

**IN THE MATTER OF AN APPEAL AGAINST THE REFUSAL OF PLANNING
PERMISSION BY THE CITY AND DISTRICT COUNCIL OF ST ALBANS IN
RESPECT OF LAND AT NORTH ORBITAL ROAD, ST ALBANS**

CLOSING SUBMISSIONS ON BEHALF OF THE LOCAL PLANNING AUTHORITY

These submissions are divided into the following sections:

Green Belt harm.

Harm to other matters including:

Landscape and visual impact;

Noise;

Ecology;

Sustainability;

Prematurity;

Whether very special circumstances exist including:

Whether the development will operate as an SRFI

Whether alternatives to Radlett exist.

The quality and significance of other benefits, like the
Country Park and by-pass.

The Approach to be Taken In this Case

Before dealing with each of these matters, I deal with the approach to be taken in this case. The Council is of the view that there should be a wholesale reassessment of this case and that it is incumbent on the Inspector to reassess, in its entirety, the evidence in support of this case, whilst taking due account of the Inspector's decision. Mr Tilley accepted each of these propositions.

That is the approach which should be taken as a matter of law. The inquiry's remit is not and cannot be restricted to a consideration only as to whether there has been a material change of circumstances from the previous decision. To do so would be to ignore the importance of this application being a separate application and thus to be established on its own merits. It is also to ask the wrong question. The correct question is, what, on the evidence before me and taking into account the issues before me, what conclusion do I reach on the essential issues.

First, in *R (on the application of Rank) v East Cambridgeshire District Council* [2002] EWHC 2081, it was decided that there was no duty to decide a case in the same way as a previous decision (see paragraph 16).

It is to be remembered, also, that there is no principle of estoppel in planning law¹.

I reiterate the position taken in the Planning Encyclopaedia on the relevance of previous decisions²:

The Court accepted that whilst relevant previous decisions were a material consideration (North Wiltshire District Council v. Secretary of State for the Environment [1992] J.P.L. 955), an inspector had to exercise his own judgment and was free to disagree with the earlier decision (Rockhold v. Secretary of State for the Environment [1986] J.P.L. 130). However, he must deal adequately with such a decision and give reasons for any material disagreement (Barnet London Borough Council v. Secretary of State for the Environment [1992] J.P.L. 540), except where the difference related to a matter of judgment and opinion where it might not always be possible for the decision-maker to give reasons for his different view, except simply to say "I disagree" (R. v. Secretary of State for the Environment, ex p. Gosport Borough Council [1992] J.P.L. 476).

As a result, care should be taken to ensure that the decision-maker does not proceed on the basis that he should not return to a particular issue because it has already been decided. The result is that when considering each of the issues which are pertinent to the decision, the decision-maker should not treat any such issue as settled since it was decided in a particular way at an earlier stage. To do otherwise would be to

This approach accords with the view of Mr Justice Sullivan in *Kings Cross Railway Lands Group v London Borough of Camden*³ in which the following was stated:

I accept the submission of Mr Hobson, QC, on behalf of the Claimant, that the weight to be attached in any particular case to the desirability of consistency and decision-making, and hence the weight to be attached to the March 2006 resolution, was a matter for the Committee to decide in November 2006. However, given the desirability in principle (to put it no higher) of consistency in decision-making by

¹There is no concept of estoppel in the context of decisions on planning merits, like an appeal against a refusal of planning permission: see *Thrasivoulou v Secretary of State for the Environment* [1990] 2 AC 273, 287, *R (Reprotech) v East Sussex County Council* [2002] UKHL 8, *Porter v Secretary of State for Transport* [1997] JPL 635, 643.

² At P70.38.

³ [2007] EWHC 1515, pg 4.

local planning authorities, Mr Hobson rightly accepted that in practice the Committee in November 2006 would have to have a "good planning reason" for changing its mind. That is simply a reflection of the practical realities. If a local planning authority which has decided only eight months previously, following extensive consultations and very detailed consideration, that planning permission should be granted is unable to give a good and, I would say, a very good planning reason for changing its mind, it will probably face an appeal, at which it will be unsuccessful, following which it may well be ordered to pay costs on the basis that its change of mind (for no good planning reason) was unreasonable.

Mr Hobson submits, correctly, that while a material change of circumstances since an earlier decision is capable of being a good reason for a change of mind, it is not the only ground on which a local planning authority may change its mind. A change of mind may be justified even though there has been no change of circumstances whatsoever if the subsequent decision taken considers that a different weight should be given to one or more of the relevant factors, thus causing the balance to be struck against rather than in favour of granting planning permission.

An example canvassed during the course of submissions was that of a local planning authority which resolved to grant planning permission for an inappropriate development in the green belt, subject to a section 106 agreement, on the basis that the very special circumstances prayed in aid by the applicant outweighed the harm to the green belt and other harm. On revisiting the matter when the section 106 agreement was finalised, that local planning authority could properly reverse its earlier decision if, on reflection, it considered the harm was not outweighed by the special circumstances. Thus, it was not necessary for the Committee in November 2006 to be satisfied that there had been any material change of circumstances since March 2006. It was entitled to conclude that, having regard to all the circumstances considered in March 2006, a different balance should be struck.

Neither the defendant nor the interested party dissented from the proposition that, as a matter of law, there did not need to have been a material change of circumstances in order to justify a different decision in November 2006. A change in circumstances was one of the more obvious reasons which might justify a change of mind by a local planning authority, but it was not the only possible reason.

From this the following may be derived:

As a matter of law, the decision maker should reach a conclusion on all the relevant matters, including any previous decisions.

The decision maker should have a good reason for reaching a different view.

That good reason may be a change of circumstances.

However, the decision-maker may reach a different decision simply because he takes a decision view from the previous decision maker or decides that the balance should be struck in a different way.

A good reason" for these purposes has also been considered in *North Wiltshire District Council v Secretary of State for the Environment*⁴ in which it was stated that a good reason will be a reason which is rationally-based and takes into account all material considerations.

Given that a good reason for these purposes is one which can be simple a decision to reach a different planning judgment, it must follow that the good reason is one which:

raises a new argument from that not raised earlier. There can be no point taken that a new or different argument should be regarded as incapable of overriding an earlier decision. To do so would be to incorporate the concept of estoppel into planning decision-making⁵;

the provision of new and significant evidence on a particular point;

a view given by an expert who was found to be compelling by the decision-maker even if contrary to another view given by an earlier expert. The tribunal of fact in the position of the court of first instance is in the best position to judge how compelling a particular point is – they see the witnesses and reach a decision accordingly. A compelling expert witness provides a sound basis for concluding that a particular issue should be decided;

Simply, that different weight should be placed on a particular factor.

As a result of the above, it would be wrong, as a matter of law, to characterise the issue in this case as being whether there has been a change of circumstances from the previous decision.

⁴ (1993) 65 P & CR 137, 145.

⁵ See above at footnote 1.

That is, however, the way that the Appellant has sought to pursue its case. The Appellant has concentrated almost entirely in this case⁶ on most of the principle issues as to whether there has been a material change of circumstances justifying a different decision. This approach simply does not engage at all with whether there are any new arguments or new evidence which has been raised or as to whether a different view should be given.

In short, it is an approach which has effect of neutering the first instance power given to you Sir⁷.

The appellant has also suggested that the fact that the council has not dissented from the conclusions of the previous Inspector in this case on certain issues is inconsistent with the approach of contending that all matters are open to argument⁸. That is an inaccurate depiction of the Council's case. The Council, first, has not queried the Inspector's and the Secretary of State's assessment of various issues on which there was no disagreement. It should be noted, however, that the Council did provide evidence from Mr Billingsley indicating those issues which were agreed with. Second, on a number of issues the Council deliberately stepped back from arguing an issue at first instance because of the threat of costs which had been made if the council pursued various issues without identifying a change of circumstances. While it did not agree with that contention, it nevertheless felt it was incumbent on the authority to limit its costs exposure by taking the approach on some issues which the Appellant contended should be taken. That was a reasonable approach, but it is clear that this was done in a way which would not impinge upon the council's ability to disagree with the decision of Inspector Phillipson in more fundamental ways⁹. [check report].

Very Special Circumstances

The Appellant relies on a number of matters which it says, together, amounts to very special circumstances justifying the proposal.

Whether the development will operate as an SRFI

The policy support in favour of this development is limited. If the development proposed does not amount to an SRFI, there is no support for it. Mr Tilley accepted that if the development did not become an SRFI because of a limited rail connection, that would be an

⁶ Except for its alternatives analysis

⁷ And, indeed, formed the basis of your initial assessment as to what the main issues in this case are.

⁸ See EC RT and XX, MR JH.

⁹ See 9/CD3.10.

unacceptable result¹⁰. It would also be unacceptable, he agreed, if the additional result of it not becoming an SRFI is that other, better locations would be prevented from coming forward.¹¹

The question, of course, that this begs is when a development either will or will not be an SRFI. That is to be determined and can only be determined, by the guidance which has informed, and continues to inform government policy, namely, the SRA guidance on interchanges¹².

This makes clear that an SRFI must be “capable now or in the future of supporting their commercial activities by rail”¹³. It also points out that, while there should be good connections to the primary road network, “high quality links to the rail network are ... essential”¹⁴. It is clear that the key factors in considering site allocations include: access “on rail freight routes with capacity and avoiding congestion”. This is reiterated in Appendix B which indicates that the transport requirements include “rail links need high capacity and good loading gauge”¹⁵.

The whole purpose of the SRFI is to enable traditionally road-based distribution operations to shift over to rail use:

[SRFI's] “should be seen not simply as locations for freight to access the railway but also sites for the accommodation of businesses capable now or in the future of supporting their commercial activities by rail”¹⁶.

It is, in order to do this, that it is has been made clear in the policy that the shift is capable of being made. The

It is, put simply, insufficient for a development to be regarded as an SRFI if it is not able through its location to enable that shift to rail to occur. Such a development, while it may have the name of an SRFI will not fulfil its purpose.

The importance of looking at the essential purpose of an SRFI is that, unless it is clear that the interchange will be such, it cannot be regarded that there will be very special circumstances justifying the development. When looking at the ability of the development to

¹⁰ RT, XX, MR.

¹¹ XX, MR, RT.

¹² 9/CD5.1, as applied by the DfT, see their statement at 9/CD5.2: note that it is chapters 4, 5, 6 and 7 which are relevant.

¹³ Para. 4.5

¹⁴ Para. 4.23.

¹⁵ Referred to at para. 4.6 of 9/CD/5.1.

¹⁶ Para. 4.5.

operate as an SRFI, the Secretary of State must be sure that it will do so, a “reasonable assurance” which cannot be “guaranteed” just cannot be a sufficient basis to conclude that a development of this magnitude is justified.

test which was applied by the Secretary of State and the Inspector previously is, in these circumstances, far too low a test when considering the degree to which very special circumstances are made out.

The Council has provided clear and compelling evidence in this case that the development will not operate as an SRFI. The site is compromised fatally in being able to achieve the cross-over from road based distribution to a part rail-based operation¹⁷, in the following ways, which I deal with below:

There will be no movements in or out of the site by rail between 0600 – 2200.

It will receive no channel tunnel traffic until the gauge has been enhanced to W9.

It is in a poor location to compete with rail from the primary deep sea ports.

It has poor accessibility to the primary rail route for competing with the road-based domestic market, the west coast mainline (“WCML”).

It requires a rail subsidy and gauge enhancement to assist with its competitiveness which will be insufficient in the circumstances.

The result is that this site will not and it cannot be concluded that it is likely to provide for the switch from road to rail.

Crossing into the Site

Mr Wilson’s pathing analysis is absolutely clear. The 2015 Thameslink service will prevent trains from crossing into the site at any point between 0600 and 2200.

It is noticeable that no alternative analysis has actually been undertaken by Mr Smith.

