

**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: PART 2

1. In the second part of the authority's submissions, I deal with the remaining harm issue identified by the Council, the very special circumstances sought to be relied on by the Appellant and the balancing of such circumstances against the totality of the identified harm.

Other Harm

Ecology

2. The Council's case on ecology has, as has been pointed out in the report of 14 October¹, relied on the changes in circumstances which have taken place since the last inquiry and the Inspector Phillipson.
3. In relation to the importance of Area 1 for birds, Inspector Phillipson was clear about its importance, particularly for over-wintering waders and breeding birds².
4. 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"³; and considered that the lack of adequate mitigation "should tell against the proposal"⁴.

¹ CD/3.10

² Para. 16.33, Inspector's Report, 9/CD/8.2.

³ Para. 16.36, Inspector's Report, 9/CD/8.2.

⁴ Para 16.179, Inspector's Report, 9/CD/8.2.

5. The ultimate conclusion of Inspector Phillipson that “harm to the ecological interest (that of providing for the birds’ welfare) would not be significant⁵ was based on two matters:
 - (a) the absence of any ecological or other designation which would operate to protect the current habitat of interest on Area 1; and,
 - (b) the uncertainties as to the restoration proposals for Area 1.
6. There are two changes of circumstances in this case which bear on these aspects and which leads to a clear conclusion that the extent of harm should be regarded as more significant than the harm found by Inspector Phillipson. It is to be remembered that the Inspector did find harm on this issue. The question is whether the extent of that harm should now be regarded as more significant: the Council says that that must be the conclusion on the basis of the following matters.
7. 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 for greater protection to be given to BAP list species over and above the general duty contained in the Act to take into account the need to preserve nature conservation interests in decisions which may affect them.
8. While these sections of the 2006 Act were before Inspector Phillipson previously, the enhanced duty to protect this particular bird was not taken into account and, indeed, the lack of the ecological protection which accompanies its higher status was part (albeit referential to a site protection) of the Inspector’s reasoning leading him to his ultimate conclusion as to the extent of the harm occasioned by the proposals.

⁵ Para. 16.37, Inspector’s Report, 9/CD/8.2.

9. Second, the site has now been designated as a county wildlife site, in part, for its bird interest in November 2009.
10. The primary issue which has emerged between the ecologists on qualification is the degree to which it was right to designate the site as a county wildlife site. The Appellant's ecologist, Mr Goodwin, takes the view⁶ that the data which was relied upon – 2004 and 2005 – is too old to allow a designation to be made.
11. Mr Hicks has pointed out that there is no sufficient data for other years⁷ and in those circumstances⁸ such data was sufficient for the site to qualify as a county site. Mr Hicks has also explained⁹ why the data was sufficient for the purpose and why data more than 2 years old is nevertheless capable of sufficiently indicating an area's merit to qualify as a designated site.
12. It has been suggested¹⁰ that the site designation was self-serving. That is, frankly, a bizarre allegation, alleging (again) unprofessionalism of Council officers and (now) others, without any foundation. It is even more curious given that the panel which reaches the conclusion on whether to designate a site includes a representative from Natural England, a body which the Appellant itself prays in aid in support of its case.
13. As for the uncertainty apparent in relation to the restoration proposals, these remain, but they are capable of being easily reversed as Mr Hicks has indicated in his written statement; the ability to reverse the planting schemes which have been undertaken was, of course, acknowledged by Inspector Phillipson.

⁶ See TG Rebuttal, 9/HS/7.3 pges 3-4.

⁷ See para. 2.9, MH Rebuttal, LPA/3.3.

⁸ See TG Rebuttal, 9/HS/7.3, Appx 1 page 2, last paragraph.

⁹ See 9/LPA/3.5.

¹⁰ See the costs application of the appellant

14. 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).
15. 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. A failure in the translocation will, in such circumstances, be all the more significant.
16. 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.

Very Special Circumstances

17. The Appellant relies on a number of matters which it says, together, amounts to very special circumstances justifying the proposal:
 - (a) Whether the development will operate as an SRFI.
 - (b) The lack of alternatives for the site.
 - (c) The benefits of the country park.
18. The Appellant may suggest that the Secretary of State had reached the conclusion that, subject to providing an acceptable alternative sites assessment, very special circumstances would exist. That is wrong if such a submission is made. The Secretary of State did not actually go through the process of reaching the judgment as to where the balance would lie if there had been a satisfactory alternatives analysis; she indicated that "this would almost certainly have led her to conclude

that this consideration, together with the other benefits she has referred to above were capable of outweighing the harm to the Green Belt and the other harm which she has identified in this case". The issue of the weight to be applied to the balancing process and each of the factors prayed in aid of the Appellant's case is, even on the Council's case, wholly open.

(A) Whether the Development Will Operate as a SRFI

(a) SRA and other Rail Policy

19. The policy support in favour of this development is limited, as Mr Tilley accepted¹¹. 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 unacceptable result¹². It would also be unacceptable, he agreed, if the result of it not becoming an SRFI is that other, better locations would be prevented from coming forward.¹³
20. 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 policy¹⁴, namely, the SRA guidance on interchanges¹⁵.
21. This makes clear that an SRFI must be "capable now or in the future of supporting their commercial activities by rail"¹⁶. Mr Gallop accepted the importance of rail connection in order to create an SRFI. He acknowledged that the SRA guidance was clear that, while there

¹¹ XX, MR, RT.

¹² RT, XX, MR.

¹³ XX, MR, RT.

¹⁴ See the DfT, 9/HS/9.1

¹⁵ 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, see NG, XX, MR.

¹⁶ Para. 4.5.

should be good connections to the primary road network, “high quality links to the rail network are ... essential”¹⁷. It also points out that the key factors in considering site allocations include: access “on rail freight routes with capacity and avoiding congestion”, including access in both directions. This is reiterated in Appendix B which indicates that the transport requirements include “rail links need high capacity and good loading gauge”¹⁸.

22. 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”*¹⁹.

23. Mr Gallop accepted that good rail access had to be ensured to provide a prospect of enticing road users from their habits²⁰. It is, in order to do this, that it is has been made clear in the policy that the shift has to be capable of being made.

24. The requirement that an SRFI actually does achieve what it is said that they should achieve is also indicated in the draft London Plan which is notably changing the emphasis contained in the London Plan from one of general support, to a support conditional on demonstrating, on a “robust” basis, that an overall reduction in traffic will be sufficient to justify any loss of the Green Belt. The development “must” also achieve a modal shift from road to rail²¹.

25. 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 from road to rail

¹⁷ Para. 4.23.

¹⁸ Referred to at para. 4.6 of 9/CD/5.1.

¹⁹ Para. 4.5.

²⁰ XX, MR.

²¹ See JH Apps pg. 3, policy 6.15 and written statement para. 6.46.

to occur. Such a development, while it may have the name of an SRFI, will not fulfil its purpose.

26. The importance, of course, of considering whether what is proposed will actually be an SRFI is that, without the government support contained in the SRA guidance, there is simply no justification for the development. When looking at the ability of the development to operate as an SRFI, the Secretary of State must be concluded that it will operate as an SRFI. In the previous decision there was an indication²² that a “reasonable assurance” (in relation to pathing, particularly) was a sufficient test by which to conclude that a particular matter had been established. Given the importance of what is proposed and the extent of the impact it will have on the Green Belt, to the extent that this test imports some relaxation of what must be established in a Green Belt very special circumstances case, it should be rejected.

(b) Summary of the Council's Position

27. 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 operation²³, in the following ways, which I deal with below:

- (a) There will be no movements in or out of the site by rail between 0600 – 2200.
- (b) It will receive no channel tunnel traffic until the gauge has been enhanced to W9.

²² 16.184, Inspector's Report, 9/CD/8.2.

²³ That is, using rail for the first leg of the distribution journey.

- (c) It is in a poor location to compete with rail from the primary deep sea ports.
- (d) It has poor accessibility to the primary rail route for competing with the road-based domestic market, the west coast mainline ("WCML").
- (e) It requires a rail subsidy and gauge enhancement to assist with its competitiveness which will be insufficient in the circumstances.
- (f) Additionally, as part of the context for assessing this issue, any doubt should be resolved against the development since the need to 2015 is currently capable of being met by other developments.

(c) Pathing

- 28. 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.
- 29. 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. Put simply, the Appellant has not, at all, made out its case.
- 30. Mr Wilson's calculations themselves have not been undermined at all. The assessment was undertaken using the Railsys modelling system (that used by Network Rail) which indicated that, on the 2015 peak off-peak timetable set out in the draft East Midland Rail Utilisation Strategy, there would be one path of 7 minutes every 30 minutes to enable trains to gain access to and from the site. Given that a train would required 8

minutes to enter the Site and 12 minutes to exit it, this path would be insufficient²⁴.

