the proposed option and confirm adequacy for consultation.”
11. Step 10 Nolan Principles. Introduced in 1995 by the UK government, Committee on Standards in Public Life, these important values are enshrined in codes of conduct across the public sector, from schools and government departments to hospitals. # Selflessness: Holders of public office should act solely in terms of the public interest. # Integrity: Holders of public office must avoid placing themselves under any obligation to people or organisations that might try inappropriately to influence them in their work. They should not act or take decisions in order to gain financial or other material benefits for themselves, their family, or their friends. They must declare and resolve any interests and relationships. # Objectivity: Holders of public office must act and take decisions impartially, fairly and on merit, using the best evidence and without discrimination or bias. # Accountability: Holders of public office are accountable to the public for their decisions and actions and must submit themselves to the scrutiny necessary to ensure this. # Openness: Holders of public office should act and take decisions in an open and transparent manner. Information should not be withheld from the public unless there are clear and lawful reasons for so doing. Honesty: Holders of public office should be truthful. # Leadership: Holders of public office should exhibit these principles in their own behaviour. They should actively promote and robustly support the principles and be willing to challenge poor behaviour wherever it occurs.
12. Step 10 The Gunning Principles These were coined in a court case in 1985. Stephen Sedley QC defined that a consultation is only legitimate when these four principles are met: 1. proposals are still at a formative stage. A final decision has not yet been made, or predetermined, by the decision makers 2. there is sufficient information to give ‘intelligent consideration’. The information provided must relate to the consultation and must be available, accessible, and easily interpretable for consultees to provide an informed response 3. there is adequate time for consideration and response. There must be sufficient opportunity for consultees to participate in the consultation. There is no set timeframe for consultation, despite the widely accepted twelve-week consultation period, as the length of time given for consultee to respond can vary depending on the subject and extent of impact of the consultation 4. ‘conscientious consideration’ must be given to the consultation responses before a decision is made. Decision-makers should be able to provide evidence that they took consultation responses into account. These principles were reinforced in 2001 in the ‘Coughlan Case which confirmed that they applied to all consultations, and then in a Supreme Court case in 2014 (R ex parte Moseley v LB Haringey)

which endorsed the legal standing of the four principles. Since then, the Gunning Principles have formed a strong legal foundation from which the legitimacy of public consultations is assessed, and are frequently referred to as a legal basis for judicial review decisions.

13. Step 11 A27 Arundel Bypass: Notification of Preferred Route Request for Ministerial Support August 2020 (DfT Briefing) para 8.2 "NN NPS and status of the national park were always known to be a key risk for gaining DCO consent and so the project team have been continuously engaging with external legal expertise to advise on option identification and selection ... During the preparation for the further consultation in Spring 2019, Pinsent Masons and QCs were fully engaged throughout".
14. Step 12 October 2019 letter from National Highways to Arun District Councillor "Any scheme that conflicts with the National Networks National Policy Statement carries a greater risk of being refused, however, it is too early and inappropriate for HE to be conclude the 'consentability' of any route. Highways England has not yet formulated any conclusions on the planning likelihood of any route and its impact on selecting a preferred route."
15. Step 12 A27 Arundel Bypass Further public consultation Have your say 30 August to 24 October 2019 page 10 "Route option development. After announcing in October 2018 our intention to carry out further consultation, we took a fresh look at the full range of possible route alignments. These were grouped by corridor (or similar route alignments) and then sifted according to compliance with the scheme objectives and legal and national planning policy tests, including consideration of environmental impacts. Our technical work concluded that six options should be put forward for consideration as part of this further consultation. These are shown in Figure 2. For ease of reference, we have assigned a colour to each option. All options would support the local housing and employment growth strategies of the local authorities and cater for traffic growth until at least 2041. However, there are significant environmental constraints and national planning policy risks that affect all six options as outlined in the following pages."
Page 29: "Compliance with National Networks National Policy Statement (NN NPS)
The A27 Arundel Bypass meets the criteria of being a Nationally Significant Infrastructure Project (NSIP) under the Planning Act 2008 and therefore must be authorised by the Secretary of State by way of a Development Consent Order (DCO). A DCO is a statutory instrument which will contain the necessary powers for us to construct, operate and maintain the scheme and replaces the need to obtain planning permission and a number of other consents. A DCO can also include a number of associated powers, including in relation to compulsory acquisition. More information is available in our planning policy summary on our website or from the Planning Inspectorate website. ... Because the project is a NSIP, the primary policy document against which the Secretary of State must assess the scheme is the National Networks National Policy Statement (NN NPS). While the scheme aligns with many of the NN NPS policies, there are also policies which it may conflict with, including: 5.133: Heritage – 'Where the proposed development will lead to substantial harm to or total loss of significance of a designated heritage asset, the Secretary of State should refuse consent unless it can be demonstrated that the substantial harm or loss of significance is necessary in order to deliver substantial public benefits that outweigh that loss or harm.' 5.151: National Park – 'The Secretary of State should refuse development consent in these areas except in exceptional circumstances and where it can be demonstrated that it is in the public interest.' 5.154: National Park – 'The duty to have regard to the purposes of nationally designated areas also applies when considering applications for projects outside the boundaries of these areas which may have impacts within them. The aim should be to avoid compromising the purposes of designation...' 5.169: Minerals Safeguarding Area – 'Applicants should safeguard any mineral resources on the proposed site as far as possible.' 5.32: Ancient woodland – Requires the Secretary of State to not grant development consent for any developments that would result in the loss or deterioration of irreplaceable habitats including Ancient woodland, unless the need for and benefits of development in that location clearly outweigh the loss. Any scheme which conflicts with NN NPS policy carries a greater risk of being refused consent and therefore not being delivered. We will consider the NN NPS when

selecting the preferred option, undertaking further detailed design and proceeding to prepare an application for consent.”

