

## **High Speed Two (HS2)**

### **Background**

At its meeting of 27<sup>th</sup> July, Council reaffirmed Warwick District Council's full opposition to HS2 and agreed the Council's response to the Government's Consultation for submission to the Department for Transport. At that time it also endorsed the 51M Group's response to the same consultation. Officers were also instructed to continue to work on opposing the Government's current proposals for High Speed Rail, including joint working with the 51m Group, and to report back as necessary to members with any significant issues.

Following the July Special Council meeting, the above mentioned responses were submitted within the specified deadlines. The Leader of the Council, the Portfolio Holder for Development Services and officers have since actively worked with the 51M Group and subsequent key developments are reported below.

### **The 51M Group**

The 51M Group has continued to grow and there are now 18 councils which make up the Group, namely:

- Buckinghamshire County Council
- London Borough of Hillingdon
- Aylesbury Vale District Council
- Chiltern District Council
- South Bucks District Council
- Wycombe District Council
- Oxfordshire County Council
- Cherwell District Council
- Lichfield District Council
- South Northants District Council
- Warwick District Council
- North Warwickshire Borough Council
- Warwickshire County Council
- Stratford-on-Avon District Council
- Leicestershire County Council
- Harborough District Council
- Three Rivers District Council, Hertfordshire
- Coventry City Council

The 51M Group has been working on a number of matters, including responding on technical issues in relation to the responding to Transport Select Committee, actively

raising awareness of the impacts of the High Speed 2 proposal and ensuring that all the Councils which make up the Group act in a united and consistent way, so that we do not prejudice any legal challenge that we may wish to make.

### **Involvement in the Transport Select Committee**

The Council actively worked with the 51M Group in preparing its submission to the House of Commons Transport Select Committee. Consideration by the Transport Select Committee included five oral evidence sessions which took place between 21st June and 13th September. The 51M Group were represented at the session on 12th July 2011, by Councillor Martin Tett, Leader of Bucks County Council, Chris Stokes and Professor John Tomaney. At the request of the Transport Select Committee, further supplementary written evidence was submitted on 7th September.

The report of the Transport Select Committee (TSC) was published on 8th November and may influence the Government's decision on whether to proceed with High Speed 2. The TSC concluded that they *'support a high speed rail network for Britain, developed as part of a comprehensive transport strategy also including the classic rail network, road, aviation and shipping.'* The fact remains though, that there is still no overarching transport strategy in place by the Government to give the context that 51M (and Warwick District Council) feels is required in order to pursue High Speed Rail.

The TSC also acknowledged that 'the Government's HS2 proposal could form part of this [high speed] network'. Interestingly they did not state say that HS2 **should** form part of this network. The TSC went on to state that there should be *'the provision of greater clarity on the policy context, the assessment of alternatives, the financial and economic case, the environmental impacts, connections to Heathrow and the justification for the particular route being proposed.'* The TSC also point out that there should be an appraisal of the Y (phase2) before any decision is made on phase 1.

Given all these areas which need to be addressed, the TSC agreed to call on the Government to consider and to clarify these matters before it reaches any decision on HS2. In effect, the TSC is saying that the Government should not make a decision until it has carried out further work.

Given the all party support for the concept of HS2, it was inevitable that the TSC report would not reject the HS2 proposal in its entirety. However the TSC does appear to call for a significant amount of extra work to be undertaken on a number of aspects of the proposal. This effectively amounts to a more comprehensive consultation and appraisal to allow for a more considered decision by the Secretary of State.

### **Campaigns by Local Residents / Organisations**

There are a considerable number of local action groups and individuals across Warwick District Council that have organised themselves to oppose the HS2 proposal. Officers from Warwick District have met with many of them to discuss their concerns and have shared information/ assisted such parties wherever possible / practicable.

In July a meeting of local opposition groups was hosted by Warwick District Council, this proved invaluable in ensuring that the Council's consultation response had addressed all of the locally important issues (economic and environmental). The Council recognises that many of these groups have promoted/ formulated mitigation strategies as a fall back position in the event that HS2 proceeds. As yet (in agreement with 51M) Warwick District has not promoted or given any backing to any possible form of mitigation as it may be 'misconstrued' by the Government as tacit approval to the overriding principle of the HS2 project.

Council members and officers continue to enjoy a good relationship with members of these groups and will continue to support and advise them throughout.

### **Other Publicity / Raising Awareness**

Communications leads for the 51M Group councils are meeting regularly to ensure the communications strategy is delivered. As well as the wider group, regional communications activity is being planned through London and the South East and the Midlands. A briefing document was prepared for use by all the 51M group members and a leaflet encouraging people to write to their local MP was also produced and distributed. The 51M group website has been continually updated with new material and links to media activity.

An event, (most likely to be at the House of Commons) is being planned at which awareness of the impact of the HS2 proposals will be highlighted to those MPs who may not have yet committed to the 'no' campaign.

Specifically in Warwick District, media activity is being delivered locally as well as regionally to keep HS2 high on the media agenda. The Leader of the Council has led the campaign on behalf of the Council and continues to meet regularly with Government Ministers and Council Leaders.

### **Parliamentary Issues**

Members are aware that the concept of HS2 is supported by all three main political parties. Despite originally saying that Labour were reviewing its commitment to the scheme, the Labour Party's Shadow Transport Secretary Maria Eagle confirmed the party's support at the Labour Party Conference in Sept 2011. A letter stating that the Labour Party had reservations about the scheme, but would not seek to oppose the scheme in Parliament, was received by the 51M group on 25th October 2011.