31. The question is, has the Appellant established that there will be paths? The answer is, quite plainly, no.

32. The Appellant has relied, heavily, on the views of Network Rail in this case to suggest that the development can work. Critically, however, as Mr Gallop agreed, Network Rail have not undertaken any analysis against the Thameslink 2015 service. Further, it should be noted that Network Rail's approach towards the site is more circumspect in respect of paths than it was at the last inquiry. The most that is confirmed is that there are two rail paths on the Midland Mainline that pass-by the Site. At the previous inquiry, Network Rail confirmed (a matter which Inspector Phillipson described as "critical") that they could see "no reason" why Helioslough's requirement for 12 intermodal paths (24 in total) could not be met²⁵. Such a statement is now notably lacking in either the agreed statement²⁶ or Network Rail's letter to the inquiry²⁷; 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 the degree to which there would be the potential to gain access to the site.

33. It seemed that the Appellants were seeking to place some weight on Inspector Phillipson's conclusions on pathing in order to seek to establish that the Thameslink 2015 service had been accounted for but, from a reasonably careful reading of the Report, what the Inspector was

²⁴ See paragraph 11.38, BW Proof.

²⁵ Paragraph 16.65, Inspector's Report, 9/CD/8.2.

²⁶ 9/CD/7.4, para. 2.3.

²⁷ 9/HS/INQ 2.0.

formerly concerned with is entirely different from that now before the inquiry. The Inspector was not concerned with Thameslink in its future state. Indeed, not only was there, at that stage, no timetable for the 2015 Thameslink service²⁸ but, in fact, the evidence being given by Network Rail at the time of the last inquiry was that the off-peak service would not change, which view was adopted by the Inspector²⁹. As a result, Inspector Phillipson was not being asked to assess the current objection in any way and no comfort can be gained by the Appellants from his conclusions on this issue.

34. The Appellant has suggested that the Thameslink 2015 timetable set out in the draft East Midlands RUS will change. It is correct that the RUS indicates that the service specification is stated to be indicative³⁰, but there is no indication that it will change, let alone change positively to the Appellant's favour, which would require a lessening of the specification from its current position. The likelihood of a lessening of the specification is plainly low given that the timetable in November in 2008 involved a lower specification than the current draft RUS, which had two of the semi-fast off-peak services going no further than Brent Cross³¹. The intent for Thameslink is that it will be a more comprehensive service, not a lesser one. Again, this is to be seen in the context of the 2007 statement on Thameslink in 2007 that there would be no change in the Network Rail offpeak. There has been a steady increase in the service requirements over time – how then, I ask, can it be concluded that it will be reversed?
35. Looking at the detail of Mr Wilson's analysis, what the Appellant has sought³² to do is to criticise and undermine the pathing analysis by floating a myriad of different factors the aim of which has been to muddy the clear message provided by Mr Wilson.

²⁸ See the Interfleet Report (based on the then current 2007 timetable: 9/LPA/6.8).

²⁹ See para.s 15.7 and 16.65, Inspector's Report, 9/CD/8.2.

³⁰ See page 93, CD/5.5.

³¹ See Strife 9/10/01.

³² See XX, BW.

- (a) First, it was suggested that the use of a double junction would provide more opportunity. Mr Wilson answered this in his note to the inquiry³³.
- (b) Second, it is contended that the use of a cross-over diamond instead of a ladder design would make a difference. Mr Wilson answered this in his note.³⁴
- (c) Third, it is contended that making use of entry and exit on caution would be significant. Mr Wilson answered this issue in his note³⁵.
- (d) Fourth, it is contended that the Rules of the Plan can be altered to give greater flexibility. Mr Wilson answered this issue in his note³⁶.
- (e) Fifth, it has been suggested that the use of the fast lines may free up capacity. Mr Wilson answered this issue in his note³⁷

36. Mr Wilson has dealt with each of these by way of his note a note to the inquiry³⁸ and none of it has even been commented upon, even less rebutted, by Mr Smith or anyone else. Quite clearly, the Appellant has realised the hopelessness of arguing on these points further and has ignored them.

37. Rather, the Appellant tried to deal with the issue by putting before the inquiry a full timetable analysis produced by Interfleet³⁹. This was introduced 3 weeks into the inquiry, in spite of Mr Wilson having raised

³³ LPA/6.6.

³⁴ Ibid.

³⁵ Ibid.

³⁶ Ibid.

³⁷ Ibid.

³⁸ LPA/6.6

³⁹ 9/HS/2.8.

the point in his proof. The Appellant had, in short, some 7 weeks to provide this document and introduced it at a surprisingly late stage in the process. I say that is surprising since, throughout the inquiry, the Appellants have continually contended, without foundation, that the Council has been seeking to surprise it. It is, however, an indication of the degree to which the Appellant was concerned about the points raised by Mr Wilson that they sought to “trump” him in this way.

38. Nevertheless, the analysis was, frankly, totally worthless. First, the timetable was totally unworkable, with a semi-fast service (the 10.24 Luton semi-fast) running down another service (the 10.16 slow St. Albans service). Mr Smith suggested that this would not occur. However, given the 8 minute difference between the services at Radlett, with a 4 minute headway between services in the Rules of the Plan (considered to be not outlandish though not agreed by Mr Smith⁴⁰, and see Mr Wilson’s evidence identifying 4 minute gap as the case⁴¹), three extra stops on the slow St Albans service⁴² and a journey time penalty per stop of 2.5 – 3 minutes (comprising 30 seconds dwell time⁴³, a c. 1 minute deceleration and c. 1 minute acceleration), the timetable was, as Mr Smith accepted, unworkable on that basis⁴⁴.

39. More importantly, the timetable was based on a service pattern that involved 8 trains on the slow line rather than 10. As Mr Gallop acknowledged, if the Thameslink specification as contained in the RUS is followed, then there will necessarily be 10 trains on the slow line. That is because, at present, there are 6 trains on the slow line with 2 trains which would otherwise be on the fast line being on the slow line due to the fast EMT services and, as Mr Gallop acknowledged, a reduction in such services is unlikely. Given the pressure on the fast line (again, accepted by Mr Gallop), each of the additional 4 services on the 2015

⁴⁰ GS, XX.

⁴¹ As well as Network Rail indicating in its answers that there would be no alteration of the Rules of the Plan with Thameslink 2015.

⁴² Hendon, Cricklewood and Kentish Town.

⁴³ Regarded as not outlandish by Mr Smith.

⁴⁴ GS, XX.

Thameslink timetable will have to go onto the slow line. The result is that, should the 2015 Thameslink timetable take effect, there will be 10 Thameslink trains on the slow line, not 8⁴⁵.

40. As Mr Gallop accepted⁴⁶, should there be 10 Thameslink trains on the slow line, the Interfleet timetable, showing two 15 minute gaps, will only be able to accommodate the Thameslink trains and there would be no paths, whether into or out of the site for the freight trains. The Interfleet timetable establishes, in those circumstances, what Mr Wilson said would happen.
41. The only issue is, therefore, whether the Thameslink specification will be reduced either through the Government's own accord or through negotiation and other means under the rail regulation processes. As a government sponsored service of some £5.5 billions which is declared as supplying "substantial benefits to rail passengers"⁴⁷, it is patently unlikely that the Government would willingly wish to see a reduction in the specification and, indeed, as I have stated, the specification has increased over time, not decreased.
42. This means that the specification is likely to be reduced only if the matter is resolved through negotiation or by way of a determination through the access provisions ultimately to be adjudicated upon by the ORR. As Mr Gallop fairly acknowledged, should there be a requirement to resolve whether Radlett or Thameslink's specification should prevail, Thameslink would win. Mr Gallop did not resile from that in RX.
43. In short, there is simply no evidence that this issue is likely to be resolved in a way that is positive to the Appellant; all the indications are that there will not be access in the off-peak period.

⁴⁵ A point confirmed by Mr Wilson in his note, at LPA/6.6.

⁴⁶ XX, NG.

⁴⁷ Network Rail Q 19.

44. Reliance was sought to be placed on the evidence of Mr Clancy that there would be 8 services on the slow line. You will recall the cross-examination and it was plain that Mr Clancy was basing his view on the older specification and the letter of Mr Morgan within his appendices, neither of which looked at the up to date situation contained within the RUS. Strife have given their note of what Mr Clancy said and, if right, indicates that Mr Clancy was looking at the specification as it was at the time that it was written down in the November 2008 specification, not some more up to date version than has been indicated in the RUS.
45. As I indicated previously, Inspector Phillipson's approach towards this issue – namely, that it is sufficient for there to be a “reasonable assurance” that the site would have sufficient pathing access – should not be regarded as undermining the very special circumstances test. Nevertheless, even if applied, it simply cannot be concluded that there is a “reasonable assurance” of very special circumstances.
46. If it is right that Appellants will not be able to get access to the rail network in the off-peak, what does this mean for the development?
47. This is resolved, of course, by Mr Gallop who confirmed: there would be no access during the peak (7-10 am and 4 – 7 pm); the off-peak is likely to be 6-7 am and 7-10 pm; so that access would only be possible, if restricted in the off-peak, to the hours 10 pm and 6 am. In those circumstances, the development would not, he agreed, amount to an SRFI⁴⁸. This analysis is consistent with the conclusions of Mr Geldard⁴⁹ who indicated that the development would fail if access could only be gained at night.
48. The reality is that this point is fatal to the development – it simply cannot be concluded that will be gained, or, should it test apply, that the

⁴⁸ XX, NG.

⁴⁹ Appendix G, BW Proof.

Secretary of State can be “reasonably assured” that the development will have access to the rail network.