16. Step 13 OBC para 1.3 "The A27 Arundel Bypass is a contentious Scheme and it has been important to obtain legal advice to ensure the decision-making process is underpinned by adherence to and compliance with Highway's England's Project Control Framework (PCF) and all relevant legal policies. This directed that the choice of the Preferred Route be taken on the basis of information that was in the public domain at the time of the further public consultation between 30 August 2019 and 1 March 2020".
17. Step 13 (see 15)
18. Step 13 A27 Arundel Bypass DfT Briefing August 2020 page 7 "8.1 HE has a general policy of not consulting on unaffordable options. The A27 Arundel Bypass scheme has been an exception to this rule since 2018 due to the complexity and sensitivities of the population, its setting, historic importance and environmental issues. 8.2 NN NPS and status of the national park were always known to be a key risk for gaining DCO consent and so the project team have been continuously engaging with external legal expertise to advise on option identification and selection: 8.2.1 Previous preferred route (in 2018) that went inside the SDNP was selected, following discussions with Pinsent Masons (planning law experts), in the understanding that the NPS could be challenged and that there was a good chance of success at DCO. 8.2.2 During the preparation for the further consultation in Spring 2019, Pinsent Masons and QCs were fully engaged throughout Work was then undertaken to look at how to increase this success rate. 8.2.3 Route MAGENTA (which 'clips' the SDNP) was deemed by Pinsent Masons to have a "nearly 50% chance" of success at DCO if the impact on the SDNP was reduced from 700m to no more than 300m length of road inside the park, and having factored in the increased noise impact on the residents of Walberton and a new housing development currently in construction. Upon providing further evidence, QC over-ruled Pinsent Masons' legal opinion and advised that the probability of success was still <20% since the noise impact needs to be far greater (thousands of people affected rather than low hundreds) to classify as exceptional circumstances to the presumption against development in a national park. This has been confirmed subsequently by a second QC".
19. Step 14 Transport Planning Group guidance June 2020 "When considering schemes specifically being promoted by Highways England then to be included in the forecast year core scenario the following two criteria must be met: # The scheme must be included in a published RIS; and # The scheme must be at PCF Stage 3 or later in its development process. Including the second criterion ensures that the route for the scheme is known (it is past its Preferred Route Announcement), its affordability and Value for Money are established (as it will usually have its Outline Business Case approved) and its buildability and environmental impacts will have been established."
20. Step 15 OBC para 1.2 "The selection of a preferred route has been subject to ongoing legal and Queen's Counsel (QC) advice which supported the recommendation to the Highways England Investment Committee (29 July 2020) was that GREY is the only deliverable option since ... it is wholly outside the South Downs National Park; QC advice is that GREY must be the preferred route as there are no foreseeable exceptional circumstances to permit a route inside the SDNP."
21. Step 16 A27 Arundel Bypass DfT Briefing August 2020 para 1. "Key Points to Note 1.1 Six route options were taken to a further consultation in 2019 for the A27 Arundel Bypass scheme. There is strong need and strategic case to improve the single carriageway section of the A27 at Arundel. The scheme aims to address a lower-than-average safety record, above normal congestion, frequent delays and rat-running along unsuitable roads in the South Downs to avoid Arundel. 1.2 HEs assessment of these route options sought to find a balance between many competing demands, including those of local communities and the environment and the need to deliver economic benefit. The responses to the consultation, concluded 1 March 2020, were polarised with no single option gaining a majority of support. From our initial assessment, MAGENTA

appeared to provide the best balance as it took traffic efficiently away from the main communities whilst only briefly entering the South Downs National Park (SDNP).

1.3 This option was examined and tested extensively between April and July 2020. However, legal advice (attached) has recently confirmed that despite all potential mitigations developed, the prospects for obtaining planning consent for MAGENTA remains low due to the NNNPS presumption against development in the SDNP where there is an alternate option (GREY) that does not enter the park.

1.4 GREY has therefore been identified as the preferred route with many of the advantages of MAGENTA while avoiding the national park, but with a greater impact on local communities and a cost estimate in excess of the capital baseline allocation. Highways England selected GREY for the preferred route at its' Investment Committee on 29 July 2020 and can fund the scheme from within RIS2. 1.5 The selection of a preferred route has been subject to ongoing legal and Queen's Counsel (QC) advice. Highways England have confidence that this route is the only deliverable route since: • it is wholly outside the South Downs National Park; QC advice is that GREY must be the preferred route as there are no foreseeable exceptional circumstances to permit a route inside the SDNP. • It does not impact on any ancient woodlands. • It is the furthest away from any bat roosting sites, thus it is the only option that is compliant with NN NPS and has a strong case for gaining the necessary consents. • It delivers the most safety and journey time reduction benefits since it is the option that provides the longest length of new road. • It will provide enhanced connectivity within West Sussex and is the first step in creating a much-needed strategic East-West corridor south of the M25. All improvements in this area will be challenging due to the region's geography, however a number of coastal towns in the region would benefit from the economic growth and levelling-up that this transport corridor would bring." (Added note by author: these issues are not all confined to Grey and referenced in the public consultation brochure – thus are not in the public domain.)

22. Step 17 (see Step 20)

(ends)