Philip Hammond moved to Secretary of State for Defence being replaced by former Treasury Minister Justine Greening, however this reorganisation is unlikely to change the Government's apparent intentions

A Parliamentary debate on the proposed HS2 rail scheme went ahead on 13 October 2011. Whilst the debate was not well attended by MPs, the overwhelming majority of speakers were firmly against the scheme, including MPs from inner London such as Frank Dobson (MP for Holborn and St Pancras) and the north such as Fiona Bryce (MP for Congleton). It

appeared that those supporting the scheme were still unable to give any clear evidence in support of their views.

### **Issues Regarding the work of HS2 Limited**

On 26 July 2011 The Department for Transport (DfT) instructed HS2 Ltd to analyse the consultation responses, advice on the issues raised in the consultation and update the business case. Working in partnership with 51M and following sound legal advice, it was agreed that the DfT's instruction to HS2 Ltd amounts to a very unfair process. Therefore a letter was sent to the Government on behalf of 51M by the legal advisor on 4th August 2011 raising this issue of 'fairness' of the instruction.

In October, Warwick District Council received a letter from HS2 Ltd stating that *'operating under the remit set out by the Secretary of State in his letter of 26th July 2011 of making preparations to enable the next phase of work on the London to West Midlands section (should the project proceed), we are setting up a series of meetings for local authority officers in November 2011 to discuss how we work closely with local authorities in the next stage'*. The Council was therefore invited to attend a meeting at the HS2 Ltd offices in November.

The view of the Leader of the Council was that it would be inappropriate, and a waste of resources, to meet with HS2 Ltd for the purpose of furthering the proposal before a decision has been made by the Secretary of State. A letter was therefore sent in response to HS2 Ltd, again by working in partnership with 51M and following sound legal advice, to advise HS2 Ltd that we have made it clear that our consultation response has been made on the basis that the consultation is genuine and that the Secretary of State will approach the decision with an open mind. We explained that we have also expressed concerns in our consultation response regarding issues surrounding the consultation process itself. We pointed out that in the circumstances, we considered that it would be inappropriate, and a waste of resources, to meet for the purpose of furthering the proposal before a decision has been made by the Secretary of State. In addition we noted that HS2 Ltd may have a private interest in a future for the HS2 proposal, but this does not justify their attempt to prematurely and unnecessarily harness local authority assistance and resources.

### **Legal Action**

If legal action is to be commenced in relation to the Government's decision, it would have to be done by way of a judicial review in the High Court. Any application for judicial review must be brought promptly and in any event within three months of the date that the grounds for the application first arose. Therefore, if the Council decides to commence judicial review proceedings, either on its own or jointly, it must do so within these time limits.

If the Government make a decision to proceed with the current proposal for high speed rail, Leading Counsel's advice will need to be sought on behalf of the 51M group to establish whether there are sufficient grounds to launch a challenge, balancing the costs against the benefits of doing so.

### **Preparation for a Legal Challenge**

In the event that the Government decides to proceed with the current proposal for HS2, 51M will seek independent legal advice on whether there are any grounds for making an application to judicially review the Secretary of State's decision. Judicial review is likely to be the main option as this allows the courts to supervise bodies exercising public functions to ensure that they act lawfully and fairly. The scope of judicial review is limited both in its availability and function and the role of the court in judicial review proceedings is not to remake the decision being challenged, or (except for the purpose of considering its lawfulness) to inquire into the merits of that decision, but to conduct a review of the process by which the decision was reached in order to assess whether that decision was vitiated by some flaw.

The recognised grounds currently available for judicial review can broadly be classified under four heads:

- **Illegality:** which arises when a decision-maker exercises a power wrongly or improperly purports to exercise a power that it does not have (*Ultra Vires*). Using this ground it is possible to challenge, amongst other decisions, such as Acts of Parliament and delegated legislation that are inconsistent with EU law; UK delegated legislation that is inconsistent with an Act of Parliament or a decision of a public body that is inconsistent with EU law, an Act of Parliament or delegated legislation.
- **Irrationality:** where the decision "is so unreasonable that no reasonable authority could ever have come to it" (*Wednesbury unreasonableness*)
- **Procedural unfairness:** which will arise if the decision-maker has not properly observed the relevant statutory procedures, such as a failure to consult or to give reasons, such as a flawed consultation process.
- **Legitimate expectation:** which arises because a public authority may, by its own statements and/or conduct, be required to act in a certain way, where persons have an expectation as to the way in which it will act.

The question of remedies is often critical in judicial review proceedings, as it may determine not only whether it is worthwhile bringing a claim, but also whether permission will be granted to bring the claim in the first instance. With regard to judicial review proceedings, a claimant may seek one or more of three forms of final relief, all of which are discretionary. They are:-

- **An order quashing the decision in question (quashing order).**
- **An order restraining the body under review from acting beyond its powers (prohibiting order).**
- **An order requiring the body under review to carry out its legal duties (mandatory order).**

However, owing to the very nature of judicial review, in many cases, even if there has been a serious procedural flaw in a decision-making process, the best a claimant could hope for would be for the court to remit the decision back to the decision-maker to look at it again on a proper basis and there is every chance that the decision-maker may still lawfully come to the same decision as it did the first time.