

Application by Four Ashes Limited for an Order Granting Development Consent for the West Midlands Strategic Rail Freight Interchange (Case Ref. TR050005)

Issue Specific Hearing: Draft Development Consent Order

Thursday 28 February 2019, 10.00am

On 23 January 2019 interested parties and others were notified that an issue specific hearing on the draft Development Consent Order (DCO) would take place on Thursday 28 February 2019 at the Hayward Suite, Molineux Stadium, Waterloo Road, Wolverhampton, WV1 4QR. The hearing room will be available from 9.30am and the hearing will commence at 10.00am. It is expected that the hearing will be completed by lunchtime but the ExA will continue the hearing after a lunchtime break should this be necessary to complete the agenda.

The main purpose of the first Development Consent Order (DCO) hearing is to undertake an examination of the draft DCO document including the proposed articles, schedules and requirements and the draft Development Consent Obligations.

For the avoidance of doubt, the hearing will not consider the underlying issues arising from the application or the representations which have been made in relation to those issues. My decision as Examining Authority to hold the hearing should not be taken to imply that I have reached any view at this stage of the examination as to whether or not the Order should be granted. The hearing will, accordingly, be conducted on a without prejudice basis.

The applicant, all interested parties and affected persons are invited to attend but should note that the DCO hearing is likely to be of interest mainly to those organisations or bodies that have a direct involvement in drafting the Order and in its subsequent implementation should the Order be granted. For this reason I would welcome the attendance of the following parties:

- The applicant
- Eversheds Sutherland (for the applicant)
- South Staffordshire District Council (SSDC)
- Staffordshire County Council (SCC)
- Highways England (HE)

Agenda

To ensure the best use of the time available at the hearing I have prepared an Agenda (Annex 1) and a number of observations and questions about the draft documents (Annexes 2-5). In summary the main purpose of the hearing is to consider the drafting aspects of the draft DCO and in particular to:

- clarify issues around how the draft DCO is intended to work, what is to be consented, the extent of the powers and what requirements, provisions and agreements are proposed;
- identify any possible issues not covered by the DCO as currently drafted;
- establish or confirm the views of Interested Parties as to the appropriateness, proportionality and efficacy of the provisions and requirements as currently drafted; and
- consider the draft Development Consents Obligation and how this might operate alongside the proposed requirements in the draft DCO.

All parties should be aware that the applicant has submitted a revised draft DCO (Document AS-014) which includes a number of changes and drafting corrections. This has been accepted into the examination and has been published on the project page of the website. The applicant will be requested to summarise the main amendments made in the revised draft at the opening of the hearing and interested parties will be given the opportunity at the hearing to comment on those proposed amendments. Subject to the scope and nature of any comments made, I envisage that the discussion at the hearing can be focussed on the revised draft rather than that originally submitted with the application.

Administrative Arrangements

Parties intending to attend the hearing are requested to provide the names of who intends to speak and which points in the agenda they wish to address. Please provide this information, together with your Interested Party unique reference number, by email to WMInterchange@pins.gsi.gov.uk by 20 February 2019.

Paul Singleton

Paul Singleton

Examining Authority

Annexe 1

Issue Specific Hearing on the Draft Development Consent Order (DC)

28 February 2019 at the Hayward Suite, Molineux Stadium, Waterloo Road, Wolverhampton, WV1 4QR

Agenda

1. Welcome, introductions and hearing arrangements.
2. Applicant's summary of the nature and purpose of the key amendments made in the revised draft DCO (Document AS-014) (10-15 minutes).
3. Opportunity for other parties to ask questions about/ comment on the proposed revisions to the draft DCO.
4. Structure of the Order, Definitions and Articles 1- 49: ExA's observations and questions (see Annex 2) and comments and questions from interested parties.
5. Schedules 1 and 3-13: ExA's observations and questions (see Annex 3) and comments and questions from interested parties.
6. Schedule 2- Requirements: ExA's observations and questions (see Annex 4) and comments and questions from interested parties.
7. Draft Development Consent Obligations: ExA's observations and questions (see Annex 5) and comments and questions from interested parties.
8. Actions arising and timetable for submission of revised draft documents including updated Explanatory Memorandum.
9. Any other business.