¹⁷ That is, using rail for the first leg of the distribution journey.

What the Appellant seeks to do is to criticise and undermine the pathing analysis by throwing up a myriad of different factors which are designed to undermine the work done by Mr Smith without providing any alternative to establish that the pathing will be available.

As a starting point, it is for the Appellant to establish its very special circumstances for the development and thus the availability of access. It is not for the Council to have to do so.

The Appellant has relied, heavily, on the acceptance of Network Rail in this case to establish that the development can work. It should be noted, however, that Network Rail's approach towards the site is more circumspect in respect of paths than it was hitherto. [detail]. In fact, Network Rail's support does not even address the issue of the availability of paths to enable to cross into the site. The most that is confirmed is that there are two rail paths on the Midland Mainline that pass-by the Site. There is no consideration that these paths can be used in the future to get into the site.

I deal, therefore, with the likelihood of paths being available.

Mr Wilson's calculations themselves have not been undermined. It was undertaken using the Railsys modelling system which indicated that, on the 2015 peak off-peak timetable, there would be one path of 7 minutes every 30 minutes to enable trains to gain access to and from the site; the peak would occur between 7 to 10 in the morning and 4 to 7 in the evening. The off peak service is likely to last between 7 – 10 in the evening and 6 – 7 in the morning. The result of this is that there would be only some 8 hours during which access could be obtained. Given that a train would be required for 8 minutes to enter the Site and 12 minutes to exit, this path would be insufficient¹⁸.

The Appellant has suggested that this analysis is too pessimistic for a number of reasons. None of these reasons, however, stand up to scrutiny.

First, it is suggested that the use of a double junction would provide more opportunity;

Second, it is contended that the use of a cross-over diamond instead of a ladder design would make a difference.

Third, it is contended that making use of entry and exit on caution would be significant.

¹⁸ See paragraph 11.38, BW Proof.

Fourth, it is contended that the Rules of the Plan can be altered to give greater flexibility.

Fifth, it has been suggested that the use of the fast lines may free up capacity.

Sixth, it has been floated that the service specification for Thameslink can change whether through further work or in order to accommodate freight whether by way of the Office of Rail Regulation or by agreement.

It is clear from the above that none of these suggestions actually add up to anything which provides, even close to a "reasonable assurance" that paths will be available¹⁹.

As I indicated previously, the Inspector's approach towards this issue, namely, that one had to be sure only of there being a reasonable assurance that the site so would be operation as an SRFI was too low a test – there should be satisfaction that the current proposal would not have difficulties with regard to pathing.

In any event, from a reasonably careful reading of the Report, what the Inspector was formerly concerned with is entirely different from that now before the inquiry. The Inspector was not concerned with Thameslink. There was, at that stage, no timetable for the 2015 Thameslink service²⁰ and, in fact, the belief of Network Rail at the time of the last inquiry was that the off-peak service would not change which was adopted by the Inspector²¹. As a result, the Inspector was not being asked to assess the current objection in any way.

He placed weight (which he described as "critical") on the fact that Network Rail confirmed that they could see "no reason" why Helioslough's requirement for 12 intermodal paths (24 in total) could not be met²². Such a statement is now notably lacking in either the agreed statement²³ or Network Rail letter to the inquiry²⁴; their position is significantly more circumspect as, rightly, it should be: *"Network Rail can offer no guarantees at this time that these paths will be available in the future as they are open to all licensed freight operators and all paths required for the interchange will need to be bid for, and are subject to the standard industry-wide timetable planning process"*. It is to be remembered that Network Rail has undertaken no assessment of

¹⁹ See paragraph 16,184, Inspector's Report, 9/CD/8.2.

²⁰ See the Interfleet Report (based on the then current 2007 timetable: 9/LPA/6.8 and

²¹ See para.s 15.7 and 16.65, Inspector's Report, 9/CD/8.2.

²² Paragraph 16.65, Inspector's Report, 9/CD/8.2.

²³ 9/CD/7.4, para. 2.3.

²⁴ 9/HS/INQ 2.0

the degree to which there would be the potential to gain access to the site.

The previous Inspector's report provides no support for the Appellant that it will be able to gain access to the Site. They cannot take the stance of falling back on what they say is a matter which was decided by the previous Inspector.

Origins and Destinations of Rail Freight

The Council has assessed the locations from which it is said that rail freight is assumed to arrive and to where it will go. The Appellant says that it is unimportant from where the destinations will go, given that traffic will come to the site, if it is constructed. As Mr Wilson has pointed out, it is important²⁵ to understand the significance of the potential locations since, should they be ill-suited to rail connection this will, with the additional difficulties, further hamper the success of rail. Should it be found that Radlett is not well suited to receiving the flows that are identified, this will further hamper the site.

It is to be noted, in that regard, that the Inspector took the view that Inspector Phillipson's belief was that the site would operate as an SRFI was because it would be receiving freight from a range of locations²⁶; patently, if it is not able to do that from one of those destinations, it will be undermining the location of the site to do that. The fact that other sites in the northwest sector may be subject to similar gauge limitations is irrelevant to the issue of whether this site will be an SRFI; they may have other countervailing factors which will overcome this particular issue – but, as will be discussed, this is not something which the Appellants have considered.

The locations from which freight will arrive or where it will go was identified by Mr Gallop in the ES²⁷: in short, the significant elements would derive from the Deep Sea ports (primarily Felixstowe and Southampton), the Channel Tunnel and domestic inter-modal. This analysis, in fact, discloses an element of unrealism (which was tacitly acknowledged by Mr Gallop given his statement that the indications in the ES were "working assumptions"). The identified proportions some 82% of the total freight traffic would derive from the Channel Tunnel and Deep sea, while only 11% would be domestic traffic. That is patently unrealistic given that the Scenarios and Long Distance Forecasts RUS²⁸ identification of domestic traffic as the basis for intermodal growth (see para. 8.5.3) and the GB Model outputs

²⁵ See his proof (LPA/2.2) at section 9.

²⁶ See Inspector's Report, 9/CD/8.2, para. 16.70.

²⁷ TR3.

²⁸ BW Gallop Rebuttal, 9/LPA/2.19, Appendix A, pges 83-84.

produced by Mr Wilson (which have not been criticised)²⁹ which identified that domestic growth increased by reference to the creation of rail linked sheds and deep sea traffic was not affected at all.

The significance of this is that it identifies the importance of being able to achieve a good accessibility to the domestic markets is critical.

Domestic Access

It is, it appears, common ground that the primary route in order to access the domestic markets is the ability to gain access to the West Coast Mainline ("WCML"). Mr Wilson has described the problems that exist in gaining access to the WCML³⁰. This routing takes more time than a heads-on route; it introduces a degree of uncertainty, along with greater cost and complexity. As such it cannot be described, at all, as an optimal route. This problem is compounded by the fact that, without gauge enhancement, the site will also be at a greater cost disadvantage when the subsidy runs out.

In relation to the problems of gaining access, at the previous inquiry, the problems with gaining this access to the WCML was not specifically dealt with; the assessment was based, primarily, on the problems of, generally, crossing London, not with the movements necessary to get onto the MML³¹. In comparison to other permitted facilities, there is not such difficulty: London Gateway has a heads on route to the WCML, as does Howbury Park. They will have a plainly favourable position to Radlett in that regard.

It was in part for this reason that the Appellant has concentrated on the likelihood of the MML being upgraded or having the potential to take up the stress which is likely on other lines. Dealing with that latter point, the Appellant noted³² that other lines, like the WCML will be at capacity. What they failed to point out, however, is that the same is predicted to be the case on the MML³³.

As for the likelihood of upgrades being proposed on the MML, it is to be noted³⁴ the numerous instances of proposals being made to upgrade rail facilities, only to be either delayed very significantly or not carried into effect.

²⁹ Pg. 5-6, BW Gallop Rebuttal, 9/LPA/2.19.

³⁰ BW Proof 9/LPA2/2, para. 9.28 – 9.29.

³¹ See Inspector's Report, 9/CD/8.2, para. 7.273 – 7.279 and 16.70.

³² See Gallop Apps, Appx L.

³³ See extract, para. 1.9.

³⁴ BW Gallop Rebuttal, pg. 7.

The Appellant has relied heavily on the Strategic Railfreight Network strategy³⁵ to suggest that the MML is likely to be upgraded. It is to be noted that while a number of possibilities (and that is all they are) that are proposed, a key aspect will be the Routes to the North study which may discount rail entirely.

It is to be noted, in that there are instances where the apparent upgrading of the MML is considerably less than certain. In the Network Rail RUS³⁶, in respect of electrification, the benefits of electrification were noted. However, but July 2009, it was pointed out³⁷ that the Government was considering the proposals and, in the East Midlands draft RUS³⁸, the potential for electrification was still being considered.

In a similar way, it is clear from the Network Rail Business Case³⁹ that there are some significant doubts about the business case for upgrading of the MML and, in looking at ways to assist with deep sea intermodal rail carriage, no schemes are considered to be relevant to by the DfT⁴⁰. Those points are compounded by the fact that of the schemes identified by Mr Gallop as likely to happen with the proposals, none have committed funding⁴¹.

In order to suggest that Radlett will be able to overcome the patent disadvantage that it has in encouraging traffic from the domestic market, the Appellant has referred to the potential for obtaining a north bound connection to the site. There are several problems with this. First, this connection is not proposed as part of this application. Second, there is no evidence that it is feasible. Third, there is no evidence that the Appellant controls sufficient land to enable this to happen. This is a wholly speculative suggestion at this stage and should be given no weight. The potential for something to happen, without any evidence that it will be a problem, should be rejected as being something favourable to the application. The SRA guidance has indicated the need for a two-way connection⁴²; it is probably for that reason that the Appellants have prayed in aid their passive connection.

Channel Tunnel Traffic

³⁵ 9/CD/5.4.

³⁶ Gallop Appx J page 76.

³⁷ See Appx K, Gallop.

³⁸ See pages 9-10, 9/CD/5.5.

³⁹ Gallop, Appx H, pages 38, 43-44.

⁴⁰ See BW Appx N, pages 71-72.

⁴¹ BW, EC.

⁴² Para. 4.32, 9/CD/5.1.

It appears to be common ground that, in the absence of W9 gauge, no intermodal trains can get to the site.

It is, of course, as a result of this, that the Appellant has now agreed to undertake gauge clearance to W9 as part of its conditions [**whether it referred to this previously**].

Certainly, it is right that the inability to actually gain access from the Channel Tunnel because of the gauge restrictions was not something that had been raised before Inspector Phillipson. There is no mention of that in his report, whether or not the Appellant is right that they had said that gauge enhancement to w10 would bring with it the ability to operate at w9.

Deep Sea Intermodal

The problem with Radlett is that it is not a short distance from any of the deep sea ports, particularly Felixstowe and Southampton; at distances under 120 miles or less rail is commercially not cost effective against road movements⁴³. The result is that, as against, HGVs, the site will be uneconomic in respect of these distances.

This problem is enhanced by the fact that the Radlett facility will be forced to use pocket or well wagons without gauge enhancement to w10; until that time, in order to get to Felixstowe, it will be necessary to use the Gospel Oak-Barking line at Junction Road junction. It is only once this gauge is enhanced to greater than w8 that it can be used for intermodal carriage. Until then, it will be necessary to run around on the north London line and turn at Acton Yard; it should be noted that this is not a point that was taken previously⁴⁴.

The purpose of the rail promotion subsidy⁴⁵ is specifically to make up for the additional disadvantage that would be caused to the rail offer pending the enhancement. It is to be remembered that the rail promotion subsidy is required in addition to the Government rail subsidy (REPS) which will be insufficient because it is calculated on an efficient use of the rail system, that is, by standard wagons.