(d) Rail Market Connectivity

(i) General Matters

49. Radlett will not be well-located to receive freight. It may, of course, be said that other locations will have similar difficulties. That is, however, nothing to the point. The question is whether, on the basis of the circumstances presented in this case –that is, the rail promotion fund, the trigger for gauge enhancement, the type of gauge enhancement proposed or the extent of access - the proposals will have a connectivity to rail destinations and origins such that it will achieve the stated aim of SRFIs to achieve the modal shift from road to rail. If there is little confidence that it will achieve its stated aims, that will tell against it. The issue of location should not, in those circumstances be compared in isolation against other proposed locations, but weighed in the balance of each of the other restrictions when deciding whether the development will be an SRFI. Other locations may, for example, have other options available which would support, in greater ways than is offered by the Appellant in this appeal, the carriage of freight by rail.
50. Mr Wilson has assessed the locations from which Mr Gallop has said that rail freight is assumed to arrive from and where it will go to. 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, however, it is important⁵⁰ to understand the significance of the potential destinations and origins since, should the primary destinations/origins be ill-suited to service by rail from Radlett this will further hamper the success of the development.

⁵⁰ See his proof (LPA/2.2) at section 9.

51. It is to be noted, in that regard, that Inspector Phillipson's belief was that the site would operate as an SRFI, in part, because it would be receiving freight from a range of locations⁵¹; patently, if it is not able to receive freight from one of those destinations, that will be significant.
52. The locations from which freight will arrive and where it will go to and in what proportions was identified by Mr Gallop in the ES⁵²: in short, the significant elements would be from the Deep Sea ports (primarily Felixstowe and Southampton), the Channel Tunnel and the domestic intermodal market. From the identified proportions some 82% of the total freight traffic would derive from the Channel Tunnel and Deep sea ports, while only 11% would be domestic traffic.
53. That is patently unrealistic given that the Scenarios and Long Distance Forecasts RUS⁵³ identification of domestic traffic as the basis for intermodal growth (see para. 8.5.3) and the GB Model outputs produced by Mr Wilson (which have not been criticised)⁵⁴ which identified that domestic growth increased by reference to the creation of rail linked sheds and deep sea traffic was not affected at all. Mr Gallop did not disagree with these calculations⁵⁵.
54. The significance of this is that it identifies the importance of being able to achieve a good accessibility to the domestic markets, a matter I now turn to.

(ii) Domestic Access

55. It is, it appears, common ground (and has been accepted by Mr Gallop) that the primary route to access the domestic markets the West Coast Mainline ("WCML"). Mr Wilson has described the problems that

⁵¹ See Inspector's Report, 9/CD/8.2, para. 16.70.

⁵² TR3.

⁵³ BW Gallop Rebuttal, 9/LPA/2.19, Appendix A, pges 83-84.

⁵⁴ Pg. 5-6, BW Gallop Rebuttal, 9/LPA/2.19.

⁵⁵ XX, MR

exist in gaining access to the WCML⁵⁶. 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.

56. The problem of gaining to the WCML was not specifically dealt with at the previous inquiry; the assessment was based, primarily, on the problems of, generally, crossing London, not with the movements necessary to get onto the MML⁵⁷.
57. It is for that reason that the Long Distance forecasts RUS does not refer to the Midland Mainline as a main route for growth⁵⁸, but, rather, the WCML and other routes. Mr Smith's suggestion that this was because the Midland Mainline would feed London, which was not a long distance, ignores the fact that the main locations for freight were from the North and other long distances, a point he acknowledged⁵⁹. While he was on the steering group which was consulted on that RUS, he did not write any part of it and could not recall if there was any comment by his steering group on the relevant part of the document⁶⁰.
58. 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 to be experienced on other lines. However, the Midland Mainline will itself, like the WCML⁶¹ be at capacity in 2020⁶².
59. As for the likelihood of upgrades being proposed on the MML, the numerous instances of proposals being made to upgrade rail facilities

⁵⁶ BW Proof 9/LPA2/2, para. 9.28 – 9.29.

⁵⁷ See Inspector's Report, 9/CD/8.2, para. 7.273 – 7.279 and 16.70.

⁵⁸ BW Rebuttal to NG, Appx A, pg 84.

⁵⁹ See GS, Xx.

⁶⁰ XX, MR.

⁶¹ See Gallop Apps, Appx L.

⁶² See extract, para. 1.9.

should be noted⁶³, only to be either delayed very significantly or not carried into effect. Mr Gallop did not disagree with Mr Wilson's examples in his rebuttal⁶⁴.

60. The Appellant has relied heavily on the Strategic Railfreight Network strategy⁶⁵ 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) are proposed, a key aspect will be the Routes to the North study which may discount this route entirely from further works. The dependency of the Midland Mainline upgrading on this study was confirmed by Mr Gallop.

61. It is also to be noted there are specific examples where the apparent upgrading of the MML is considerably less than certain. In the Network Rail RUS⁶⁶, in respect of electrification, the potentially unlimited benefits of electrification were noted. However, by July 2009, it was pointed out⁶⁷ that the Government was considering the proposals and, in the East Midlands draft RUS⁶⁸ (August 2009), the potential for electrification was still being considered.

62. In a similar way, it is clear from the Network Rail Business Case⁶⁹ 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 by the DfT⁷⁰. 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 funding⁷¹; this was not rebutted by Mr Gallop.

⁶³ BW Gallop Rebuttal, pg. 7.

⁶⁴ XX, MR.

⁶⁵ 9/CD/5.4.

⁶⁶ Gallop Appx J page 76.

⁶⁷ See Appx K, Gallop.

⁶⁸ See pages 9-10, 9/CD/5.5.

⁶⁹ Gallop, Appx H, pages 38, 43-44.

⁷⁰ See BW Appx N, pages 71-72.

⁷¹ BW, EC.

63. 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 northbound connection to the site. This is a wholly speculative suggestion and should be given no weight in this case; Mr Gallop accepted that he was placing no weight on it. In addition, 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. Fourth, it was not, as Mr Tilley acknowledged, the subject of assessment in the ES⁷². The reason why the Appellants are perhaps intent on referring to it is that they are mindful of the SRA guidance which indicates the need for a two-way connection⁷³.

(iii) Channel Tunnel Traffic

64. As Mr Gallop accepted, in the absence of W9 gauge, no intermodal trains will be able to get to the site.

65. 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. It is said that this was offered at the time of the last inquiry. This was not identified in the statement of agreed facts with Network Rail and it was not in the conditions offered at the time of this inquiry. There was no suggestion that this was actually being offered, whatever was the belief of Mr Cleland in the letter he produced previously⁷⁴. It is certainly clear (following your questions, Sir to Mr Gallop) that the W9 clearance is not achieved automatically through w10 gauge enhancement and it W9 is not nested in W10.

66. It should also be noted that the inability to gain access from the Channel Tunnel because of the gauge restrictions was not something

⁷² RT, I's Qs.

⁷³ Para. 4.32, 9/CD/5.1.

⁷⁴ CB/1.9

that had been raised before Inspector Phillipson. As a result, it is important to decide what the significance of this is. Inspector Phillipson considered that, as part of the reasoning why the development would act as an SRFI, there would be access to various destinations; as a result of the W9 gauge restriction, no intermodal service from the channel Tunnel can access the Site until gauge clearance is undertaken.

(iv) Deep Sea Intermodal

67. The problem with Radlett is that it is a short distance from the primary deep sea ports, particularly Felixstowe and Southampton; at distances under 120 miles or less rail is commercially not cost effective against road movements to ports⁷⁵; Mr Gallop accepted that as a generality, that was so⁷⁶. It will be recalled that, in RX, it was suggested that this contradicted what Mr Wilson said about short distance haulage domestically⁷⁷; that is an unfair depiction of his evidence which distinguishes between the economics of short haul in the context of deep sea port traffic⁷⁸ and domestic traffic – that is unsurprising given that different considerations apply to each. In any event, Mr Smith accepted that short haul, if not used as an intensive service (which he would not define), would be uneconomic without a rail promotion fund. His examples of movements to ports given in EC were all notably long-distance⁷⁹.

68. The purpose of the rail promotion subsidy⁸⁰ is specifically to make up for the additional disadvantage that would be caused to the rail offer pending 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 amongst other matters.

⁷⁵ Para. 9.5, BW.

⁷⁶ NG, XX.

⁷⁷ See paragraph 9.26.

⁷⁸ Para. 9.5, BW Proof.

⁷⁹ XX, GS, MR.

⁸⁰ See the section 106 agreement.

69. 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 rebuttal⁸¹), it would last about 125 days; while this may be longer with fewer trains or when applying the subsidy for Southampton, it would not be significantly greater. Mr Gallop did not seek to disagree with the calculations that had been undertaken by Mr Wilson⁸². Even if other assumptions are used, it is clear that the Appellants were previously suggesting the fund would only last for 2 years⁸³; once it has run out, deepsea traffic will be uneconomic.
70. The ability to make the rail offer more attractive must, ultimately, rest on the necessary gauge enhancement and not on a finite and limited rail promotion fund. I deal with enhancement next.