Annex 2

Draft DCO – Structure, Definitions and Articles 1-49 (Agenda item 4)

COMMENTS AND QUESTIONS BY EXAMINING AUTHORITY

Q Ref	Part of DCO	Directed to	Question/ comment
1.1	General	Applicant	It is noted that the use of the word " <i>shall</i> " has been replaced with other wording in a number of places within the revised draft in accordance with the guidance in Advice Note 15 (AN15). However, " <i>shall</i> " is still used extensively in the drafting where alternative wording would seem more appropriate. The applicant is requested to undertake a further review of the draft text with a view to minimising reliance on this wording whilst maintaining consistency across the draft DCO as a whole. (Compare for example A16 (6) with A17 (3) where there appears to be no obvious need for a different wording).
1.2	A2	Applicant	Why within the definition of " <i>Authorised Development</i> " is it necessary or appropriate to include the additional wording " <i>and any other works carried out under the requirements</i> "? This appears to be superfluous since works carried out under the requirements would, presumably, already be covered by the phrase " <i>and any other development authorised by this Order</i> " within the first part of the definition.
1.3	A2	Applicant SSDC	The definition of " <i>commence</i> " in the revised draft DCO includes the words " <i>unless the context indicates otherwise</i> ". (i) What circumstances are envisaged by this reference and how might this affect the clarity of the Order? (ii) Is this additional wording necessary and appropriate?
1.4	A2	Applicant SSDC SCC	i) Is the definition of " <i>maintain</i> " in the revised draft DCO consistent with the guidance at paragraph 18.2 of AN15 that a power to maintain should not authorise development which may result in significant environmental effect not already assessed? ii) Has the applicant engaged with the relevant bodies to seek to agree this definition and the related article in the draft Order?
1.5	A2	Applicant SCC HE	(i) Is there any specific need or purpose for using separate terms for " <i>street authority</i> " and " <i>relevant street authority</i> " and for " <i>traffic authority</i> " as well as " <i>relevant traffic authority</i> " when there seems to be no similar

			<p>duplication of the term "<i>highway authority</i>"?</p> <p>(ii) Is any useful distinction identified by means of the separate terms or could they be reduced to a single term for each type of authority to be used in all appropriate parts of the DCO?</p>
1.6	A2	Applicant	<p>As drafted the second part of the definition of "<i>rail served warehousing</i>" is not particularly clear. Any warehouse could, arguably, be capable of receiving goods "<i>by means of another form of transport</i>". (i) Is this intended to refer to the transfer of goods from the Rail Freight Terminal to a warehouse comprised within the authorised development? (ii) does the definition cover all of the proposed warehousing?</p>
1.7	A2	Applicant SCC HE	<p>The definition of "<i>verge</i>" as drafted would appear capable of including any footway or cycleway running alongside the '<i>carriageway</i>'. Is this an accurate meaning of the term having regard to the definitions set out in s329 of the Highways Act 1980?</p>
1.8	A3	Applicant	<p>(i) Are the words "<i>and used</i>" towards the end of A3 needed? (ii) Do they meet a separate and specific purpose not already covered in the wording of A5 and A39?</p>
1.9	A4	Applicant	<p>How would Clause (a) operate alongside Note 3 on the Works Plans, for example in respect of the flexibility in relation to the detailed siting, plan and footprint of any of the proposed warehouses or other buildings?</p>
1.10	A4	Applicant	<p>i) How would Clause (b) operate alongside the annotations on the Bridge Plans which indicate detailed levels for the underside, deck and other key elements of the proposed bridges and set minimum clearance levels for the underside of bridges?</p> <p>ii) Would there be a risk that the flexibility provided by Clause (b) might operate in tandem with that provided by Clause (c) (i.e. in relation to a bridge over part of the railway works) to result in an upwards deviation in the level of such a bridge by 3 metres?</p> <p>iii) Has the full degree of flexibility provided for in A4 been assessed in the ES on a worst case basis?</p>
1.11	A4	Applicant	<p>In respect of the second part (rider) to A4, generally it is acceptable to provide for the LPA (or other body) to agree subsequent amendments to details that it has been responsible for approving under a requirement</p>