Mr Wilson has indicated how long the subsidy would last using pocket and well wagons; on the basis of the subsidy currently provided to Felixstowe (and it is clearly stated as being so in his rebuttal⁴⁶), it would last about 125 days; while this may be longer with fewer trains or when taking the subsidy for Southampton, it would not be significantly greater.

⁴³ Para. 9.5, BW.

⁴⁴ See the Inspector's Report, 9/CD/8.2, para. 7.289.

⁴⁵ See the section 106 agreement, clause [].

⁴⁶ See para 7.10, BW Rebuttal Gallop, 9/LPA2.19.

Of course, the ability to make the rail offer more attractive will require the necessary gauge enhancement. I deal with this next.

Gauge Enhancement

In the absence of gauge enhancement, the facility will inevitably fail to be an SRFI. It simply cannot, in the absence of a gauge greater than w8 achieve the competitiveness associated with it.

Inspector Phillipson was content that the conditions which were proposed would be fulfilled and that the further works, including gauge enhancement would be carried out⁴⁷. That conclusion was based on the belief that it was unlikely that a development would “incur expenditure on the scale required to provide the rail facilities and then not use them” and that occupiers, who would be expected to pay for the services “would have little incentive to come to the Radlett site, as opposed to another non-rail connected facility nearby, if they did not intend to make use of the rail facilities provided”. There are two points to note on this conclusion which leads to the ultimate conclusion requiring a re-assessment. First, the conclusion was based upon a financial case but no evidence was provided as to the level of the profit and cost arising from the further development of warehousing beyond the 175,000 which could be provided without gauge enhancement. Second, the conclusion as to what occupiers might do was reached without any market research or the level and extent of the service charges either with or without gauge enhancement. It was a speculative conclusion, not one based on evidence.

In the present appeal, again, the Appellant has provided no evidence to establish that the economics of the further gauge enhancement would clearly favour enhancement; nor is there any evidence that the service charges would be such as to discourage occupation by anybody else than persons who wanted to use rail.

The requirement that there should have been such evidence is critical and cannot be left to mere speculation. Otherwise, some 175,000 square metres will have been allowed to be developed within the Green Belt without any real assurance that proposal would ultimately act as an SRFI.

Current Need and Other Facilities

The current need for SRFI must be seen in the light of what has been proposed. Inspector Phillipson’s conclusion was that there was still a need for SRFI in spite of the granting of permission. However, that was

⁴⁷ Inspector's Report, 9/CD/8.2, 16.153.

a conclusion reached on the basis of him having limited knowledge about London Gateway⁴⁸. Nevertheless, his “understanding” was “that the proposal was “essentially for a port and associated port-related development and there is no evidence that its owners propose or intend to permit it to be used more widely”⁴⁹.

That understanding has been corrected in the evidence provided by Mr Wilson⁵⁰ in which it is clear that London Gateway is not being regarded simply as a port development: “In addition to a major deep sea facility, London Gateway port will combine with Europe’s largest logistics park, offering 9.5 million square feet ... for distribution, manufacturing and high tech sectors. The logistics park will offer individual units in excess of one million square feet”.

In these circumstances, Howbury Park and London Gateway will provide, together, more than 1,200,000 square metres of rail connected warehousing. In these circumstances, when there are quite clear doubts about the ability of a proposal, like Radlett, to actually operate as an SRFI and in circumstances where it is doing such massive damage to the Green Belt, there is no especial need or urgency which should override such uncertainties.

The recent correspondence from the DfT⁵¹, properly understood, in fact supports this approach. The letter points out that Appendix G informed SRA policy on the number of SRFI required and that the SRA policy remains relevant. Appendix G identifies that only some 400,000 square metres was to be provided to achieve the London and the South East targets.

The letter notes that more than the predicted amount of floorspace has been provided in particular area, but that there remains a significant under-provision in some parts, particularly London, the South-East and Eastern England; it is looking at the amount actually provided, as opposed to what has been permitted. What this does not say is that, should Howbury and London Gateway be built out, there would still be a requirement for 3-4 SRFI. Given the relevance of Appendix G of the SRA policy⁵², it follows that, should these come forward within the relevant timescale, they will take up that floorspace requirement. It is, of course, right that this level of floorspace is not a ceiling; the point, however, is that the level of need is significantly reduced. That means that, when looking at Radlett, the position has changed: it is not needed to meet the need identified to 2015.

⁴⁸ Page 191, Inspector's Report, 9/CD/8.2.

⁴⁹ Ibid.

⁵⁰ Appx A, pg. 2.

⁵¹ Appx M, BW Proof 9/LPA2/2.

⁵² 9/CD/5.4.

General Support of Network Rail

The Appellants, of course, pray in aid the support of Network Rail in support of the proposal. Mr Wilson, rightly, described that support as “very weak”⁵³. It should be noted, as I have indicated already, that their support is support “in principle” only and in circumstances where the development of the proposals through the formal approval processes (the GRIP process), has only (as it was previously) got to the first stage, GRIP stage 1. It is quite clear from their recent responses to the inquiry⁵⁴ that it Network Rail’s statutory responsibility to engage with the appellant. It is also, quite clear, that they are significantly less committed about the extent to which support would be forthcoming than they were previously, particularly about the availability of paths. In the event that it became clear that the development could not gain access to the network, it is obvious that their approval would not be forthcoming. Inspector Phillipson placed considerable reliance on the fact that Network Rail, as the “guardians of the UK rail network”⁵⁵ were “fully supportive”⁵⁶ of the proposal. Their “in principle” support is considerably more circumspect than it was when it was said there were “no concerns”⁵⁷ about gaining access to the site from the Midland Mainline.

DB Schenker

Considerable weight was placed by Mr Tilley⁵⁸ on the support of DB Schenker for the proposals. There is an agreement

Alternatives

The Appellants accept that it is necessary for them to show that there is no better site. Mr Tilley accepted the “evidential burden”⁵⁹ set out by Inspector Phillipson that “unless and until a convincing case is presented showing that there is no suitable and available alternative to the appeal proposal which would meet the need for an additional SRFI to serve London and the South East, and in doing so cause less harm to the Green Belt than would be the case at Radlett, then planning permission for the appeal proposal should be refused”.

⁵³ BW XX MK

⁵⁴ 9/HS/INQ 2.0.

⁵⁵ Para. 16.71, Inspector’s Report, 9/CD/8.2.

⁵⁶ Para. 16.71, Inspector’s Report, 9/CD/8.2.

⁵⁷ Para 15.2, Inspector’s Report, 9/CD/8.2.

⁵⁸ EC, RT.

⁵⁹ Para 204, Inspector’s Report, 9/CD/8.2.

The Appellant has failed, again, to provide an adequate alternatives assessment in this case. There are two essential bases on which it has done so:

First, it has restricted its search to the north-west sector;
Second, even if it was corrected to restrict position to the north-west sector, the assessment was wholly inadequate.

It is to be noted that each of these aspects contributed to the reason for refusal⁶⁰.

Whether the Assessment Should have been Restricted to the North West Sector

The decision to restrict the site search to the north-west sector is critical; Mr Tilley accepted that should the Secretary of State decide that the search should have gone beyond the north-west sector, the analysis was fatally flawed⁶¹.

The basis of the Appellant's decision⁶² to restrict the alternatives site search was because of the Inspector's conclusion in, essentially, one paragraph of the decision letter⁶³; it is worth repeating this paragraph:

To my mind, a sectoral approach to the identification of sites for SRFIs has considerable merit, notwithstanding the lack of policy support for the approach. I say this because given the size of London and the levels of traffic congestion prevalent in the region, it is, in my opinion, very questionable as to whether a SRFI located to the east of London in, say, the Thames Gateway could efficiently serve development to the west of London such as that found around Heathrow, Slough and outwards along the M4 corridor. Journey times by lorry between these areas would be significant, which would increase road haulage costs and potentially reduce the environmental advantage which rail haulage to the SRFI would confer. Indeed, when challenged on this point the Council's rail witness, Mr Thorne, conceded that it would not be sensible to serve the north west sector of London from London Gateway. Equally he agreed that a site at Alconbury would not effectively served north-west London.

As Mr Tilley agreed ⁶⁴, this analysis was based on the lorry mileage benefits that would derive from locating an SRFI in one part of London as opposed to another; it was the only significant basis for his view. As

⁶⁰ See the Council's SoC, para. 8.2 and R for R 4.

⁶¹ RT, XX, MR.

⁶² See para. 2.4 of Technical Report 6.

⁶³ Para. 16.125, Inspector's Report, 9/CD/8.2.

⁶⁴ XX, MR, RT.

Mr Tilley accepted, however, if the occupiers of SRFI warehousing distribute on a regional basis comprising London and the South East, there is benefit in lorry mileage terms in being in one part of London as opposed to another, so long as the site is reasonably close to London⁶⁵. It is clear that the Inspector's analysis was based on an assumption as to the distribution area of those likely to occupy the premises, not evidence to that effect. There was no market-based evidence before Inspector Phillipson which informed that conclusion. Mr Tilley accepted the extent of the evidence before Inspector Phillipson which informed the Inspector's conclusions⁶⁶ which contained no market analysis and was in very limited terms.

In these circumstances, it is critical to understand the distribution systems of those expected to occupy the SRFI. It is imperative to do so; if it is clear that all, or a majority of those who will be occupying the premises will be distributing to locations on a regional basis comprising London and the South-east, there is simply no basis for that restriction.

The Appellant's evidence

The evidence which is now presented by the Appellant before this inquiry is either unpersuasive actually indicates entirely the opposite to that which is suggested by the Inspector. The basis of the Appellant's case on this issue is set out in one section of the ES⁶⁷. Technical Report 3 refers in effect, in two sections, the entirety of its case for the restriction to the North West sector. The first is at 3.2.1 which is an analysis based on roads not informed by any market analysis. The second is at paragraph 3.2.2 which refers to the evidence note provided by King Sturge at Appendix 10 of Technical Report 6. The majority of that document refers to the market demand and supply of areas in the North West sector without any reference to the scale of the occupiers or their distribution areas by reference to their scale. The only part of the document which does that is contained in one paragraph of that document; this refers to larger users which are more 'footloose' than smaller occupiers. The "large distributors" referred to in the King Sturge report are those occupying the scale of warehousing proposed at the site (the smallest unit will be 500,000 sq ft); the example (in fact, the only example in the document) given of such occupiers was AS Watson, who moved from Croydon to Dunstable⁶⁸; that indicates delivery to the whole of London and the South East, not simply a sector of London.

⁶⁵ XX, MR, RT

⁶⁶ See JH Rebuttal evidence, pages 9 – 10.

⁶⁷ Technical Report 3.

⁶⁸ See 9/LPA/6.11

The only other piece of evidence provided in the Technical Reports is contained in paragraph 3.3 of Technical Report 3 which is a description of the GB freight model which does not show a breakdown by reference to London and does not establish that the market is in some way restricted the North West sector.

Aside from these matters, the Appellants rely on the evidence of DB Schenker and the distribution centres of food retailers within the London area⁶⁹.

As to the latter ...

As to the former ... degree of interaction between the two, knowledge of delineation, difference between the two.

In short, the Appellant's evidence is entirely lacking that the units will be occupied by those who will be distributing to within the North-West sector. Further, as Mr Tilley accepted, the Appellant has no evidence that the majority of the units will be occupied by distributors who will be distributing to within the northwest sector. In spite of this evidence, it is noticeable that within the Technical Reports to the needs case, there is no recognition that there will be delivery outside the North-West sector.

Mr Tilley was clear that the demand for warehousing in a particular area would not be a reason for restricting an alternatives site search to a particular area in circumstances where it was not contended that there was no market outside that area⁷⁰.