(e) The Cost of Gauge Enhancement

71. 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 once the rail promotion fund has run out.
72. Inspector Phillipson was content that the conditions which were proposed would be fulfilled and that the further works, including gauge enhancement would be carried out⁸⁴. 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

⁸¹ See para 7.10, BW Rebuttal Gallop, 9/LPA2.19.

⁸² Confirmed, XX, NG.

⁸³ Inspector's Report, 9/CD/8.2, para. 7.289.

⁸⁴ Inspector's Report, 9/CD/8.2, 16.153.

intend to make use of the rail facilities provided". There are two points to note on this conclusion. First, the decision to upgrade would be based primarily on financial considerations (albeit informed by Government subsidies) and no evidence was provided to the inquiry as to likelihood that the costs, in the region of £30 millions, would make this viable. Mr Gallop confirmed that was the case. 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. Again, that was confirmed by Mr Gallop⁸⁵. Inspector Phillipson's conclusion was, with respect, reached without any detailed evidence being presented on the point at all.

73. 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 other than persons who wanted to use rail. The decision to upgrade will now, as before, be decided on economic grounds. It is to be remembered that, as drafted, the development is capable of being built out to 275,000 if Network Rail requires gauge enhancement to w9 and w10 on both the Junction Road junction and Dudding Hill legs before further trains are allowed on the network. On this basis, the floorspace could be built out almost totally without any gauge enhancement being carried out at all.

74. In order to avoid the obvious potential for either of these unacceptable eventualities, the Council has put forward alternative conditions⁸⁶ which have been wholly rejected by the Appellant and described, as yet another attempt to taint the Council with malpractice, as "wrecking conditions"; that is a surprising suggestion since, if the Appellant is so sure that there will be gauge enhancement, the conditions ensure that they will be done. It is to be recalled that the Council's suggestions do

⁸⁵ XX, NG.

⁸⁶ Proposed condition 12.

not require works to be done any sooner than the Appellant's conditions suggest (although the Appellant did not seem to understand that); they simply require approval sooner.

(f) The Context: Current Need and Other Facilities

75. The merits of this proposal must be seen against the backdrop of other, recently permitted developments.
76. It is right, of course, that Inspector Phillipson's conclusion was that there was still a need for SRFI in spite of permission having been granted for London Gateway and Howbury Park which together provide some 1,200,000 metres of rail-connected warehousing floorspace.
77. However, that was a conclusion reached on the basis of him having limited knowledge about London Gateway⁸⁷ and being ultimately unconvinced that it was capable of being an SRFI: 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"⁸⁸.
78. That understanding has been corrected in the evidence provided by Mr Wilson⁸⁹ 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". The Inspector also took that view because it appeared that EERA was of the view that London Gateway was a port; that is not what they have indicated in

⁸⁷ Page 191, Inspector's Report, 9/CD/8.2.

⁸⁸ Ibid.

⁸⁹ Appx A, pg. 2.

the most recent letters⁹⁰. Mr Gallop accepted that London Gateway is capable of being an SRFI⁹¹ and is not restricted to port users.

79. It is clear, then, that matters have moved on since the analysis of Inspector Phillipson⁹². It is also to be noted that Mr Gallop acknowledged that, just as is the situation in the West Midlands, London Gateway is capable of subsisting with Howbury Park, despite their close proximity⁹³. It is also notable that Mr Smith pointed out that DBS would be serving London Gateway.
80. The further difference between the current assessment of Howbury Park and London Gateway and that which was the subject of consideration by Inspector Phillipson is that, in the present case, there is significant and compelling evidence that the distribution area of potential occupiers is such that these two sites will be capable of meeting the strategic need.
81. In these circumstances, where there can be nothing less than (and the Council says there should be considerably more than) clear doubts about the ability of Radlett to operate as an SRFI and in circumstances where Radlett will do such massive damage to the Green Belt, there is no especial need or urgency which should override such uncertainties.
82. The recent correspondence from the DfT⁹⁴, 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.
83. The letter notes that more than the predicted amount of floorspace has been provided in particular area, but that there remains a significant

⁹⁰ JH Apps. Pg. 66.

⁹¹ NG, XX.

⁹² See Inspector's Report, 9/CD/8.2, pg. 191(iii).

⁹³ NG, XX.

⁹⁴ Appx M, BW Proof 9/LPA2/2.

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 permitted⁹⁵.

84. 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 policy⁹⁶, 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 and the weight which should be attached to Radlett should be correspondingly reduced.

(g) General Support of Network Rail

85. The Appellants, of course, pray in aid the support of Network Rail in support of Radlett. Mr Wilson, rightly, described that support as “very weak”⁹⁷.
86. It should be noted, as I have indicated already, that their support is “in principle” only and in circumstances where the progress of Radlett through the formal approval process (the GRIP process), has only (as it was previously) passed the first stage, GRIP stage 1. There is also a Basic Services Agreement which is acknowledged by Mr Gallop as an agreement where all that is required is *prima facie* feasibility.
87. It is quite clear from their recent responses to the inquiry⁹⁸ that it is Network Rail’s statutory responsibility to engage with the appellant. It is also quite clear that they are significantly less committed in their support

⁹⁵ Agreed, NG, XX, MR.

⁹⁶ 9/CD/5.4.

⁹⁷ BW XX MK

⁹⁸ 9/HS/INQ 2.0.

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 support would not cease. Inspector Phillipson placed considerable reliance on the fact that Network Rail, as the “guardians of the UK rail network”⁹⁹ were “fully supportive”¹⁰⁰ of the proposal. Their “in principle” support is considerably more circumspect than it was when, in 2007, it was said there were “no concerns”¹⁰¹ about gaining access to the site from the Midland Mainline. That statement has notably, not been repeated in this inquiry.

(h) DB Schenker's Support

88. Considerable weight was placed by Mr Tilley¹⁰² on the support of DB Schenker for Radlett. An agreement has, we are told, been entered into between the Appellant and DB Schenker but, despite being sought by the Council in October 2009, it was not disclosed on the basis of commercial confidentiality. It cannot be seen, therefore, whether there is a number of trains, below which DBS can walk away. It cannot be seen what, if any, is the financial investment being made by DBS.
89. It is, to say the least, surprising that this is commercially confidential – why, for example, can the financial elements not be blanked out? As a result of the refusal to give any information at all about the document when questioned upon it (on issues which cannot be regarded as confidential matters), the significance of the support provided by DBS must be reduced in weight.
90. It was also noteworthy that Mr Smith indicated to you that there was no particular reason why Radlett was chosen by DBS; it was very probably because DB Schenker was looking to expand.

⁹⁹ Para. 16.71, Inspector's Report, 9/CD/8.2.

¹⁰⁰ Para. 16.71, Inspector's Report, 9/CD/8.2.

¹⁰¹ Para 15.2, Inspector's Report, 9/CD/8.2.

¹⁰² EC, RT.

(C) Alternatives

91. The Appellants accept that it is necessary for them to show that there is no better site than Radlett. Mr Tilley accepted that the “evidential burden”¹⁰³ was upon the Appellant to meet the test 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” planning permission for the appeal proposal should be refused” [my emphasis].

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

- (a) First, it has restricted its search to the north-west sector;
- (b) Second, and in any event, even if it was correct to restrict its search to the north-west sector, the assessment was wholly inadequate.

93. It is to be noted that each of these aspects contributed to the reason for refusal¹⁰⁴.

(a) Whether the Assessment Should have been Restricted to the North West Sector

(i) Introductory Remarks

¹⁰³ Para 204, Inspector's Report, 9/CD/8.2.

¹⁰⁴ See the Council's SoC, para. 8.2 and R for R 4.

94. 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 flawed¹⁰⁵.

95. The basis of the Appellant's decision¹⁰⁶ to restrict the alternatives site search was because of the Inspector's conclusion in, essentially, one paragraph of the decision letter¹⁰⁷; 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.

96. As Mr Tilley agreed¹⁰⁸, 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 and was the only the only significant basis for Inspector Phillipson's view of the appropriateness of the North West sector.

¹⁰⁵ RT, XX, MR.

¹⁰⁶ See para. 2.4 of Technical Report 6, 9/CD/2.8.

¹⁰⁷ Para. 16.125, Inspector's Report, 9/CD/8.2.

¹⁰⁸ XX, MR, RT.

97. As Mr Tilley accepted, however, if the occupiers of SRFI warehousing distribute on a regional basis comprising London and the South East, there is no 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 London¹⁰⁹.
98. It is clear from his analysis that the Inspector's assessment of the North West sector was, given the above, based on an assumption that the distribution area of those likely to occupy the premises would be within the North West sector. He had no 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 conclusions¹¹⁰; it contained no market analysis and was in very limited terms. It simply did not provide a basis for the conclusion that was reached.
99. It is plainly critical to understand the distribution systems of those expected to occupy the SRFI. If there is the potential for all, or a majority, of those who will be occupying the premises to distribute to locations on a regional basis comprising London and the South-east, there is simply no basis for the restriction.
100. It seems, given the evidence of Mr Gallop, that it is likely to be argued that it is impossible to identify what distribution areas of the potential occupiers of Radlett is likely to be. If that is its case, that must be regarded as a wholly unacceptable basis for reaching the judgment the search area for an SRFI should be restricted to the North west sector.
101. Additionally, it is likely that there will be a concentration by the Appellant on whether there is a market within the North West sector for the SRFI. Care should be taken to discount that point in the context of the alternatives issue; it is relevant to whether there is a market for

¹⁰⁹ XX, MR, RT.