			<p>included within a DCO. However, giving an LPA the power to agree subsequent amendments to details approved by the SoS as part of the original Order creates uncertainty for the SoS as to what is being approved by the DCO. The additional flexibility proposed in this part of A4 appears to be of this nature and is a cause of concern. What further variation from the limits prescribed in Clauses (a) to (c) is anticipated and why cannot this be accommodated within the parameter plans which would be approved as part of the DCO?</p> <p>It is noted that the EM refers to similar wording having been proposed in the DCO for the A14 road project. However, I am advised that the SoS rejected that wording and made any power to approve any further variation from the approved parameters subject to SoS approval (See A7 of that DCO- Ref. TR010018).</p>
1.12	A12	Applicant SCC	<p>I understand this article to be concerned with the new rights of way that are proposed to be created. Should there also be provision made within the DCO for the construction and delivery of the routes proposed as permissive paths if these are considered necessary for accessibility purposes? (Paragraph 6.37 of the Explanatory Memorandum (EM) only refers to the means of keeping them permanent once they have been provided).</p>
1.13	A13	Applicant	<p>There appears to be an error in the description in Column 2 to Part 3 of Schedule 6 re the notation of the private footpath between points J and AAA on Document 2.3C. The route appears to be shown by a dashed orange line rather than a blue one.</p>
1.14	A17	Applicant SCC	<p>Further clarification is sought on the purpose and scope of the provisions in A17 (2) and why these are needed. There appears to be nothing in the wording that limits the provisions to roads within the Order Limits and the provision seem very broad in their scope. What is the specific justification for including these provisions in this draft DCO?</p>
1.15	A20	Applicant	<p>The provisions in A20 (1)(e) could potentially circumvent the need for the normal statutory process to be followed in relation to the stopping up or diversion of a highway and deprive those who might be affected by such a proposal of the opportunity to comment on or</p>

			object. What is the specific justification for including these provisions in this draft DCO?
1.16	A22	Applicant	(i) What is the basis/ rationale for specifying 28 days' notice in A22 (2)? (i) Is there any precedent for adopting this time period?
1.17	A35	Applicant	I note that s A46 (3) disapplies the provisions of the Neighbourhood Planning Act (NPA) 2017 and that paragraph 6.97 of the EM states that this is because the relevant parts of the NPA have not yet come into force. However, the NPA provisions might be taken to give an indication of what Parliament considers to constitute reasonable notice periods in temporary possession situations and the right of the owner to serve a counter notice. What justification is there for adopting shorter periods proposed and for not including any right to serve a counter notice in the circumstances of this draft DCO?
1.18	A35	Applicant SCC	The amendments made to A35 (4) have resulted in some awkward wording. Further clarity might possibly be added to avoid the possible reading that the provision requires the undertaker to both remove and restore any temporary highway access.
1.19	A36	Applicant SCC	The amendments made to A36 (5) have resulted in some awkward wording. Further clarity might possibly be added to avoid the possible reading that the provision requires the undertaker to both remove and restore any temporary highway access.
1.20	A43	Applicant SSDC	Given that the proposed development requires the felling of a small number of veteran trees and some lengths of important hedgerows is there a need for a specific provision to be included in the DCO which gives consent for this felling and removal? (See paragraphs 22.1 & 22.2 of AN15).
1.22	A46	Applicant	i) The first paragraph of A46 is not numbered in the revised draft DCO. ii) What is the justification for the provisions set out in the first paragraph and what precedent, if any, is there for including such provisions in the DCO? iii) Has the EA been consulted about the proposal to include these provisions given that it would likely be the relevant regulatory authority in relation to the legislation and statutory instruments listed in sub paragraphs (a) to (f)? (See Good Practice Point 10 in AN15).