The Council's Evidence

On the other hand, there is a considerable amount of evidence indicating that the North west sector is not the primary distribution area of those occupying the SRFI. It is clear, from a cursory glance at the Council's case previously⁷¹ that the extent of evidence now relied upon is considerably greater than previously and looked, essentially, at the market basis for locating within the North West sector, rather than the distribution area of those occupying the SRFI.

In terms of rail (the SRA policy, for example) and regional policy (T10 of the East of England Plan⁷² and T3 of the South East Plan⁷³) these refer to SRFI serving London and the South east, not some sectors. In addition, T10 no longer refers to an SRFI being located in the Northern Quadrant

⁶⁹ See Gallop Rebuttal, appx A.

⁷⁰ XX, MR, RT

⁷¹ Section 7.205-212.

⁷² 9/CD/4.1.

⁷³ 9/CD/4.2.

as it did before Inspector Phillipson; that accords with the view of EERA who believe that there is no support for an SRFI to be located in this quadrant⁷⁴.

The SRA are clear about who will be occupying SRFI⁷⁵; they state: SRFI “operate such as to serve regional areas” and occupied by “major logistics service companies and national and multi-national manufacturers or retailers” who will “often include businesses which choose to locate their national and regional distributions centres at such strategic locations” (in that regard it is notable that Mr Tilley pointed out that KIG was presenting itself as a base for national operations; given its location, it is unclear why Radlett would not undertake at least this role).

The Council has produced evidence to support that assessment. Professor McKinnon’s assessment (whose expertise was not challenged⁷⁶), has indicated the extent to which non-food retailers will generally have about 3 distribution centres and that food retailers have a different role⁷⁷. The Council has also produced market research to establish the extent to which distributors would be likely to occupy the SRFI to distribute on a local basis. The conclusions arising from this are absolutely clear: the clear approach of potential occupiers would be

On the other hand, in spite of all of this evidence, what evidence does the appellant rely upon? Essentially, of its own evidence, the King Sturge report, which actually points in the direction of the Council’s case. The Appellant seeks, primarily, to rely upon the Inspector’s report. The difficulty with that is that the Inspector’s report was not, itself based on any market analysis. That is, in part, the result of the approach it has taken in this case: of failing to appreciate that it is necessary to establish its case before this inquiry.

As a simple point to note, no other search area for an SRFI has been as localised as the appellant’s⁷⁸ which either looked at the whole of London (Klg) or large parts of it (at Howbury).

Mr Wilson was cross-examined on the basis of documents which it was suggested indicated there was a sectoral approach to the distribution areas of London. None of that evidence supported this. The Lambert Smith Hampton report⁷⁹ simply described the areas of market demand,

⁷⁴ JH Rebuttal, Appx WH11, October 09 letter.

⁷⁵ See paragraphs 4.4, 4.9, 4.12 and 4.25.

⁷⁶ RT, XX, MR.

⁷⁷ See Appx D, BW Apps, para. 1.3.

⁷⁸ See the plan at page 84, BW Proof 9/LPA2/2.

⁷⁹ Appx F, BW Apps.

not the distribution areas of those who occupied the warehousing; the same was true of the DfT report []⁸⁰.

The patent shortfalling of this line of XX was that it concentrated on the sectoral approach to the location of warehousing, rather than the actual distribution areas of those likely to occupy the SRFI; in that sense, it entirely misses the point.

Other Matters

In that connection, finally, I touch on one issue which may be raised by the Appellant in support of the submission that there was no need to go beyond the North West sector, which is that Howbury Park study, on a wider search, did not find a site better than Howbury. No weight should be put on such an argument, for two reasons. First, the Appellants did not verify the accuracy of the results contained in the Howbury analysis. Second, the Howbury Park analysis simply looked at alternatives as to whether they were better or worse than Howbury, not whether they were better or worse than Radlett. In those circumstances the fact that the Howbury analysis searched outside the Radlett area is not a basis for justifying the Appellant's failure to undertake its own alternatives analysis.

The SDG Alternatives Assessment

In summary, therefore, the evidence establishes quite clearly that the search assessment should have been undertaken on a much wider basis. Had that been done, as the SDG analysis⁸¹ has shown, there are many sites which are better able to provide an SRFI than Radlett. I deal with this further in the context of the Appellant's assessment of the North-West sector, but the clear conclusion to be drawn from this analysis is that had the analysis been undertaken on a wider basis, better sites would have been found (some [] a better than Radlett). I deal with the criticisms made about the study further below. However, as Mr Tilley acknowledged⁸², the Appellants, whilst they may have criticised parts of the methodology, did not suggest that any of the ultimate criticisms were wrong.

The fact that we did not look at those sites were are now raising.

In these circumstances, there can be no real doubt that, had an assessment reflected the regional nature of the distribution occupiers

⁸⁰ Appx N, BW Apps.

⁸¹ BW Appx J.

⁸² RT XX MR.

who are likely to occupy the SRFI, other, better locations would have been found. The alternatives analysis is, consequently, wholly flawed.

The Analysis of Alternatives in the North-West Sector

In any event, even were it to be considered that the Appellant was correct to consider only the north-west sector, the analysis itself is defective on numerous levels and should be rejected.

The choice of methodology

The Appellants took the approach of essentially following the alternatives site assessment carried out in Howbury Park⁸³ on the basis, it appears, that it had been accepted in that appeal. It was inappropriate, however, simply to adopt that methodology. There was no specific endorsement of the analysis by the Inspector in that case because there had been no specific testing of the assessment. No party criticised the methodology in that case and, consequently, Inspector Phillipson had little reason to look at it further. A very good example of that, however, is that Inspector Phillipson accepted in the Howbury case one of the criteria used for sifting out sites as 2 kms from a rail link; that approach was, however, rejected by Inspector Phillipson in relation to the Radlett alternatives analysis⁸⁴.

When each of the stages of the analysis is considered, however, there are myriad of problems with it. It is to be noted that each of these problems, on which the Council's decision was based, were pointed out to the Appellant on 25 August 2010, some 3 months before the appeal.

I deal with each stage that was adopted by the appellants.

The initial site search

The Appellants used a number of criteria and methods in order to identify sites for the filtering stage. A number of these were either unnecessarily restrictive or had the ability to remove potentially good sites. I deal with the primary problems.

First, an approach was taken in the search of removing from consideration those sites which were regarded as unavailable because they were either allocated for⁸⁵ housing. Existing employment land was also not included unless the remaining vacant area was greater

⁸³ 9/CD/6.2.

⁸⁴ See Inspector's Report, 9/CD/8.2, pg. 186, fn 2.

⁸⁵ See para. 5.1.5 of Technical Report 6.

than 40 hectares. The effect of taking such a restricted area was to quite clearly unnecessarily restrict the opportunities for finding alternative site.

As for residential allocations, the effect of taking this restricted approach has been to exclude potential sites. The logic of the Appellant's approach was flawed. It was suggested that the sites which were allocated for housing simply could not receive planning permission for an SRFI; this was because there was a "huge pressure"⁸⁶ for housing. It is to be noted, of course, that the basis of the current application is that there is an overriding need for SRFI which is sufficient to justify planning permission in the Green Belt. The needs are countervailing, but to simply reject potential sites on this basis is plainly doing away with sites which may become available⁸⁷. The illogicality in rejecting such allocations is compounded by the fact that allocations of a mixed nature were considered; it is difficult to understand why a mixed use including residential can be separated from an allocation for housing. Given that allocations for housing were rejected. The potential for smaller areas of housing (that is, smaller than 40 hectares) to be considered as part of a larger area for the location of an SRFI was also rejected. This issue of availability was raised by SDG in August 2009, but was not acceded to.

The approach towards employment sites was similarly restrictive. Unless sites with vacant employment allocations of 40 ha.s were found, existing employment sites were rejected. Mr Tilley's answer to this was that there were not many employment sites in the north-west sector and it would be impossible to bring the many interests on an employment site together to construct an SRFI. However, the example he cited of Slough Industrial Estate cannot be regarded as a fair example – he was describing a large industrial estate, not a smaller, less successful estate. The fact that Mr Tilley stated that such estates did not exist cannot be regarded as credible and, importantly, was not justified by any audit of sites that had been rejected on this basis.

Another part of the search system was to exclude sites which were more than 5 kms from a railway line⁸⁸ (see paragraph 5.2.3). The reason for excluding sites beyond this distance was two-fold. First, it was determined by a financial assessment of the cost and, second, it was determined by the difficulties of topography over that distance and the environmental effects of that⁸⁹. As for the financial aspect, that was, quite plainly, an impermissible criterion; such an approach had, rightly, been rejected by Inspector Phillipson when he concluded

⁸⁶ RT, EC and XX, MR.

⁸⁷CD

⁸⁸ Paragraph 5.2.3, Technical Report 6.

⁸⁹ See paragraphs 2.2.1. – 2.2.3 of Technical Report 6.

that using financial elements as a justification for the criteria was impermissible in the absence of an overall viability analysis⁹⁰.

As to the topography justification, no detailed analysis had been undertaken to establish that there was an unacceptable environmental effect when accessing these areas (as opposed to an engineering issue which was subsumed within the financial element). There had, in fact, been no detailed financial assessment⁹¹. This matter had been raised by SDG in August 2009 with CGMS but CGMS had refused to accept the point, rather reiterating the inappropriateness of looking in this area.

What is notable, however, is that some of the areas which were rejected by CGMS in their response to this criticism⁹² (Areas 1 and 3) were not in the Green Belt⁹³; patently, the decision to exclude these sites had the effect of removing potentially very meritorious sites without any detailed scrutiny at all.

Part of the problem with the analysis is that it is not possible to identify what CGMS used as a definition for a "site" in their analysis. Again, this was a point which had been raised by SDG in its August 2009 report. Mr Tilley's reply to these points⁹⁴ did not actually describe what definition for a site was being used. It was only in XX that Mr Tilly indicated in detail some of the criteria, including the need for the site to be "as flat as possible", "the right shape" and that the sites, from the map search which were actually taken forward were "representational" of a particular area of which there may be 1000's of sites⁹⁵. This "representational" aspect was a site search criterion that had not been referred to before. There had, quite plainly, been an earlier, unrecorded site sifting process which had led to the removal of numerous other sites.

These aspects are critical. Even if a considerable number of the sites which the Council was concerned about in the context of the Long List analysis have now been resolved, these points remain outstanding.

The overly restricted approach can be seen in CGMS' approach to the M3 sites. SDG had pointed out to CGMS in its critique that an area of land between the M3 and M4 had not been considered by CGMS as part of its site search. CGMS accepted the point⁹⁶ and undertook a

⁹⁰ Para. 16.30 and fn2, pg 186, Inspector's Report, 9/CD/8.2.

⁹¹ Agreed, RT, XX MR.

⁹² Appendix 4 of 9/HS/1.5.

⁹³ 9/LPA/6.10.

⁹⁴ 9/HS/1.5

⁹⁵ RT, XX, MR.

⁹⁶ Para. 25, 9/HS1.5.

search. 3 sites were found to the south of Wokingham but these were rejected on the basis that a road connection would have to go through Wokingham⁹⁷. It was clear, however, that this was incorrect as it was possible to connect to the south-east of Wokingham onto the A329 and then to the A322 (which, as Mr Tilley later acknowledged, was dual carriageway bypass to Bracknell) onto the M4 at a distance of some 27 kms to the M25. The later response of Mr Tilley as to why these sites should remain removed⁹⁸ was on the basis of road again (which assessment did not apply as Mr Tilley acknowledged to the eastern most site) and the fact that the area had been included in a draft allocation to the Wokingham Core Strategy for housing. However, inclusion in a draft allocation was not one of his criteria and was subject to the generally restrictive approach of not taking into account housing allocations as a matter of principle. This overly restrictive approach is compounded by the fact that none of these sites is in the Green Belt. To simply reject this area without more is quite clearly to take an overly restrictive approach.