¹¹⁰ See JH Rebuttal evidence, pages 9 – 10.

warehousing in the northwest sector but it is irrelevant to whether the search for warehousing to meet the need is to be restricted to that area. 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 area¹¹¹.

102. The point is that the alternatives assessment is to undertake a proper search as to whether other better alternatives exist for the limited SRFI need in London and the South East. If the evidence is that the SRFI are footloose because of the distribution areas that either all or the majority of potential occupiers could have, then the fact that there may be a market for warehousing in a particular area does not impact on that at all. As Mr Gallop acknowledged, acting fairly, the search should in those circumstances be widened.

(ii) The Appellant's Evidence on Distribution Areas

103. The evidence which presented by the Appellant before this inquiry, to the extent that it engages with the distribution area of potential occupiers at all, is either unpersuasive or indicates what the Appellant alleges.
104. The basis of the Appellant's case on this issue is set out in one section of the ES as informed by Appendix A10¹¹². Technical Report 3 sets out in effect, in two sections, the entirety of its case for the restriction to the North West sector.
105. 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

¹¹¹ XX, MR, RT

¹¹² Technical Report 3.

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 such scale. The only part of the document which does that is contained in one paragraph of the appendix; 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 Dunstable¹¹³; that indicates its distribution area was to the whole of London and the South East, not simply a sector of London. In RX, it was suggested that King Sturge were aware of this move; that is, of course, significant – given the context of the statement (that bigger facilities are 'footloose'), it establishes the distribution area is wider than simply sectoral.

106. In RX of Mr Tilley, it was suggested that the King Sturge report did more than look only at the market area; reference was made to the section of the Report which referred to the Lambert Smith Hampton report¹¹⁴ but that document simply deals, again, with market areas, not what distribution areas the occupiers are serving. There was also, you will recall, some concentration in RX of Mr Tilley on the rental levels of various areas in the LSH report¹¹⁵; that is no evidence, at all, of the distribution areas of the occupiers of the units. Again, the point needs to be made absolutely clear but that the relevant issue is not the market in which the buildings are to be located but the distribution area of its occupant.
107. Turning to other live evidence, Mr Gallop confirmed that he did not indicate anywhere in his evidence what the distribution area of potential occupiers might be¹¹⁶. While in his rebuttal he referred to the

¹¹³ See 9/LPA/6.11.

¹¹⁴ See BW's Appendix F.

¹¹⁵ Page 9-10, Appx f, BW Apps.

¹¹⁶ XX, MR

distribution area of certain food retailers, he confirmed that he was putting forward no evidence to indicate: (a) the degree of interrelationship between distribution areas of each of the distribution centres; (b) the extent to which certain centres dealt with particular lines and had distribution areas over a regional basis in that way; (c) whether there was a move to consolidating any of those distribution centres. It should be remembered that, when questioned by you, Sir, Mr Gallop indicated that, in terms of occupiers "the observed situation" is that there is a "mixture" and is constituted by "shades of grey, not black or white". The picture he described was of various locations having different sorts of occupiers; that suggested, perhaps for the first time, that the distribution areas could be wider than the northwest sector. It cannot properly be concluded, therefore, that the SRFI will be occupied by distributors distributing to the north-west sector; in such circumstances, restriction to the north-west sector was, quite plainly, unjustified.

108. 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.
109. Mr Smith confirmed¹¹⁷ that he was not providing any evidence on where potential occupiers of the SRFI would be distributing to, in spite of suggestions from Mr Gallop and Mr Tilley that he would; that is unsurprising given that he has no direct experience of dealing with intermodal sheds.
110. It appeared at one stage that Mr Smith would be providing evidence on the distribution areas of potential occupiers. He side from these

¹¹⁷ XX, MR, GS.

matters, the Appellants rely on the evidence of DB Schenker and the distribution centres of food retailers within the London area¹¹⁸.

111. In short, the Appellant's evidence is entirely lacking that the units will be occupied primarily 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.

(iii) The Council's Evidence

112. 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 likely to be occupying an SRFI. It is clear, even from a cursory glance at the Council's case previously¹¹⁹, 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.

113. Mr Gallop indicated that he would be interested if a public body had indicated what the likely distribution areas of likely occupiers of the SRFI would be. The SRA guidance indicates clearly what that distribution area will be:

- (a) SRFI "operate such as to serve regional areas, they are also key components in a national and international network"¹²⁰;

¹¹⁸ See Gallop Rebuttal, appx A.

¹¹⁹ Section 7.205-212.

¹²⁰ 4.4, CD/5.1

- (b) "Occupiers are likely to be major logistics service companies and national and multi-national manufacturers and retailers";
- (c) SRFI "will include intermodal (container) handling and also the accommodation of large-scale warehousing, processing or manufacturing facilities. Occupiers of such Strategic RFI will often include businesses which choose to locate their national and regional distribution centres at such strategic locations.

114. Given that the SRA felt able to identify what the distribution areas of likely occupiers would be, it is surprising that Mr Gallop did not.

115. In terms of regional policy (T10 of the East of England Plan¹²¹ and T3 of the South East Plan¹²²) 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 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 quadrant¹²³. It was suggested¹²⁴ that the description at 7.25 strengthens the north-west sector; that attempt was one which ignores the fact that the previous¹²⁵ draft indicated that an SRFI would be in the northern quadrant but now does not. The description is describing the "region" in paragraph 7.25, not the north west sector.

116. Professor McKinnon's assessment (whose expertise was not challenged¹²⁶) has indicated the extent to which non-food retailers will generally have about 3 distribution centres and that food retailers have a different role¹²⁷. The most that could be said by Mr Tilley as a criticism

¹²¹ 9/CD/4.1.

¹²² 9/CD/4.2.

¹²³ JH Rebuttal, Appx WH11, October 09 letter.

¹²⁴ RX RT.

¹²⁵ HS1.12.

¹²⁶ RT, XX, MR.

¹²⁷ See Appx D, BW Apps, para. 1.3.

of this analysis is that it¹²⁸ was “broadbrush”; not the most extreme criticism.

117. SDG commissioned market research to establish the extent to which distributors would be likely to occupy the SRFI. It was suggested that the number responses was insignificant. However, there are two points to note about this criticism. First, the companies themselves were significant concerns who distributes in aggregate, millions of miles. Second, absolutely no rebuttal evidence was provided by the Appellant to establish the contrary position. The conclusions arising from research are absolutely clear: the approach of potential occupiers would be to locate a single distribution centre in the south east which would serve that area.

118. Mr Wilson was cross-examined on the basis of various documents which it was suggested indicated there was a sectoral approach to warehousing in London. The patent shortfall in 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 missed the point. The Lambert Smith Hampton report¹²⁹ simply describes the areas of market demand as I have indicated, not the distribution areas of those who occupy the warehousing; the same is true of the DfT report on container freight¹³⁰.

119. Finally, as a simple point to note, no other search area for an SRFI has been as localised as the appellant’s¹³¹ which either looked at the whole of London (“KIG”) or large parts of it (at Howbury).

(iv) The SDG Alternatives Assessment

¹²⁸ See RX RT

¹²⁹ Appx F, BW Apps.

¹³⁰ Appx N, BW Apps.

¹³¹ See the plan at page 84, BW Proof 9/LPA2/2.

120. In summary, therefore, the evidence establishes quite clearly that the search assessment should have been undertaken on a much wider basis.
121. Had that been done, as the SDG analysis¹³² has shown, there are many sites which are better able to provide an SRFI whilst causing less harm than Radlett. However, as Mr Tilley acknowledged¹³³, the Appellants, whilst they may have criticised parts of the methodology, did not suggest that any of the ultimate criticisms were wrong.
122. In these circumstances, there can be no real doubt that, had an assessment reflected the regional nature of the distribution occupiers who are likely to occupy the SRFI, other, better locations would have been found. The alternatives analysis is, consequently, wholly flawed.
123. 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 if it is made (and it should be noted that it was not put in XX), for two reasons. First, it was no part of the Appellant's case that they not verified 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.

(b) The Analysis of Alternatives in the North-West Sector

¹³² BW Appx J.

¹³³ RT XX MR.

124. 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 so defective on numerous levels that it should be regarded as unfit for its purpose.

(i) The choice of methodology

125. The Appellants took essentially the approach of following the alternatives site assessment carried out in the Howbury Park appeal¹³⁴ on the basis, it appears, that it had been accepted in that appeal by various parties. The acceptance of that methodology does not, however, justify its use in this case. There was no specific endorsement of the analysis by Inspector Phillipson in the appeal. No party had criticised its methodology and, consequently, Inspector Phillipson had little reason to look at it further. A very good example of his lack of scrutiny of the analysis in that case is demonstrated by the fact that Inspector Phillipson accepted a 2 km limit from a rail link as an appropriate sifting criterion; that approach was, however, rejected by Inspector Phillipson in the Radlett appeal¹³⁵. It was suggested¹³⁶ that the study was looked at "quite thoroughly" in the lead up to the inquiry but nothing more specific was given to how it was looked at and for what purpose. It was suggested that the approach was also consistent with that taken in KIG¹³⁷; there was no evidence, at all, however, to support that contention.