Annex 3: Draft DCO – Schedules 1 and 3-13 (Agenda Item 5)

COMMENTS AND QUESTIONS BY EXAMINING AUTHORITY

Q Ref.	Part of DCO	Directed to	Question/ comment
1.23	S1 Part 1	Applicant	The numbering of sub paragraphs under the heading of " <i>Works No.1</i> " appears to have gone awry in both the tracked changes and clean versions of the revised draft DCO.
1.23	S1 Part 1	Applicant	In Works No. 2 sub paragraph (g) what facilities and operations are envisaged under the reference to " <i>rail freight terminal refuelling</i> " and where are any structures or facilities required for this purpose indicated on the plans submitted with the application?
1.24	S1 Part 1	Applicant	In Works No.3 sub paragraph (e)what works are anticipated over and above the " <i>rail linked warehousing sidings</i> " which are shown on the plan at Document 2.14 and appear to be within the site area of Works No.2?
1.25	S1 Part 1	Applicant SCC	Works No. 5 includes reference to signage and street lighting but these items are not referenced in Works No.4. Should they be included?
1.26	S1 Part 2	Applicant	Are the community parks likely to involve lighting, signage, hard landscaping and built structures/furniture that might need to be listed under Works No.6?
1.27	S1 Part 2	Applicant	Item (c) of Works No.9a refers to " <i>underground cabling in Works No.4</i> " but these works are not listed in Works No.4. There is a similar cross reference in Works No. 9b to underground cabling in Works No.6 but those works are not listed in Works No.6. (i) Are these omissions? (ii) What is the extent of the underground cabling in the central part of the site? (iii) Do they also extend into the site area of other Works (for example Nos. 3 & 7)?
1.28	S1 Part 2	Applicant	Would Development Zone A3 have any other vehicular access than via part of the private estate road included within Works No.10a? If not, this might suggest that the main purpose of the first section of that road is to provide access to the authorised development and give rise to the question of whether it is properly included in Part 2 of S1 as 'Associated Development' when all other key access roads are listed in Part 1.
1.29	S13 Part 3	Applicant SCC	Paragraph 2 (2) includes a definition for the term " <i>country link road</i> " but that term does not appear to be used in S13 Part 3. Neither

			is the road identified by this notation on the plans at Document 2.10. Is the definition needed?
1.30	S13 Part 6	Applicant	How do the provisions within Part 6 relate to the SI remediation works and programme or are these dealt with separately?

Annex 4: Draft DCO Schedule 2 – Requirements (Agenda Item 6)