The Long List Sifting

The next stage of the process, having obtained the initial list of 118 sites, was to apply a series of criteria, including a rail criterion. Before dealing with these various issues, it will be said that a large number of those criteria have now been resolved so that SDG's points are academic. First, the point, if made, is inaccurate. There are still numerous sites that should have been considered at the short list stage⁹⁹; Mr Tilley's most recent note has not resolved the position¹⁰⁰. Second, the point is that each of the sites which has been resolved has only been resolved by additional work being undertaken by Helioslough. The initial analysis was inadequate and it is not for the Council to make good defects in the Appellant's own alternatives case. Indeed, the Appellant has continually referred to the need for the Council to have entered into a collaborative approach on the alternatives sites analysis with the Appellant. The Council did provide a critique to inform the debate, but it is not incumbent on the Council to fill the gaps in the Appellant's case. It is wrong as a matter of principle to place a responsibility on the Council to do so; the Council's role is not to assist an appellant in making good its own case []. In any event, it should be noted that, of all of the points raised in the critique by SDG, none of them were accepted by CGMS; its approach has not actually been to engage with the points raised by SDG but to reject them.

⁹⁷ See 9/HS1.5, Appx 3.

⁹⁸ See 9/HS1.9, last 2 pages.

⁹⁹ See 9/LPA/6.3

¹⁰⁰ 9/HS/1.9.

I turn them to the problems with the Appellant's long list sifting analysis. The points I deal with below derive from the critique undertaken by SDG.

With regard to the rail criterion in the Technical Report¹⁰¹, the Appellant's only description of those aspects that would lead to a removal are phrases like "major engineering works" or when rail links will be in a "significant cutting" or if the rail line is "heavily used". Such phrases are wholly unclear; they do not amount, at all, to applicable criteria which would ensure that a particular site is excluded on clear and identifiable bases.

In addition to using unclear criteria, the assessment failed to assess any of the sites against the gauge of

A further, systemic failing in the assessment was the choice of criteria at the short list stage which had the effect of removing sites without any consideration being given of the degree to which they had rail benefits greater than or landscaping impacts and other impacts lesser than Radlett.

For example, there was no consideration of landscaping or other harm at all during the long list stage in respect of any of the sites; nor was this considered in the initial identification stage which produced the initial list. In short, the effect of the assessment was to removed 113 sites without looking at any of the harm issues, in spite of the fact that this was one of the primary issues being considered by Inspector Phillipson as necessary to establish that Radlett was a better site than others.

Similarly, rail gauge was removed as a criterion in total (although it was kept in at Howbury¹⁰²); of course, had it been used as a sifting criterion in the same way as it was used in Howbury (which applied W8 as the cut off), Radlett would have failed. Again, the quality of the rail connection was a matter which Inspector Phillipson considered was a necessary consideration as part of the assessment.

The fact that, on the issues which the Appellants had identified as important to consider, many of the sites were resolved in favour of the Appellant does not deal with these failings since, critically, there was no balancing of attributes in favour of them when considering these sites, there was simply a removal of the sites.

¹⁰¹ See para. 7.14, Technical Report 6.

¹⁰² See 9/CD/6.2, para. 3.9.

An example of a site which should properly have got through the long list was Langley, site 6¹⁰³. Site 6 was excluded on the road access criterion at the long list stage; the road access criterion allowed new road building, but only if it did not then go through residential areas¹⁰⁴. A new road was feasible but ended up accessing the A4 which had a small section of residential areas. However, what was not considered was that this access was also the access used in the LIFE scheme in respect of which no overriding issue was raised by the Inspector in that case (see para. 13.364¹⁰⁵); it is also the access being proposed in SIFE which, of course, went through to the short list stage. The result of that approach, which was plainly wrong and unnecessarily restrictive, is that a site which had the potential to get through to the short list stage and thus have landscape and other impacts considered as part of the balancing process was unnecessarily rejected.

Availability was another criterion which led to unfair removals. The approach in Technical Report 6 was to remove those sites which were regarded as being unavailable; one such site was White Waltham (site 14). This was regarded as being unavailable because it was in use as an aerodrome. However, as Mr Tilley acknowledged, should a site do well in the alternatives analysis of the Appellant, it had a much greater likelihood of becoming available. It is also to be noted that other aerodrome sites, like Denham (site 30)¹⁰⁶ was not removed for being unavailable.

The Mid Point Rejection

Following the long list rejection, the Appellant undertook a further stage of rejection¹⁰⁷. Again, at this stage of the process, there was no assessment of the degree of landscape and visual impact or noise impacts predicted by the use of the site as an SRFI so any comparative benefit of such sites was not considered.

There was no standard approach to this sifting stage. Some sites were rejected on the basis of being compared with other nearby sites and the best site was allowed to go through. This was the case for Sites 15 – 18. Sites 16, 17 and 18 were removed from the short list because site 15 was better on road grounds. There was, at this stage, no other basis for the rejection. In short, no consideration was given at this stage as to how the other sites fared against Radlett in relation to any other aspects of relevance. Notably, it is only in Mr Tilley's further response¹⁰⁸

¹⁰³ See Appendix 6, Technical Report 6 and see RT, XX, MR.

¹⁰⁴ See para. 7.18 – 7.21, Technical Report 6.

¹⁰⁵ 9/HS1.6.

¹⁰⁶ See Appendix 6, Site 30, Technical Report 6.

¹⁰⁷ Para. 7.32, Technical Report 6.

¹⁰⁸ 9/HS1.9, paras. 8 – 13.

(despite the point first having been raised by SDG in August 2009) that these other sites were then tested against other matters, including green belt and landscape impacts. There was, as Mr Tilley acknowledged, however, no assessment of comparative landscape impacts in any detail and certainly nothing from Mr Kelly on this.

Further, what is noticeable is that CGMS's approach of simply comparing and contrasting these sites, in order to remove some of them from the list of assessment, prevented consideration of the sites being looked at in combination, 16, 17 and 15 (as well as White Waltham) are all contiguous, lying in part on either side of the railway line (just like Areas 1 and 2 of Radlett), but they were not considered in that fashion. The result is that a combined site with greater potential benefits was not taken forward.

A different approach was taken towards Denham Aerodrome (site 30); it did not¹⁰⁹ fail any of the criteria, but in spite of this, it was removed because of the combination of failings. Not only is there no basis for ½ failings, but the result of removing the site has been to fail to consider the potential for the site to be considered on a comparative basis on those matters which were not considered, like landscape and visual impact, which are critical to the decision.

Now, however, a further point is taken in respect of Denham, that of rail connection¹¹⁰; again, there has been no detailed assessment of the degree to which the issue is capable of being overcome on engineering terms; this, again, is a cost issue.

Yet another approach was taken towards Tring (site 50)¹¹¹. This is a site in the AONB and was rejected entirely on the basis of that allocation, in spite of the fact that there is an allowance for nationally significant projects (which, Mr Tilley accepted, it was his case SRFI were) to be granted permission, albeit taking into account the availability of alternatives. Again, however, no consideration was given as to whether the development was capable of being more adequately accommodated than at Radlett in landscape, visual and other terms; it was rejected as a matter of principle.

The effect of undertaking the midway sifting was to remove a number of sites from the potential shortlist. None could go forward to have their merits considered.

The Short List Stage

¹⁰⁹ See Table 3, Technical Report 6, page 32.

¹¹⁰ See 9/HS1.9

¹¹¹ Appx 6, Technical Report 6.

The short list stage was made up of two essential aspects: operational/market considerations and sustainability considerations.

No real faith can be placed on the alternatives analysis. The assessment was entirely subjective. As to the market/operational considerations, there were no criteria that were capable of being understood and scrutinised. There was no clear comparison to be made between the 5 sites. There was, in contrast, a series of criteria which were applied to the sustainability analysis. Yet, even here, there was no ability to scrutinise what weight CGMS had placed on a particular issue in order to reach a conclusion as to which was the better site. Mr Tilley's point on why this form of analysis was that it allowed a decision-maker to reach their own decision as to which was the best site. As an initial point, the assessment was not in neutral terms, allowing a decision-maker to pick and choose: a clear view as to why Radlett was better was made at each stage of the analysis. Second, if the purpose is to allow the decision-maker to choose the best site, it is necessary for the assessment to be sufficiently clear in order to allow the decision to be made. Given the lack of clarity as to what weighting was being placed on a particular issue, the decision-maker simply could not, even were that to be the approach, reach his/her own decision. For example, it was said that "substantial weight" was given to the proximity of the site to London¹¹². If it was decided that substantial weight should not be given to this issue, what then is the decision-maker to do? No, the reality is that this was an alternatives analysis which aimed to reach a conclusion as to which site was the best, it was not simply a description of each of the sites allowing the decision-maker to make up their minds. As an example of the opacity of the assessment (which I return to below), Mr Tilley pointed out that no weight was given to gauge issues in the assessment – that was not apparent from anything in the documents provided by CGMS and only became so in XX.

Additionally, given the fact that no scoring has been undertaken and no clear weighting placed on a particular issue, it is not possible to undertake any sensitivity testing to the analysis has been given.

As a result, it is necessary to test whether the assessment was correct. It, patently, was not, for a number of reasons. Given the failure of the Appellant to indicate clearly what weight should be given to a particular issue, had the weight been placed on issues which Inspector Phillipson considered important in the assessment, then other sites would have been considered to be better sites.

¹¹² Para. 8.11, Technical Report 6.

First, given, as has been stated above, Inspector Phillipson considered that landscape and other impacts were of considerable significance in identifying better sites. Had greater weight been placed on that issue then other sites, for example SIFE and Upper Sundon, would have done better than Radlett¹¹³.

Second, there was no basis for placing “substantial weight” on distance from London. Of course the Council’s case is that given the likely occupation of the premises by regional distributors, the proximity to London is of little significance. However, even on the basis of the Appellant’s own case, which was limited to the north-west sector, to place such weight on proximity to London would necessarily undermine those which had passed the initial criteria for distance from the M25. There is also no logic to placing such weight on distance to London when Inspector Phillipson placed greatest weight when alternatives were to be considered of green belt, landscape and other impacts; so long as a site was capable of being an SRFI (rather than the best SRFI), the greatest weight should then have been placed on landscape and visual impacts rather than proximity to London. The consequence has been to favour London when (as I have already indicated) other sites were more favourable from the point of view of impacts.

Third, no weight was placed on the rail criterion. The significance of the rail issue cannot be underestimated; the SRA¹¹⁴ took the view that the quality of rail connection was “essential”. The reasoning for this approach was curious and unconvincing. It was said that this was given a neutral scoring because Radlett was regarded as being adequate. The patent failing of this was that it failed to recognise the additional benefits which could be provided by other sites in rail terms. In any event, it was also wrong because Radlett was only regarded as being acceptable because, in part, of the gauge enhancement. However, the analysis of alternatives did not take account of gauge enhancement. There was, therefore, no basis for treating this aspect as neutral.

Fourth, the approach that was taken towards ownership issues plainly favoured Radlett unjustifiably. The description of the other 4 sites was largely in negative terms. In Colnbrook, it was pointed out that the developer did not “appear to control” all of the required interests¹¹⁵; in Harlington there were potentially difficulties in land assembly¹¹⁶. Of Littlewick Green there was no evidence of it being “promoted”¹¹⁷.

¹¹³ See the relative scoring Appendix 8, summary, last page, Technical Report 6.

¹¹⁴ 9/CD/5.1, para. 4.17.

¹¹⁵ Para. 8.21, Technical Report 6.

¹¹⁶ Para. 8.137-8, *ibid.*

¹¹⁷ Para. 8.58, *ibid.*

Each of these descriptions was largely negative. In respect of Radlett, when at the time of Inspector Phillipson's consideration was not positive in respect of the County Council's position, it was described pointed out that the County Council had not "indicated an unwillingness". The difference of emphasis is perfectly plain.