126. When each of the stages of the analysis is considered there are numerous 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, some 3 months before the appeal. The continual suggestion that the Council had not indicated its concerns must be seen in the light of that fact.

¹³⁴ 9/CD/6.2.

¹³⁵ See Inspector's Report, 9/CD/8.2, pg. 186, fn 2.

¹³⁶ RX RT

¹³⁷ RX RT

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

(ii) The initial site search

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

129. First, the search removed from consideration those sites which were regarded as unavailable because they were either allocated for¹³⁸ housing or amounted to existing employment land unless the remaining vacant area was greater than 40 hectares. The effect of taking such a restricted area was to quite clearly unnecessarily restrict the opportunities for finding alternative site.

130. 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. Mr Tilley 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"¹³⁹ for housing. It is to be noted, of course, that the Appellant's basis for its 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 the basis of another need is plainly doing away with sites which may be appropriate alternatives¹⁴⁰. 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 and treated differently. The potential for smaller areas of housing (that is,

¹³⁸ See para. 5.1.5 of Technical Report 6, 9/CD/2.8.

¹³⁹ RT, EC and XX, MR.

¹⁴⁰CD

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.

131. Reference was made to PPG13¹⁴¹ in reinforcing the reason for rejecting housing¹⁴². It is to be noted, however, that this was not a factor used in the assessment and was raised, in fact, in RX. In any event, it is a bad point – if PPG13 is so relevant to the issue, then mixed uses should not have been considered either, but they were.
132. 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. Mr Tilley suggested that in his response¹⁴³ he had given information on industrial sites; he did not; in fact, he simply rejected SDG's criticism on this point¹⁴⁴.
133. Another part of the initial search system was to exclude sites which were more than 5 kms from a railway line¹⁴⁵ (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 this distance and the environmental effects of undertaking the connection¹⁴⁶. As for the

¹⁴¹ Para. 18

¹⁴² RX RT.

¹⁴³ HS/1.5

¹⁴⁴ Para. 31.

¹⁴⁵ Paragraph 5.2.3, Technical Report 6, 9/CD/2.8.

¹⁴⁶ See paragraphs 2.2.1. – 2.2.3 of Technical Report 6, 9/CD/2.8.

financial aspect, that was, quite plainly, an impermissible criterion; such an approach had, rightly, been rejected by Inspector Phillipson when he concluded that using financial elements as a justification for the criteria was impermissible in the absence of an overall viability analysis¹⁴⁷.

134. As to the topographical 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 has been a suggestion that this point was somehow raised late in the day. It was, however, a point raised in August and SDG's critique was peremptorily dismissed. The Appellant has now been, through this inquiry, trying to plug the gaps on this issue.

135. What is notable, however, is that some of the areas which were rejected by CGMS in their response to this criticism¹⁴⁸ (Areas 1 and 3) were not in the Green Belt¹⁴⁹; patently, the decision to exclude these sites had the effect of removing potentially very meritorious sites without any detailed scrutiny at all. Further information¹⁵⁰ has again been provided on these areas, detailing some of the topography. Again, the points that are made seem to be an exercise in providing detail without giving any indication of how that establishes unacceptability: there is no reference to any of the topographical descriptions producing an unfeasible connection to a rail line. Moreover, it is now suggested that a further matter of relevance to one of the areas is that it is *proposed* green belt, which is, to say the least, an odd ground for restricting the search, given Radlett's location.

136. 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

¹⁴⁷ Para. 16.30 and fn2, pg 186, Inspector's Report, 9/CD/8.2.

¹⁴⁸ Appendix 4 of 9/HS/1.5.

¹⁴⁹ 9/LPA/6.10.

¹⁵⁰ See RT response to LPA/6.13

was a point which had been raised by SDG in its August 2009 report. Mr Tilley's documentary reply to these points¹⁵¹ did not actually describe what definition CGMS were using to identify a site. It was only in XX that Mr Tilley 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 were 1000's of sites¹⁵². 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.

137. 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.
138. 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 point¹⁵³ and undertook a 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 Wokingham¹⁵⁴. 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 an effective bypass to Bracknell) onto the M4 at a distance of some 27 kms to the M25.
139. The later response of Mr Tilley as to why these sites should remain removed¹⁵⁵ was on the basis of road issues again (which assessment did not apply, as Mr Tilley acknowledged, to the eastern most site) and the

¹⁵¹ 9/HS/1.5.

¹⁵² RT, XX, MR.

¹⁵³ Para. 25, 9/HS1.5.

¹⁵⁴ See 9/HS1.5, Appx 3.

¹⁵⁵ See 9/HS1.9, last 2 pages.

fact that the area had been included in a draft allocation to the Wokingham Core Strategy for housing. The allocation was stated to have been endorsed by an Inspector. However, inclusion in a draft allocation was not one of his criteria. In any event, this aspect was not known about at the time of the alternatives analysis. This negative approach might well be justified were it not the fact that none of these sites is in the Green Belt. To simply reject this area, given that, without more, suggests a systemic negativity to candidate alternative sites and areas.

140. A further attempt was made to undermine these sites¹⁵⁶ by referring to the lack of road access¹⁵⁷, but the key point is that, on the southern route referred to by Mr Tilley, it remains a high standard strategic route, well trafficked by HGVs.

(iii) The Long List Sifting

141. 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 questionably removed sites have now been resolved so that SDG's points are academic.
142. First, the point, if made, is inaccurate. There are still numerous sites that should have been considered at the short list stage¹⁵⁸; Mr Tilley's most recent note has not resolved the position¹⁵⁹. Second, the point is that each of the sites whose issues have been resolved have 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 particularly where the point has been raised by the Council at an earlier stage. The Council,

¹⁵⁶ CGMS response to LPA/6.13.

¹⁵⁷ Para. 4.

¹⁵⁸ See 9/LPA/6.3

¹⁵⁹ 9/HS/1.9.

as I have said, provided the 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.

143. In any event, it should be noted that, of all of the points raised in the critique by SDG as to sites which should stay in, none of them were accepted by CGMS, not one; its approach has not actually been to engage with the points raised by SDG but to reject them.
144. I turn then to the problems with the Appellant's long list sifting analysis. The points I deal with below derive from the critique undertaken by SDG.
145. With regard to the rail criterion in the Technical Report¹⁶⁰, 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. These points did make a difference, in spite of what Mr Tilley indicated¹⁶¹, given that Denham was rejected, in part, on this basis. It was suggested that the alternatives site analysis by SDG used similar wording, but the point was that there was a clear scoring system applied to that, not simply criteria based on words alone.
146. A further, inherent 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.

¹⁶⁰ See para. 7.14, Technical Report 6, 9/CD/2.8.

¹⁶¹ RX, RT.

147. 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 first list.
148. In short, the effect of the assessment was to remove 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. The point is that, had these been identified, a more proactive approach towards road or rail issues would have been taken because of the clear benefits in landscape/visual/harm terms a site may have had.
149. Similarly, rail gauge was removed as a criterion in total (although it was kept in at Howbury¹⁶²). 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 additional importance of this approach is that, the benefits of better gauge are wholly ignored at this stage; they do not allow a site to be weighed up against Radlett.
150. An example of a site which should properly have got through the long list was Langley, site 6¹⁶³. 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 areas¹⁶⁴. A new road was feasible but ended up accessing the A4 which had a small section of residential area. 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 appeal Inspector,

¹⁶² See 9/CD/6.2, para. 3.9.

¹⁶³ See Appendix 6, Technical Report 6, 9/CD/2.8 and see RT, XX, MR.

¹⁶⁴ See para. 7.18 – 7.21, Technical Report 6, 9/CD/2.8.

Mr Self (see para. 13.364¹⁶⁵); it is also the access being proposed in SIFE which, of course, went through to the short list stage.

151. 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. It was suggested that the “better site” had got through¹⁶⁶, but there had been no analysis of whether it was “better” in terms of other impacts, like landscaping.
152. 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; it was then (last week) removed on the “duplicate” basis. That is surprising to say the least. 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)¹⁶⁷ was not removed for being unavailable.

(iv) The Mid Point Rejection

153. Following the long list rejection, the Appellant undertook a further stage of rejection¹⁶⁸. Again, at this stage of the process at the application stage, 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.

¹⁶⁵ 9/HS1.6.

¹⁶⁶ RT, RX.

¹⁶⁷ See Appendix 6, Site 30, Technical Report 6, 9/CD/2.8.

¹⁶⁸ Para. 7.32, Technical Report 6, 9/CD/2.8.

154. 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 would far against Radlett in relation to any other aspects of relevance.
155. Notably, it is only in Mr Tilley's further response ¹⁶⁹ (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; in spite of the further notes that have been produced by Mr Kelly, there has been nothing more.
156. 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 these sites being looked at in combination. Sites 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.
157. The Council submitted a note in order that¹⁷⁰ it could not be said that by not answering Mr Tilley's further response¹⁷¹ it had acceded to his points on the duplicate sites points, which was the suggestion that was being made by the Appellants during RX of Mr Tilley. The further response produced by Mr Tilley now, the first time takes further, for

¹⁶⁹ 9/HS1.9, paras. 8 – 13.