COMMENTS AND QUESTIONS BY EXAMINING AUTHORITY

Q Ref.	Part of DCO	Directed to	Question/ comment
1.31	Part 1	Applicant SCC HE	Have the definitions and locations of “ <i>early arrival</i> ”, “ <i>extended stay</i> ” and “ <i>operational</i> ” bays been agreed?
1.32	Part 1	Applicant	The word “ <i>shall</i> ” still appears in a small number of the requirements (3, 7 & 18) where other wording, such as “ <i>must</i> ” may be more appropriate. As in respect of the articles a consistent approach is to be preferred.
1.33	Part 1	Applicant	Where requirements cross reference an application document it would be helpful for the document reference to be included in the text; e.g. the reference to the Design and Access Statement in R3.
1.34	R2	Applicant SSDC SCC HE	<p>i) In the interests of clarity should R2 specify what details are to be submitted as part of the written phasing scheme?</p> <p>ii) Is there a need for R2 to refer to the Indicative Phasing Plan (Figure 4.5 of Document 6.2) since this indicative phasing is referred to at various places in the ES?</p> <p>iii) In the interests of certainty should R2 specify a stage in the development of the proposed warehousing by which the Initial Rail Terminal must be completed and available for use? (see R2 of the East Midlands Gateway RFI DCO)</p> <p>iv) Would it be helpful, for the purposes of cross referencing in subsequent requirements, for R2 to include the words “<i>approved phasing scheme</i>” or similar wording?</p>
1.35	R3	Applicant SSDC	Would it provide greater clarity if the first sentence of R3 (5) was moved to the end of R3 (1)?
1.36	R4	Applicant SCC SSDC	As it is likely that SCC would be consulted on these details before SSDC issued any approval under R3 is R4 needed?
1.37	R6	Applicant SSDC	I have concerns about the proposed exclusion of “ <i>landscaping works</i> ” from the construction hours restriction. These works could have significant potential to generate noise and some of these works would be likely to close to sensitive receptors. What is the justification for this proposed exclusion?
1.37	R9	Applicant SSDC	i) Would “ <i>heritage assets</i> ” be a more appropriate description than “ <i>heritage receptors</i> ” or is there a specific reason for this

			wording? ii) There is potential for confusion between the requirements of paragraphs (2) and (5) as to when demolition can take place. Greater clarity might possibly be provided if R9 (2) is incorporated within R9 (3) and R9 (5) is reworded to require that the demolition of any asset must not take place until written confirmation that all of the works required under paragraph 3 (a)-(c) have been completed has been submitted to the LPA.
1.39	R10	Applicant SSDC	Would it be better simply to state that <i>"demolition of the canal crossings ... must be completed within 5 years..."</i> ?
1.40	R11	Applicant SSDC SCC	Is it sufficient that the Ecological management and Mitigation Plan should be in accordance with the Framework plan or is there a case for more specific requirements as done in R10 of the East Midlands Gateway DCO?
1.41	R15	Applicant SSDC	i) Is R15 (e) intended to refer to hedgerows to be retained and, if so, would a rewording of this requirement add clarity to its purpose? ii) Would additional clarity be added by amending (g) to require the submission of a programme for the implementation of the works?
1.42	R16	Applicant SSDC	The wording of R16 (1) is a little awkward. (i) Why is this needed and could the wording be simplified? (ii) If it is necessary to exclude landscaping works undertaken as part of highway works would this be better stated in the requirement as per R9 of the East Midlands Gateway DCO?
1.43	R20	Applicant SSDC	i) In instances where it would not be practicable to meet the limit set in R20 (1) would it be desirable to include a requirement to obtain prior approval to that exceedance? (See R21 of East Midlands Gateway DCO). ii) Is there a need for R20 to require the carrying out of regular noise monitoring during the construction period to ensure compliance with the imposed limit? iii) Would R 20 (1) be made clearer if the wording specified that the limit applies to noise generated by construction and demolition works?
1.44	R21	Applicant SSDC	i) As drafted R21 does not impose any limits for operational noise for any part of the development or any monitoring requirements. How does this secure the protection of sensitive receptors?

			ii) Should the wording from R20 (2) also be repeated in R21 to control reversing alarms on all vehicles servicing the RFT and the warehousing units?
1.45	R27	Applicant SSDC	i) What is the justification for the exclusion of earthworks and ecological mitigation works from this requirement? ii) R27 (1) should identify the Document references where the flood risk assessment and site wide drainage strategy are contained.
1.46	R28	Applicant SSDC	As drafted R28 does not include any timing clause and would not, therefore, meet the relevant tests. What wording is required to rectify this omission?
1.47	Part 2	Applicant	Paragraph 3 (3) of this Part defines time limits for the appointed person to issue a decision on any appeal. What rationale/ justification can the applicant provided for the periods proposed and are there precedents for these?