Fifth, the approach of the shortlist assessment systemically favoured Radlett. The approach was to consider each of the sites against Radlett, with Radlett offering the benefits that are currently offered¹¹⁸. Patently, given that Radlett is a mature proposal it is likely to bring forward benefits which other sites which have not yet been fully developed can offer. A site like Littlewick Green cannot compete with Radlett in these circumstances (even when considered in isolation, rather than with sites 16 and 17) even though, with further development, it could. This meant that the most that was said about Littlewick Green in the assessment is that it had the potential to provide "some benefit"¹¹⁹.

Sixth, the approach towards Colnbrook highlights quite clearly the degree to which the approach inherently favoured Radlett. The approach taken towards each of the four other sites was to take the example of a development of the scale of Radlett. The Colnbrook development comprises a development of a considerably lesser scale than Radlett; this would lead to a reduced impact in relation to a number of different matters like noise and [] as against the scale of the development which was looked at on the Colnbrook site.

In short, the proposed development at Colnbrook was smaller than Radlett and would thus have a lesser impact. In spite of the fact that CGMS knew about this lesser scale of development, they considered that it was not appropriate to test Colnbrook by way of what was actually going to happen as against some theoretical scale of development which was not proposed. That is quite obviously a wrong approach. It has meant that there has been no landscape and visual impact assessment of this lesser scale of development even though, when considered against biodiversity and noise it did have a reduced impact. Given that the scale of the development is considerably less (200,000 sqm as against 300,000 sqm). The problem goes further. The appellant has laid considerable stress in this case on the degree to which the Colnbrook site is covered by a strategic gap designation, but the degree of harm to that gap (on the assumption it adds anything to the overall considerations, which I deal with below), will be affected by the degree of built development. The difference that would occur with the actual proposal at Colnbrook is of clear

¹¹⁸ See paragraph 8.84, Technical Report 6.

¹¹⁹ See paragraph 8.82, Technical Report 6.

relevance to how it would compare to Radlett. By ignoring the actual development at Colnbrook has disadvantaged that site. The approach of Radlett might have had some logic if the development proposed at Colnbrook could not amount to an SRFI, but there is no dispute that it would.

Further, the Appellant has made mistakes in its assessment, which, had it consulted Goodmans, would have no doubt been corrected well in advance of this inquiry, instead of by a note in the 3rd week of the inquiry¹²⁰. The Appellants now acknowledge that there is no difficulty with access to the Colnbrook line¹²¹ in comparison to the issues they had in the original report. They accept that the footpath severance will be only 2000, not 5050m as they had measured it and now acknowledge that the rail gauge is W8 on the Colnbrooke line. Even if the last issue (only on the basis of the Appellant's flawed approach) is disregarded, it is obviously incorrect to take the view that none of these issues is relevant.

Much of the Appellant's time in XX on Colnbrooke was spent in seeking to establish the significance of the Strategic gap¹²². Mr Hargreaves was right in his approach towards this issue. His view¹²³ was that the strategic gap policy did nothing to enhance the protection of the Green Belt in the vicinity of Colnbrook because such matters were themselves protected under Green Belt. This approach is supported by the fact that the assessment of harm to the gap was considered in the Life decision¹²⁴ in relation to the substantive effect on the gap, as opposed to its designation. In any event, as Mr Tilley accepted, the question, substantively, of the gap, is the degree to which there will be an effect on openness in this area and on this point, Mr Kelly's view was that¹²⁵ in respect of "openness" both Colnbrook and Radlett would be affected to the same extent.

In any event, the gap policy contained in the Core Strategy¹²⁶ is not up to date. The South East Plan requires a reconsideration of the gap policy¹²⁷ which post-dated the core strategy and is very different from the former CC10b which does not specify any reconsideration. The fact that PPS7 predated the draft core strategy does not affect this chronology given the positive approach taken in the draft South East Plan.

¹²⁰ 9/HS/1.8.

¹²¹ Para. 25 of 9/HS/1.8 and para. 8.17 of Technical Report 6.

¹²² See, for example, MK XX of JH and JB.

¹²³ EC, JH.

¹²⁴ See para. 13.129 as the summary, 9/HS/1.6.

¹²⁵ See the summaries for Colnbrook and Life in Appendix 8 of Technical Report 6.

¹²⁶ See Kelly Rebuttal, Appx 4, HS/5.3

¹²⁷ See page 242, SE Plan, 9/CD/4.2.

Additionally, the Appellants have referred to the Colne Valley Park. There is an air of unreality about this point by which it was suggested that Colnebrook was rendered far worse than Radlett. The simple fact is that the same sort of designation – the Watling Chase Community Forest – which is protected in a similar way under the East of England Plan¹²⁸ lies over SRFI. As Mr Hargreaves pointed out¹²⁹, it was possible to identify the same aims in the Colne Valley and Watling Chase plans.

The result, ultimately, is that very little weight can be placed on the alternatives assessment. It simply has not been shown with any degree of persuasiveness, that there is no better site than Radlett. Again, as I pointed out in opening, it is important to be clear that the evidential burden is upon the Appellant and, in order to show very special circumstances, must establish that there is no better site than Radlett. To place weight on the alternatives assessment, it should have been shown to be clearly the best site; it just has not done that.

The SDG Assessment

Further, the SDG Assessment found that 2 of the sites, Littlewick Green and Colnbrook, were better sites than Radlett. Before dealing with the analysis in more detail, it is important to note the purpose of the assessment. As Mr Hargreaves pointed out (and indeed as Mr Wilson pointed out¹³⁰), the purpose was not to look at each of the sites identified by CGMS. It was to look at only those sites which were publicly identified as potential SRFI sites; that is unsurprising given the time constraints that the Council was under to prepare for the inquiry.

It was suggested that the Council had not stated in its Statement of Case that it was undertaking an alternatives analysis. That is a patently bad point. The Council did identify that it considered that other better alternatives existed. There was no requirement to say that it was going to provide evidence, as it did, to demonstrate that; the fact that it had used a particular method was not an important part of that process. Had it said that it was undertaking a scored alternatives analysis, it would obviously¹³¹ not have disclosed that until it was finalised since it had to be sure that the results were robust. What was important to point out was that the Council believed other, better alternatives existed and that it would be demonstrating that, which is what it did state. In any event, the point is without substance since the alternatives that were being analysed were only those, in the North West sector, that the Appellant had assessed and the remainder were

¹²⁸ Policies ENV1 and 2, CD/4.1

¹²⁹ EC.

¹³⁰ XX, BW and JH.

¹³¹ See JH, ReX.

outside the North West sector which the Appellant considers to be irrelevant to its case.

The SDG analysis used a scoring methodology; this had the clear advantage of being capable of scrutiny – it allowed someone to understand clearly what the Council’s approach was to each site. Mr Tilley’s primary criticism with the SDG approach was that it used a scoring system. He suggested that it was inappropriate to use a scoring system as a matter of principle.

That is quite obviously wrong. First, the Inspector did not complain, at all¹³², about the use of a scoring system (and neither did either the Councils¹³³ or STRIFE); the point was the means by which such scoring was undertaken that rendered the previous alternatives assessment inadequate. Similarly, the employment land review guidance relied upon by Mr Tilley¹³⁴ does not reject scoring but points out that a scoring system is capable of being used¹³⁵.

Other points were taken on the value of the report. It was pointed out that, in respect of Radlett, the landscape and visual assessment was based on Mr Billingsley’s assessment, even where it diverged from Inspector Phillipson’s analysis and that the assessment of Colnbrook ignored the conclusions identified in Life. It is notable, first, that it was not shown, nor attempted to be established, that any changes would make a significant difference. In any event, the alternatives analysis was rightly considering the matter on the basis of the judgments reached by those involved in the assessment. Their judgments were readily observable and accessible. To that extent, they differ markedly from the CGMS report.

It was suggested that Mr Billingsley’s assessment of landscape impacts in respect of each of the sites was flawed for not taking into account landscape policy issues (like local designations at Radlett)¹³⁶. That, however, was a criticism which went nowhere because Mr Hargreaves, as part of his policy analysis for the sites, did take that into account¹³⁷.

It was contended that the SDG assessment was flawed because it scored equally between impacts on the Green Belt and impacts on local footpaths. That may have been right, but the effect of that approach was to enhance the prospect of Radlett against other non-

¹³² See paragraph 16.133-134, Inspector’s Report, 9/CD/8.2.

¹³³ That is, Hertfordshire County, Hertsmere and St Albans Councils.

¹³⁴ See RT Rebuttal, Appx 3.

¹³⁵ [].

¹³⁶ XX, JB.

¹³⁷ JH, XX, MK

Green Belt alternatives. It is difficult, in those circumstances, to understand how the criticism actually amounts to anything.

It was suggested¹³⁸ that the analysis had failed to take into account the importance of SRFI being sited close to good road connections. That was a wholly unpersuasive point; first, because the analysis had laid down a considerable weighting for road connections and, second, a sensitivity test had been undertaken which had placed road as one of the most important criteria¹³⁹.

It was criticised on the basis that the weighting to market was give 2% of the total scores¹⁴⁰. That is entirely logical given that the sites were within London and South East area and would thus be located within the distribution areas that distributors would serve as Mr Wilson explained¹⁴¹.

It was contended that the road criterion was defective because it failed to consider the quality of the route by which the roads were accessed¹⁴². First, Mr Wilson explained why it was that the quality of roads (that is, A roads) was a proxy for a reasonably route. Second, and importantly, no particular site was identified which, it was said, this criterion made a difference to its overall categorisation.

The result is that, on a clear and understandable basis, two sites come out better than Radlett.

Policy (rail etc)

[]

Prematurity

There is a stronger case for prematurity in the present case than was the case in the previous appeal. The Council points to the changed circumstances from the previous appeal in support of this part of its case (as was indicated in its report to committee on 14 October 2009¹⁴³. Inspector Phillipson recognised that on the basis of PPS1, there was a case for prematurity. PPS1, General Principles, states¹⁴⁴ that prematurity will not normally be justified where [].

¹³⁸ BW XX MK

¹³⁹ See Appx J, BW Apps, para []

¹⁴⁰ BW XX MK

¹⁴¹ Ibid.

¹⁴² XX, BW

¹⁴³ CD/3.9.

¹⁴⁴ Paragraph [].

However, recognising the exception to that approach (as Mr Tilley acknowledged¹⁴⁵) Inspector Phillipson did accept that there could be an argument of prematurity. He stated that here could not be prematurity against either the St Albans LDF or the (then) emerging regional strategy¹⁴⁶ but carried on:

But is, as the Councils argue, refusal of planning permission on prematurity grounds nonetheless justified?

With regard to this matter, there is no doubt that (i) the proposal is for significant development and (ii) it is of such a nature that only a very limited number of SRFIs (three or four) are required to serve London and the South East. Accordingly, granting permission for a SRFI at Radlett, in addition to the permission already granted for a SRFI at Howbury, would reduce the number of further SRFIs required to serve London and the South East to one or two only and hence materially prejudice the outcome of any regionally based study to determine the optimum sites for them. In this sense it could be argued that the application is premature.

Inspector Phillipson took the view, however¹⁴⁷, that the argument only held good if there was a reasonable prospect that such a study was both likely to be undertaken and its findings accepted as binding on the various authorities within a reasonable timeframe. Here, he found, the evidence to be thin. That was because:

The East of England Plan ("EEP") did not propose a strategic assessment;
The South East Plan ("SEP") maintained a criteria based policy which was an indication of a desire to allow developments in the interim.
The possible timetable for a study was some 5-6 years.

The position has moved on, however, since that time.