¹⁷⁰ LPA/6.13.

¹⁷¹ HS/1.9.

example, that one of these sites is an irregular shape¹⁷² and suggests that new points have been taken by Mr Wilson about some sites, which were not¹⁷³.

158. A different approach was taken towards Denham Aerodrome (site 30) in the sifting process; it did not¹⁷⁴ fail any of the criteria, but in spite of this, it was removed because of a combination of ½ failings. Not only is there no basis for ½ failings, but the result of removing the site has been to prevent it from being considered on a comparative basis on those matters which were not considered but which were critical for Inspector Phillipson, like landscape and visual impact; that is, the benefits that might derive from development of this site, as against any other.
159. Now, however, a further point is taken in respect of Denham, that of rail connection¹⁷⁵; 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 and floated at the last possible stage.
160. Yet another approach was taken towards Tring (site 50)¹⁷⁶. 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. 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. It should be remembered that the site did pass¹⁷⁷ each of the long list elements. The point was not,

¹⁷² Para. 8

¹⁷³ Paragraph 9 suggests that LPA/6.13 raised concerns about Site 50 for the first time – that is wrong as the SDG notes show.

¹⁷⁴ See Table 3, Technical Report 6, 9/CD/2.8, page 32.

¹⁷⁵ See 9/HS1.9.

¹⁷⁶ Appx 6, Technical Report 6, 9/CD/2.8.

¹⁷⁷ Acknowledged by RT, RX.

therefore, “academic” but had the potential to be taken forward for further consideration¹⁷⁸.

161. 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.

(v) The Short List Stage

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

163. No real faith can be placed on the short list assessment. It was quite plainly subjective in respect of the market/operational considerations that were taken into account; there were no criteria for this issue that were capable of being understood and scrutinised.

164. There was, in contrast, a series of criteria which were applied to the sustainability analysis. Yet, even here, there was no ability to scrutinise the weight that CGMS had placed on a particular issue in order to reach a conclusion as to whether it was a reasonable assessment.

165. Mr Tilley’s point on the purpose of 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 was to allow the decision-maker to choose the best site for him or herself, 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 any 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”

¹⁷⁸ As was suggested in RX.

was given to the proximity of the site to London¹⁷⁹. If it was decided that substantial weight should not be given to this issue, what then is the decision-maker to do?

166. 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.
167. I deal with some specific criticisms of the approach taken in the shortlist analysis.
168. First, 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.
169. Second, there was no basis for placing “substantial weight” on the distance of a site 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 on matters like green belt, landscape and other impacts; so long as a site was capable of being an SRFI (rather than being the best SRFI), the greatest weight should then have been placed on landscape and visual impacts rather than proximity to London; that was Inspector Phillipson’s point and placing what appears to be the primary weight on distance

¹⁷⁹ Para. 8.11, Technical Report 6, 9/CD/2.8.

to London negated its significance. The consequence has been to favour Radlett when (as I have already indicated) other sites were more favourable from the point of view of impacts¹⁸⁰.

170. Third, no weight was placed on the rail criterion. It was said that this issue was treated as neutral because Radlett was regarded as being adequate by Inspector Phillipson. The general approach of putting rail in a neutral position is wholly unjustified – it is a critical factor as the SRA criteria makes plain. Mr Gallop¹⁸¹ accepted that a W8 gauge is better and more efficient in rail carriage terms than W7. However, Mr Gallop also accepted¹⁸², that in the alternative sites study, sites were compared in their existing rail state and not in an upgraded state. He also acknowledged that Radlett was only regarded by Inspector Phillipson as being acceptable in rail terms as a result, in part, of gauge enhancement; the premise of the acceptability of the Radlett proposals in rail terms was predicated on the upgrading. In consequence, the approach of treating rail as neutral unfairly and unjustifiably assisted Radlett in the alternatives assessment.

171. It was suggested¹⁸³ that Inspector Phillipson thought that the proposal was acceptable up to 175,000 metres without gauge enhancement; that is so, but the important point is that Radlett was being considered as a whole in terms of its floorspace when assessed at the alternatives stage, not in part; treating Radlett as a whole development as acceptable in rail terms in the alternatives assessment when it was not acceptable in such terms was quite obviously wrong and favoured Radlett against other better sites in this regard, like Colnbrook.

172. In order to bypass the obvious failing of the alternatives assessment, it was argued that Radlett was actually primarily W8 so as to display its comparability to Colnbrook; this was done, first, by reference to the

¹⁸⁰ See for example, Upper Sundon, which was found to have, overall lower landscape and visual impacts in Appendix 8 of TR6, last page.

¹⁸¹ NG, XX.

¹⁸² XX, NG, MR

¹⁸³ NG, RX

route plan which Mr Gallop, in his own evidence¹⁸⁴, considered to be wrong and then by Mr Smith who, by reference to the Sectional Appendix¹⁸⁵, indicated that large parts of the Midland Mainline were gauged at W7. Both of these witnesses acknowledged¹⁸⁶, however, that the Interfleet report before Inspector Phillipson was the only evidence of a detailed analysis of gauge and Mr Gallop acknowledged it showed 28 x W8 Substandard structures and 1025 x foul clearances at w8 and neither knew of anything more recent. In addition, and in any event, Mr Gallop accepted that in order to get onto the Midland Mainline from the south, there had to be gauge clearance works undertaken.

173. The patent failing of this approach towards rail was that it failed to recognise the additional benefits which could be provided by other sites in rail terms.

174. 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 interests¹⁸⁷; in Harlington there were potentially difficulties in land assembly¹⁸⁸. Of Littlewick Green there was no evidence of it being “promoted”¹⁸⁹. In respect of Radlett, however, when, at the time of Inspector Phillipson’s consideration of the site, was not positive in respect of the County Council’s position, it was said that the County Council had not “indicated an unwillingness”. The difference of emphasis is perfectly plain.

175. Fifth, the approach of the shortlist assessment systemically favoured Radlett. The approach was to consider each of the sites against

¹⁸⁴ NG Proof, pg 32, fn 4.

¹⁸⁵ At writing, unnumbered.

¹⁸⁶ XX, NG and GS.

¹⁸⁷ Para. 8.21, Technical Report 6, 9/CD/2.8.

¹⁸⁸ Para. 8.137-8, *ibid.*

¹⁸⁹ Para. 8.58, *ibid.*

Radlett, with Radlett offering the benefits that are currently offered¹⁹⁰. 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”¹⁹¹.

176. Sixth, the scale of development used as the basis of comparison favoured Radlett, particularly in the context of Colnbrook. The current 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 noise¹⁹² as against the scale of the development which was looked at on the Colnbrook site.
177. 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.
178. 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) it will patently make a difference – the extent of that difference can be seen clearly¹⁹³.

¹⁹⁰ See paragraph 8.84, Technical Report 6, 9/CD/2.8.

¹⁹¹ See paragraph 8.82, Technical Report 6, 9/CD/2.8.

¹⁹² See Appx 8, Technical Report 6, last page summary, footnotes.

¹⁹³ HS1.8, last page, aerial photograph.

179. 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 relevance as to how it would compare to Radlett. By ignoring the actual development at Colnbrook it has plainly 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. It was suggested¹⁹⁴ that the Secretary of State¹⁹⁵ had not criticised the scale of Radlett (and nor had the inspector). That misses the point. The “need” is for an SRFI, not of the scale of the warehousing proposed at Radlett; the point would be relevant if SIFE was not to be an SRFI, but it plainly is. In that sense, there is no difference in the “need” (relied upon by the Appellants) to be met in this case.
180. It was suggested that the proximity of Colnbrook to Heathrow is something that would hinder it in its use as an SRFI¹⁹⁶; evidence was being given by Mr Tilley without any expert basis on this issue (since he relied upon King Sturge for his market evidence).
181. 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 inquiry¹⁹⁷. The Appellants now acknowledge that there is no difficulty with access to the Colnbrook line¹⁹⁸ 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 Colnbrook line. Even if

¹⁹⁴ RX RT

¹⁹⁵ Para. 42; and Inspector's Report, 9/CD/8.2, 16.148.

¹⁹⁶ RT I's Os.

¹⁹⁷ 9/HS/1.8.

¹⁹⁸ Para. 25 of 9/HS/1.8 and para. 8.17 of Technical Report 6, 9/CD/2.8.

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, but it displays the largely negative approach taken to any criticisms that have been lodged by the Council or anyone else.

182. Much of the Appellant's time in XX on Colnbrook was spent in seeking to establish the significance of the Strategic gap¹⁹⁹. Mr Hargreaves was right in his approach towards this issue. His view²⁰⁰ was that the strategic gap policy did nothing to enhance the protection of the Green Belt in the vicinity of Colnbrook. This approach is supported by the fact that the assessment of harm to the gap was considered in the Life decision²⁰¹ in relation to the substantive effect on the gap, as opposed to its designation. Reference was made to part of the report²⁰² but this referred to the on-going pressure for housing as a result of the Radlett development, not the proposals themselves. 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 that²⁰³ in respect of "openness" both Colnbrook and Radlett would be affected to the same extent.