Annex 5: Draft Development Consent Obligations (DCOb) (Agenda Item 7)

COMMENTS AND QUESTIONS BY EXAMINING AUTHORITY

Q Ref.	Part of DCOb	Directed to	Question/ comment
1.48	General	Applicant SSDC	In the interests of clarity should all references to obtaining the approval of the District Council or other bodies be worded so as to require " <i>written approval</i> "?
1.49	1.1	Applicant	Some definitions and figures have still to be completed.
1.50	1.1	Applicant	" <i>Implementation</i> " is defined only by reference to the 1990 Act; should there be a reference to S155 of the 2008 Planning Act?
1.51	1.1	Applicant	There appears to be a typographical error in the definition of "Index".
1.52	1.1	Applicant	" <i>Obligation Land</i> " is defined as the " <i>land edged red on Plan A</i> " but there is no plan marked " <i>Plan A</i> " attached to the draft deed. The plan included in the draft DCOb (TerraQuest Drawing No. 1710-7760_512 v0.1) shows the extent of Mr Monckton's ownership and the rest of the area to be referenced in preparation for the submission of the Land Plans and Book of Reference. Given that Mr Monckton's ownership appears not to include the majority of the land within the Order Limits that lies to the west of the WCML or a large part of that to the south of Vicarage Road clarification is required as to what land parcels would be bound by the proposed Development Consent Obligations. A revised plan that clearly shows this is also required.
1.53	S1:1.1	Applicant SSDC	i) The wording " <i>at the same time as ... the Development</i> " is unclear as to what timescale is intended by the obligation in 1.1. ii) There appears to be no definition in the draft document of " <i>the first phase of development</i> ". Is one required in order to clarify the intention of this obligation?
1.54	S1:1.2	Applicant SSDC SCC	i) Why could this not be dealt with by a requirement? (See Q1.34) ii) Have the proposed trigger points been agreed with other parties? iii) The inclusion of the words " <i>unless otherwise agreed...</i> " raises possible concerns with regard to the undertaker's commitment to delivering this key component of the proposed development.

			iv) Should the obligation not refer both to completion of the works and to the Initial Rail Terminal being available for use by the specified time limit?
1.55	S1:1.3	Applicant SSDC SCC	This clause seems to provide a great deal of flexibility as to when the works might be completed. What circumstances are anticipated that would justify such flexibility?
1.56	S1:1.4	Applicant SSDC SCC	This clause seems to provide a great deal of flexibility as to the future use and operation of the Rail Terminal. What circumstances are anticipated that would justify such flexibility
1.57	S1:2	Applicant SSDC SCC	Although the term " <i>Rail Freight Co-ordinator</i> " is defined in the draft document this part of S1 does not include any obligation on that person to do anything other than report progress or on the undertaker to actively promote and market the use of the rail facilities to prospective or existing occupiers. Is this a satisfactory level of commitment?
1.58	S1:4	Applicant SSDC	i) Is there a requirement for membership of the Liaison Group to be approved by SSDC prior to its first meeting? ii) Is it necessary/ desirable to specify a stage in the development process by which the Group should be established and should hold its first meeting?
1.59	S2:3 & 4	Applicant SCC	i) Is there a requirement for membership of the TSG and the Transport Co-ordinator appointment to be approved by SCC?
1.60	S2:5.1 & 6.1	Applicant SCC	Have the draw down stages been agreed with SCC?
1.61	S2:8	Applicant SCC	Could the provision of permissive paths not be dealt with by a requirement? (See Q 1.12)
1.62	S4:1 & S5:1.1	Applicant SSDC SCC	Have the arrangements been agreed?
1.63	S7	Applicant SSDC	Are the parties content with the use of the term " <i>Applicant</i> " throughout S7 in terms of identifying who is responsible for the required actions?
1.64	S7	Applicant	In S7 the paragraph numbering appears to jump from paragraph 1 to paragraph 4 which renders the paragraph references within the text (e.g. at 5.4) unintelligible. Some revision appears to be required.