First, policy T10 of the EEP now does point to a comparative analysis being undertaken of proposed sites, albeit stopping short of a strategic interregional study. In short, if other better sites outside the EEP area are identified, there will be no support for an SRFI. It therefore is relevant that both SEERA, SEEDA, EERA and EEDA have indicated a need for an interregional assessment of the position¹⁴⁸. As to the timescale for such work, the patent reason why nothing as yet has come forward is because the DfT, in its response provided in June

¹⁴⁵ MR XX RT.

¹⁴⁶ Para. 16.110, Inspector's Report, 9/CD/8.2.

¹⁴⁷ Para. 16.112, Inspector's Report, 9/CD/8.2.

¹⁴⁸ See the letters, EERA; JH Apps page 66, last paragraph and SEERA: Appx JH19.

2008¹⁴⁹ (which was not taken into account by the Secretary of State on this decision)¹⁵⁰ indicated that such a study would be taken up by through the NPS. In the event that it is not, then, since the DfT has indicated the use of joint working both in that letter and in its general guidance for DaSYSTs[]¹⁵¹, the timescale has the potential to be short.

Second, the relevant NPS is due for production shortly. As Mr Tilley accepted, in the event that it is site specific and does not refer to Radlett, the permission for Radlett would be premature¹⁵². It is clear, in those circumstances, that, until the content of the NPS is known, permission should not be granted. The point goes further, of course, because the initial publication will be a consultation draft and, given the calls for an interregional analysis of sites from the regional assemblies, the potential nevertheless for a site specific list is there even if such a list is not provided in the first draft. The consequence is that, until it is known that a site specific list of sites will not be identified through the NPS, this remains an additional basis for holding the current application as premature.

Mr Tilley has suggested that the DCLG guidance to local authorities on the NPS system¹⁵³ suggests that there is a clear intention that proposals should not be regarded as premature an NPS. In fact, read properly, the system suggests that prematurity decisions can still be made. The guidance points out that in circumstances where no NPS is in place when an application comes before the IPC, the decision will be given over to the Secretary of State¹⁵⁴; the obvious reason for that is so that, should the Secretary of State consider that it is inappropriate to allow the decision because of what may be in the NPS, he would be able to do so. In short, one of the purposes is to allow the Secretary of State to refuse the permission because of the potential for prematurity. Mr Tilley accepted the logic of this¹⁵⁵.

There is another aspect to this argument. Should you Sir, be in doubt about the likelihood of this site achieving its stated promise of being an SRFI, then the degree of force behind the prematurity argument increases. At the same time, it is to be borne in mind that with the grant of Howbury and the commencement of construction of London Gateway, the degree of need is such that prematurity in the current context – the prospect of other, better sites being compromised – becomes that much more significant.

¹⁴⁹ JH Apps.

¹⁵⁰ Agreed, RT, XX, MR.

¹⁵¹ JH Apps [].

¹⁵² MR XX RT.

¹⁵³ Appx 1, RT Rebuttal.

¹⁵⁴ See paragraph 8 of the Guidance.

¹⁵⁵ MR XX RT.

Benefits – Country Park and By Pass

Securing the Benefits and the Enhancement to Rail

The Secretary of State was clear that very little weight should be placed on the section 106 because it did not include all parties who owned the sites and because a condition to enter into the section 106 was used as the mechanism for overcoming the issue.

The Appellants now use three alternative mechanisms to seek to overcome this defect¹⁵⁶.

The first method is that which is used at the last inquiry is put forward. This should have as little weight as that which was before the Secretary of State in 2008.

The second option prevents the development of site 1 until site 2 is developed (and the unilateral prevents the development of site 2 until a unilateral is entered into). The difficulty with that is that it contravenes the guidance of the Secretary of State in Circular 11/95, paras. 38-40 which requires that, where there is a Grampian condition, there should be reasonable prospects of its fulfilment; the Appellant has presented no evidence in this case that there would be reasonable prospects of its fulfilment in a reasonable timescale. While case law has established that this should not be considered blindly, in this case there is a patent reason why this should policy should apply. Given, as Inspector Phillipson pointed out, the policy support is limited and given that, as Mr Tilley accepted, if this permission prevented a better site coming forward that would be an unacceptable outcome, the granting of this permission without evidence that there is a reasonable prospect of it being implemented would undermine both of these imperatives.

The third alternative does not make provision for any financial payments and is, consequently, defective – it does not achieve the aspects set out in the draft unilateral. Further to the extent that any particular set of works may require the payment of money under a reserved matters approval, it is simply and impermissibly deferring the issue to that later stage when the outline approval will have been granted. The effect, ultimately, is to seek to deal with the payment of money through a condition, which is both unlawful and contrary to the Secretary of State's guidance¹⁵⁷.

¹⁵⁶ See draft condition 33.

¹⁵⁷ Circular 11/95, Annex, para. 83.

As a result, the matters offered up in the section 106 agreement should be given very little weight.

Green Belt Harm

[]

Noise

The Council has indicated why on the evidence it has presented, established that the decision previously reached by Inspector Phillipson should not be followed.

Mr Stephenson has indicated plainly why it is that there will be a significant effect on residents particularly of Napsbury and Park Street and Frogmore from the SRFI.

Inspector Phillipson previously accepted that the appropriate form of assessment for judging whether there would be adverse effects in noise from the site was under BS4142¹⁵⁸. He also accepted that, in judging how that BS4142 should be undertaken, it was appropriate to make a 5dB correction for operational noise to reflect the fact that there would be metallic clangs arising from handling operations in the intermodal terminal¹⁵⁹.

The conclusions which the Council contends in this case should not be accepted are, first, that the proposed condition to control noise would be achievable and is therefore reasonable¹⁶⁰ and that it would have the effect of adequately protecting residents, even if achievable¹⁶¹.

Mr Stephenson's evidence was compelling; I deal first with the extent to which the condition, even if achievable, would protect residents against adverse noise from on-site operations.

The primary issues with which Mr Stephenson was concerned about was the effect of intermittent noise and associated Lamax events.

As to the question of intermittent noise, Mr Stephenson identified, in a similar way to that identified by Inspector Phillipson the extent to which, without any conditions, the proposals would, following BS4142, cause unacceptable impacts; the development would lead to levels of up to plus 20 dB, which would mean that complaints would be likely¹⁶². It is

¹⁵⁸ Inspector's Report, 9/CD/8.2, para. 16.46.

¹⁵⁹ Inspector's Report, 9/CD/8.2, para. 16.49

¹⁶⁰ Inspector's Report, 9/CD/8.2, para. 16.55.

¹⁶¹ Inspector's Report, 9/CD/8.2, para. 16.54.

¹⁶² See also 16.50-16.51, Inspector's Report, 9/CD/8.2.

only if the condition is imposed that levels would reduce. However, as Mr Stephenson pointed out, even with the condition in place, the levels would still be such as to make complaints likely¹⁶³. This conclusion was different to the Inspector's conclusion that, with the condition in place, complaints would reduce to "marginal" under BS4142¹⁶⁴. The difference is to be found in the fact that Mr Stephenson applied a 5dB correction as part of the 4142 assessment with the noise condition¹⁶⁵ which was not undertaken by Dr Hawkes previously¹⁶⁶; that approach was not criticised by the Appellants in this case. The result is that, as Mr Stephenson has pointed out, even if the condition was achievable it would still lead to complaints being likely because of the intermittent nature of the noise levels. The defect in the condition proposed by the Appellants is that it does not control intermittent noise, as Mr Stephenson pointed out. Had the 2009 guidelines been available, this may have drawn the Inspector's attention to the need to consider the extent to which intermittent noise was capable of being dealt with by the condition¹⁶⁷.

Additionally, the condition does not deal with L_{Amax} events. Mr Stephenson's evidence was clear on the point that the proposed condition would allow, potentially, 60 very loud "impact" events per night, every night, each with an L_{Amax} of around 85 dBA¹⁶⁸. He gave evidence that, from his calculations, L_{Amax} levels of around 60dBA can be expected at properties in Napsbury¹⁶⁹. The Inspector did not have to deal with the question of L_{Amax} issues at the last inquiry since it was not a point pursued by the Councils at that inquiry. It is being pursued at this inquiry, because of the patent problems that are likely to arise¹⁷⁰. Mr Stephenson's conclusions on these likely levels has not been rebutted.

None of these noise levels are controlled by the proposed noise condition. There will be complaints and adverse impacts arising from the development, even if the conditions were achievable.

I turn next to the proposed noise conditions. It is proposed that a condition which restrict noise levels at the façade of properties to 50dB will deal with noise. It will not; Mr Stephenson has provided considerable evidence as to why the noise level will not be achievable. First, his experience is that developers can ask for

¹⁶³ See Table 5.2, SS Proof, LPA/4.1.

¹⁶⁴ Inspector's Report, 9/CD/8.2, para. 16.54.

¹⁶⁵ See Table 5.2, SS proof, LPA/4.1.

¹⁶⁶ See 9/LPA/6.9.

¹⁶⁷ SS EC.

¹⁶⁸ Para. 5.3.9, SS Proof.

¹⁶⁹ Para. 5.3.4, SS Proof and Rebuttal, para. 6.1 et sec.

¹⁷⁰ See paras. 7.58-7.90, Inspector's Report, 9/CD/8.2.

conditions which are later found to be unachievable; that meets one of Inspector Phillipson considerations as to why the condition would be achievable¹⁷¹. Second, Inspector Phillipson relied on Mr Sharps' conclusion that his model would over-predict noise levels¹⁷². Mr Stephenson gave detailed and in depth evidence as to why ISO 9613 did not over-predict noise levels. His own experience of the Model, which was considerable, indicated that the model was robust¹⁷³ in part on the basis of research undertaken on behalf of Defra. He also demonstrated how the reasoning presented on behalf of Mr Sharps at the last inquiry was wrong and based on a misunderstanding of the model¹⁷⁴.

Finally, Mr Stephenson has indicated how¹⁷⁵ the ambient level will increase dramatically through this development which will lead to adverse effects.

The Appellant's approach in this case has been, in fact, not to engage with the points that have been raised by Mr Stephenson at all. The position they have adopted is to steadfastly refuse to look beyond the Inspector's decision, to the extent that they have produced no witnesses whose evidence could be cross-examined and, indeed, have not sought to engage with any of the points raised by Mr Stephenson.

The position is summed up in the written statement of Mr Sharps that he has been "advised that it is not appropriate to over that ground when clear conclusions" had been reached in the previous Inquiry and adopted by the Secretary of State¹⁷⁶. As an example of the Appellant's approach, it sought to suggest that Mr Stephenson's conclusion that it was unclear how the Inspector got to the view that the noise levels would only lead to a "marginal" situation with the condition in place was explained by the fact that he was not aware of "the correct version of [table 7.1] which was provided to the inquiry¹⁷⁷. However, it will be noticed that this "corrected" table was not an agreed table¹⁷⁸ and it did not include the 5 dB character correction which Dr Hawkes' ¹⁷⁹ (and Mr Stephenson's¹⁸⁰) tables did; they largely correspond with the conclusion that complaints would be likely even

¹⁷¹ Para. 16.55, Inspector's Report, 9/CD/8.2.

¹⁷² Para. 16.55, Inspector's Report, 9/CD/8.2.

¹⁷³ Para. 5.4.10, SS Proof.

¹⁷⁴ See para. 5.4.13, SS Proof.

¹⁷⁵ See Table 5.4, SS Proof

¹⁷⁶ See DS Rebuttal, para. 2.38.

¹⁷⁷ See Mr Sharps Rebuttal, para. 2.30.

¹⁷⁸ See LPA/6.9.

¹⁷⁹ LPA/6.9 original table 7.1 (page 21).

¹⁸⁰ Table 5.2, SS Proof, LPA/4.1.

with the noise condition. Had Mr Sharps engaged with the point, this point is likely to have been made clear in evidence.