183. In any event, the gap policy contained in the Core Strategy²⁰⁴ is not up to date. The South East Plan requires a reconsideration of the gap policy²⁰⁵ which post-dated the core strategy and is very different from the former CC10b which does not specify any reconsideration; that was made clear by Mr Hargreaves²⁰⁶. The fact that PPS7 predated the draft core strategy does not affect this point – there is still a requirement for reconsideration.

¹⁹⁹ See, for example, MK XX of JH and JB.

²⁰⁰ EC, JH.

²⁰¹ See para. 13.129 and the summary, 9/HS/1.6.

²⁰² 13.367-8.

²⁰³ See the summaries for Colnbrook and Life in Appendix 8 of Technical Report 6, 9/CD/2.8.

²⁰⁴ See Kelly Rebuttal, Appx 4, HS/5.3.

²⁰⁵ See page 242, SE Plan, 9/CD/4.2.

²⁰⁶ See RX, JH.

184. Additionally, the Appellants have referred to the Colne Valley Park. There is an air of unreality about this point. 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 Plan²⁰⁷ lies over Radlett. As Mr Hargreaves pointed out²⁰⁸, it was possible to identify the same aims in the Colne Valley and Watling Chase plans. Reliance was placed²⁰⁹ on the Life decision²¹⁰ and the degree to which there would be a conflict from inappropriate development; that is exactly the position with regard to the Watling Chase Community Forest – the Inspector considered that, while the country park would be in accord with its aims, it would not on Areas 1 and 2 and, in relation to the landscape would be ultimately harmful²¹¹.

(vi) Summary

185. 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 in terms of the impacts it would cause; it has not done that.

(vii) The SDG Assessment

186. 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 stated (and indeed as Mr Wilson pointed

²⁰⁷ Policies ENV1 and 2, CD/4.1.

²⁰⁸ EC.

²⁰⁹ RX RT

²¹⁰ Para. 13.122

²¹¹ Inspector's Report, 9/CD/8.2, para. 16.177.

out²¹²), 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.

187. 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 obviously²¹³ 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 that 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 outside the North West sector which the Appellant considers to be irrelevant to its case.
188. 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.
189. That is quite obviously an unfair criticism. First, the Inspector did not complain, at all²¹⁴, about the use of a scoring system (and neither did either the Councils²¹⁵ or STRIFE); the point was the means by which such

²¹² XX, BW and JH.

²¹³ See JH, ReX.

²¹⁴ See paragraph 16.133-134, Inspector's Report, 9/CD/8.2.

²¹⁵ That is, Hertfordshire County, Hertsmere and St Albans Councils.

scoring was undertaken that rendered the previous alternatives assessment inadequate. Similarly, the employment land review guidance relied upon by Mr Tilley²¹⁶ does not reject scoring but points out that a scoring system is capable of being used²¹⁷.

190. 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 (which was not significant as his proof demonstrates) 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 as a result of that, 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, understandable and accessible. To that extent, they differ markedly from the CGMS report.

191. 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) in spite of what the LCA Topic Paper 6 indicated, namely that it should be included²¹⁸. That, however, was a criticism which went nowhere because Mr Hargreaves, as part of his policy analysis for the sites, did take that into account²¹⁹. It was also suggested that Mr Billingsley was wrong to use the LCA Topic Paper 6²²⁰ as against the GLVIA, given that it was not as evolved as the GLVIA. However, the Topic Paper actually post-dated the GLVIA (and specifically referred to it). The topic paper approach adopted by Mr Billingsley had the merit²²¹ of being able to

²¹⁶ See RT Rebuttal, Appx 3.

²¹⁷ RT Rebuttal, Appx 3, para. 3.41.

²¹⁸ XX, JB, 9/HS/5.2.

²¹⁹ JH, XX, MK

²²⁰ 9/HS/5.2

²²¹ EC, JB

gauge sensitivity in a contextual sense rather than requiring consideration of a specific form of development.

192. It was contended that the SDG assessment was flawed because it scored equally, for example, 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 scoring of Radlett against other non-Green Belt alternatives. It is difficult, in those circumstances, to understand how the criticism actually amounts to anything.
193. It was suggested²²² 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 criteria²²³.
194. The Study was criticised on the basis that the weighting to market was give 2% of the total scores²²⁴. 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 explained²²⁵.
195. It was contended that the road criterion was defective because it failed to consider the quality of the route by which the roads were accessed²²⁶. 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.

²²² BW XX MK

²²³ See Appx J, BW Apps.

²²⁴ BW XX MK

²²⁵ Ibid.

²²⁶ XX, BW

196. The result is that, on a clear and understandable basis, two sites within the North-west sector, come out better than Radlett. This conclusion acts to confirm that the Appellant's alternatives study, when properly assessed, is inadequate and cannot be relied upon.

(C) Country Park and By Pass

(i) Securing the Benefits Relied Upon (including other Rail funds and other mitigation matters)

197. The Secretary of State was clear that very little weight should be placed on the section 106 undertaking 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.

198. The Appellants now use three alternative mechanisms to seek to overcome this defect²²⁷.

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

200. 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).

201. Following the decision in *Merritt*, Circular 11/95, paras. 38-40, have been amended by the Secretary of State so that it now states: "when there are no prospects at all of the action in question being performed within the time-limit imposed by the permission negative conditions should not be imposed"²²⁸. This is set in general terms and does not deal with specific contexts, particularly where the conditions purport to provide

²²⁷ See draft condition 33.

²²⁸ HS/INO/4.

benefits of relevance to the very special circumstances case. In circumstances, where the burden is specifically placed on the Appellant to prove its case, as is the case here where the Appellant is to establish very special circumstances, the burden should be on the Appellant to show that there prospects of the condition being satisfied before the time limit has expired.

202. The third alternative appears simply to defer the issue of the payment of money, to a later stage in many respects, and, to that extent will impermissibly require the payment of money under a condition; it is both unlawful and contrary to the Secretary of State's guidance²²⁹.
203. As a result, the matters offered up in the section 106 agreement or by way of the condition should be given very little weight.

(ii) The Significance of the Country Park and the Bypass

204. If weight is to be given to the provisions of the section 106, the Council recognises the merit of the Country Park and the Bypass, but the degree of benefit should not be overestimated. As Mr Billingsley has pointed out²³⁰ the proposals for areas 3 – 8 are more in the nature of upgrades to existing areas of open space and agricultural land than new benefits. 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 the sites, particular areas 3, 4 and 8 and area 5; and other areas which do not have existing access (area 7) would still not have such access²³¹.
205. 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"²³² and that

²²⁹ Circular 11/95, Annex, para. 83.

²³⁰ Para. 5.8, JB Proof.

²³¹ See para. 5.2, JB Proof.

²³² Inspector's Report, 9/CD/8.2, para. 16.146.

some of new footpaths and bridleways would duplicate existing paths nearby²³³; 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 value²³⁴. Ultimately, while there was a benefit, he noted the restrictions.

206. The extent of the proposed benefits are, consequently, limited.

Conditions and the Section 106

207. I turn to deal with certain matters relating to the conditions. First, the contamination condition²³⁵ amendments are not agreed; they should be incorporated because, as was explained in the first conditions session, the condition needs to make plain that the decontamination scheme will deal with the potential pollution that is arising from the landfill area in order to accord with the Secretary of State's concerns that the condition should ensure that the development if permitted ensures that the land it covers is no longer to capable of ascription as contaminated land.

208. I have dealt with the requirement for sustainable construction conditions in the second conditions session. Mr Hargreaves has indicated in his proof the enhanced sustainability agenda²³⁶ that now exists; this will achieve that aim in part.

Assessment of the Reason for refusal and the Green Belt Balance

209. The Council's reasons for refusal individually establish why it is that planning permission should be refused.

²³³ Para. 16.146, Inspector's Report, 9/CD/8.2.

²³⁴ Para. 16.147, Inspector's Report, 9/CD/8.2.

²³⁵ Proposed condition 24.

²³⁶ See Part 1 of my Closing under Sustainability.

210. Looking, however, at the matter in the context of the Green Belt test, there will be very considerable harm caused to the Green belt by this development, by which it will undermine a large number of the purposes of including land in the Green Belt. There will be significant landscape and visual impacts caused from a range of locations which will be incapable of being mitigated. There will be significant adverse effects on local residents because of the intermittent nature of noise arising from operations on the site and the potential for very significant lamax events. There will be harm to the sustainability agenda given that the development will not operate as an SRFI and the development will be premature a regional wide assessment and a forthcoming national policy statement. There will be harm to significant ecological interests which will not be adequately mitigated.

211. It is against the harm by reason of inappropriateness and the other harm that the very special circumstances case relied upon by the Appellant must be judged. Radlett will not become an SRFI. The alternatives analysis is defective because it has failed to search outside the northwest sector and because of its inherent and ingrained flaws. The country park and the bypass are beneficial but are to be provided or controlled, in part, through a defective section 106 agreement. These circumstances cannot, in short, overcome the massive harm that will be caused.

212. In such circumstances, it is respectfully requested that the appeal be dismissed.

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