As a result, the Appellant has no evidence to rebut any of the following issues raised by Mr Stephenson:

The regularity of the likelihood of Lamax breaches of the 1999 WHO guidelines, even though that was not a matter on which any conclusions were previously reached and which was not concluded upon at the last inquiry.

The reasons why the noise model used by Mr Sharps (ISO 9613) is robust and does not overestimate noise levels.

The reasons why Mr Stephenson is of the view that the noise condition will not be achievable and will not protect residents.

The degree to which ambient noise levels will be raised to a significant and unacceptable level as a result of the development.

The extent to which the 2009 WHO guidelines would have drawn Inspector Phillipson's attention to the need to consider whether the proposed condition could adequately deal with impulsive noises.

In short, there is no evidence at all provided by the Appellant as to why the noise produced by the development would be acceptable except that Inspector Phillipson decided they would be acceptable. It has adopted an approach that, in effect, there is a quasi-stoppel on this issue, preventing this inquiry from looking beyond the previous conclusions at the time of the last appeal. It does so even if points have not actually been grappled with. That is, to say the least, odd, since the Appellant's ostensible position is that at this appeal, the Inspector is required to consider all matters and that the relevance of the last Inspector's assessment and the Secretary of State's decision is as weighty material consideration¹⁸¹

The evidence presented by Mr Stephenson should, consequently, be accepted.

Construction condition

Finally, Mr Stephenson indicated why a construction condition measured under BS5228 should be employed in order to protect

¹⁸¹ See DF, XX, Mr Clancy.

against amenity, as opposed to the Control of Pollution Act 1974 which protected only against nuisance. The relevant condition has been proposed.

Ecology

The Council's case on ecology has, as has been pointed out in the report of 14 October¹⁸², relied on the changes in circumstances which have taken place since the last inquiry and the Inspector's report.

The Inspector reached a number of conclusions on the issue of ecology which make the various changes in circumstances which have arisen in this case very important.

In relation to the importance of the Area 1 for birds, Inspector Phillipson was clear about the importance of the site for birds, particularly over-wintering waders and breeding birds¹⁸³.

He also concluded that the proposed mitigation of the bird interest by the provision of habitat on parts of the Country Park would "not be sufficient to fully offset the likely losses"¹⁸⁴; and he ultimately considered that the lack of adequate mitigation "should tell against the proposal"¹⁸⁵.

The ultimate conclusion of Inspector Phillipson that "harm to the ecological interest (that of providing for the birds' welfare) would not be significant"¹⁸⁶ was based on two matters:

the absence of ecological or other designation which would operate to protect the current habitat of interest on Area 1; and,

the uncertainties as to the restoration proposals for Area 1.

There are two primary aspects which do amount to changes of circumstances in this case. First, the lapwing has now been included on the UK Biodiversity Action Plan list. The enhanced significance of this bird should not be underestimated. Sections 40 – 41 of the Natural Environment and Rural Communities Act 2006 provides:

While these sections of the 2006 Act were before the Inspector previously, the enhanced duty to protect this bird was not taken into account and, indeed, it was part of the Inspector's reasoning leading

¹⁸² CD/3.10

¹⁸³ Para. 16.33, Inspector's Report, 9/CD/8.2.

¹⁸⁴ Para. 16.36, Inspector's Report, 9/CD/8.2.

¹⁸⁵ Para 16.179, Inspector's Report, 9/CD/8.2.

¹⁸⁶ Para. 16.37, Inspector's Report, 9/CD/8.2.

him to the ultimate conclusion about the significance of this site that there was no such protective designation.

The primary issue which has emerged between the ecologists on the impact on birds is the degree to which the County Council was right to designate the site as a county wildlife site. The Appellant's ecologist takes the view¹⁸⁷ that the data which was relied upon – 2004 and 2005 – is too old to allow a designation to be made. There is no sufficient data for other years¹⁸⁸ and in those circumstances¹⁸⁹ it was sufficient for the site to qualify as a county site.

The importance of this designation is significant: it deals with one of the reasons why the degree of impact found by Inspector Phillipson was not significant.

As for the uncertainty apparent in relation to the restoration proposals, these remain, but they are capable of being easily reversed.

As for the acid grassland issue, Inspector Phillipson considered that the proposals to translocate should not tell against the proposal, though he agreed that the translocation, if not carefully planned and executed could fail and the resource would be lost (see paragraph 16.28 of the Inspector's report). Again, this site has now been identified as a county wildlife site and its importance has been emphasised by the small heath butterfly, which is a priority species under the UK Biodiversity Action Plan. The wildlife designation finds protection under policy ENV2 of the RSS and policy 106 of the Local Plan.

As a result of each of these matters, the degree of significance of the impacts in this case should be increased as well. The weight to be placed on this negative impact which had been identified by Inspector Phillipson should increase as well.

[]

Landscape and Visual

The Council's assessment of the impacts of the proposals in this case derives considerable support from Inspector Phillipson's conclusions (as agreed by the Secretary of State). Mr Billingsley has given considerable evidence as to why Inspector Phillipson was right to reach the conclusions he did on the landscape and visual case.

¹⁸⁷ See TG Rebuttal, 9/HS/7.3 pges 3-4.

¹⁸⁸ See para. 2.9, MH Rebuttal, LPA/3.3.

¹⁸⁹ See TG Rebuttal, 9/HS/7.3, Appx 1 page 2, last paragraph.

The landscape value of areas 1 and 2 is high¹⁹⁰ and the landscape impact of the proposals on area 1 and at year 15 would be “significant adverse”¹⁹¹. The mitigation earthworks would be “artificial and intrusive” there would be “significant visual impact” from some quarters, including the Midland Mainline, from which the impact would be “significant and adverse”¹⁹². The upper parts of the warehouses would remain open to view from higher vantage points, including the Shenley Ridge¹⁹³.

The impact of the development in landscape and visual terms of areas 1 and 2 cannot be offset by the proposals for areas 3-8. This was specifically followed by Inspector Phillipson¹⁹⁴ who rejected the idea put forward by Mr Kelly (who nevertheless continued with the same approach for the purposes of the ES for this appeal) that the enhancement of areas 3 – 8 could be taken into account; this, Inspector Phillipson considered, was “a step too far”; they were “discrete stand alone areas with little or not visual connection to areas 1 and 2”¹⁹⁵.

Indeed, the Inspector recognised that the promise of tree planting on the Areas 3 – 8 should not be a basis for allowing unwelcome development as was identified in the Watling Chase Community Forest Plan Review¹⁹⁶. That is unsurprising since the landscape quality of areas 3 - 5 is “good” and of areas 6-8 is “ordinary”. Consequently, even if the approach was taken of balancing all the areas together, the overall impact was judged by Inspector Phillipson as being moderately adverse¹⁹⁷.

Mr Billingsley largely agreed with these aspects; he has reviewed Inspector Phillipson’s conclusions and largely follows them.

The importance of these impacts should not be underestimated and must weigh heavily in the balance against the development. Their significance is rooted in a range of policy provisions which make clear the extent of their impact:

PPS7¹⁹⁸, key principles requires (irrespective of any Green Belt designation) new building development to be strictly controlled

¹⁹⁰ Inspector's Report, 9/CD/8.2, para. 16.14.

¹⁹¹ Inspector's Report, 9/CD/8.2, para. 16.14.

¹⁹² Inspector's Report, 9/CD/8.2, para. 16.17.

¹⁹³ Inspector's Report, 9/CD/8.2, para. 16.18.

¹⁹⁴ Inspector's Report, 9/CD/8.2, para. 16.21.

¹⁹⁵ Inspector's Report, 9/CD/8.2, para. 16.21.

¹⁹⁶ Inspector's Report, 9/CD/8.2, *ibid.*

¹⁹⁷ Inspector's Report, 9/CD/8.2, *ibid.*

¹⁹⁸ Para. 1

and should “in keeping and scale with its location, and sensitive to the character of the countryside”.

PPS1¹⁹⁹ indicates how inappropriate development or poor planning can result in the loss of our finest countryside. The need to protect and enhance the countryside is emphasised. It is apparent that the requirement is to both preserve and enhance the countryside (at paragraphs 17, 18 and 27), not simply preserve.

The East of England Plan²⁰⁰ requires²⁰¹ that there should be the enhancement and conservation of the natural environment and states²⁰² that areas of green infrastructure should be protected and enhanced, including community forests. The aim of planning authorities should be recognise, protect and enhance the diversity and local distinctiveness of the countryside character²⁰³.

The Local Plan recognises the need to protect landscape within its area²⁰⁴ and particularly, the Watling Chase Community Forest²⁰⁵

The policy context makes all the more plain why it is that this proposal will have very significant effects. The harm will, in the light of this contravention, be all the greater.

There was much concentration by the Appellants in XX on the changes of circumstances since the last development. The Council, and indeed, Mr Billingsley were not actually seeking to rely on significant changes of circumstances in support of the case put before this inquiry as was made clear in the report of 14 October²⁰⁶. Nevertheless, there are a number of changes of circumstances which enhance Inspector Phillipson’s overall consideration that the proposals on areas 1 - 2 would have considerable adverse effects. Mr Billingsley opined that the widening of the M25 has commenced which was not a clear and detailed proposition before Inspector Phillipson²⁰⁷ had the potential to contribute to the effect of the SRFI, primarily through the lighting proposed. He was criticised²⁰⁸ for not producing plans but had indicated he had seen the M25 ES and it is notable that nothing by way of rebuttal was produced by Mr Kelly to dispute his conclusion.

¹⁹⁹ Para. 1

²⁰⁰ CD/4.1.

²⁰¹ Para. 8.2

²⁰² ENV1

²⁰³ ENV2

²⁰⁴ Policies 69 and 74 together of CD/4.6.

²⁰⁵ Policy 143a.

²⁰⁶ CD/3.10.

²⁰⁷ See Inspector's Report, 9/CD/8.2, pg. 172, fn 1.

²⁰⁸ MK XX JB.

The Country Park

The Country Park provision is, of course, beneficial (subject to the caveat that it will not be delivered), but the degree of benefit should not be overestimated. As Mr Billingsley has pointed out²⁰⁹ the proposals for areas 3 – 8 are more in the nature of upgrades to existing areas of open space and agricultural land. In particular, area 6 has restoration proposals which would deliver access and landscape enhancements; there is a reasonable amount of public access across a number of the sites, particular areas 3, 4 and 8 and area 5; other areas which do not have existing access (area 7) would still not have such access²¹⁰.

In that regard, Inspector Phillipson acknowledged that the “ areas of land that would make up the country park are not contiguous and there would be only limited visitor facilities and parking ”²¹¹ and that some of new footpaths and bridleways would duplicate existing paths nearby²¹²; he reached a similar conclusion in respect of the ecological value of these sites which have ecological value and which are currently designated for their wildlife value²¹³. Ultimately, while there was a benefit, he noted the restrictions.

Sustainability

As was made clear in opening and on the basis of the Council’s Statement of Case and the officer’s report of 14 October 2009²¹⁴, the Council’s sustainability objection to the proposal is based on the degree to which the proposal will offend against sustainability policy given that it will not amount to an SRFI. The objection itself is thus based on the Council’s rail case and on the changes of circumstances which have occurred since the previous decision which have laid greater stress on sustainability issues. It follows from these various policies that, should the development not achieve its stated aim of transferring road freight journeys to rail, it will more greatly contravene the sustainability aims contained in policy.

As for the policies themselves, the following has emerged since the previous decision:

[]

²⁰⁹ Para. 5.8, JB Proof.

²¹⁰ See para. 5.2, JB Proof.

²¹¹ Inspector’s Report, 9/CD/8.2, para. 16.146.

²¹² Para. 16.146, Inspector’s Report, 9/CD/8.2.

²¹³ Para. 16.147, Inspector’s Report, 9/CD/8.2.

²¹⁴ CD/3.10.

