

Application by Four Ashes Limited for an Order Granting Development Consent for the West Midlands Interchange

Your Ref: TR050005

Response to The Examining Authority's third written questions and requests for information (ExQ3) on behalf of City of Wolverhampton Council (CWC) and Walsall Council (WC) (respondent reference 20015794)

Submitted: 5th August 2019

The responses below are organised in relation to the table produced by the EA. Only questions that seek a response from the local authorities have been listed. .

3.1.1	The applicant Local Authorities Highways England Stop WMI Group Other IPs Deadline 7	<p><i>Schedule 2-Part 2: Rail Requirements</i> <i>The Flexibility provided for in the draft Requirements</i></p> <p>A central theme in the evidence submitted to the Examination has been the Applicant's commitment to the construction and completion of the rail connection and terminal proposed as part of the WMI development. Concerns have been expressed that the flexibility sought in the proposed Requirements creates uncertainty, not only about the timing of the provision of the rail infrastructure provision but also as to whether it would be provided at all.</p> <p>It is common ground that the Transport Assessment has not considered a development scenario with more than 186,000 sq. m of warehousing in occupation without the rail link being in place. The Applicant's Technical Note 41 at Appendix 10 to their Deadline 5 submissions [REP5-005] sought to provide such an assessment but this has not been agreed by Highways England (HE). HE and other IPs remain concerned that delay in the delivery of the Rail Terminal (RT) might result in a larger quantum of warehouse floorspace being occupied which is wholly road-dependent.</p> <p>In addition to the concerns about the potential effects on the highway network, a scenario in which the RT is not delivered at all could have significant implications in terms of whether the completed development would be a Nationally Significant Infrastructure Project (NSIP) under the</p>
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		<p>decision as to whether or not the Very Special Circumstances needed to justify what all parties agree to be inappropriate development in the Green Belt have been demonstrated. These will, accordingly, be important matters for the ExA to address in his report and recommendation.</p> <p>Much of the recent oral and written evidence has concerned the detailed wording of the proposed requirements and the extent to which these can be drafted so to minimise areas of uncertainty and ambiguity. In response, the Applicant has made a number of changes to the Rail Requirements as set out in Part 2 to Schedule 2 of the final draft DCO submitted at Deadline 6 [REP-003].</p> <p>Rail Requirement 4(1) requires that the rail terminal works be completed before: (a) the occupation of more than 186,000 sq. m of warehousing or (b) the sixth anniversary of the first occupation of more than 47,000 sq. m, whichever is the earlier. As drafted, this requirement is qualified by the words "subject to sub-paragraphs 2-6" and "unless otherwise agreed with the local planning authority."</p> <p>Subject to the limitations set out sub-paragraphs 5 and 6, these qualifications would, if requested by the undertaker (developer), enable South Staffordshire District Council, as Local Planning Authority (LPA), to approve a different timescale for the completion of the RT. By implication, as the draft Rail Requirement 4 refers to "substitute figures" being</p>
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		<p>submitted and agreed, any variation to the requirement for completion of the RT could involve the construction and occupation of a larger volume of warehousing before the RT has been completed. The Applicant seeks this flexibility in the event that the construction of the RT is delayed due to <i>"matters outside of the control of the undertaker"</i>.</p> <p>As drafted, Rail Requirement 6 requires that, following completion of the RT, the undertaker must retain, manage and keep the rail terminal works available for use. However, the words <i>"unless otherwise agreed by the local planning authority"</i> provide for the possibility that the LPA could, if requested by the undertaker, give approval for the RT and related infrastructure to be removed at some future date. It seems unlikely that the LPA would give approval to such a change without good reason but the tailpiece to the Requirement could give rise to that possibility.</p> <p>The ExA does not wish IPs and other parties to repeat evidence already given on the detailed wording of the proposed Rail Requirements although they are invited to comment on the further changes made in REP6-003. The ExA does, however, wish to know the final views of parties with an interest in these matters on the wider issues set out in the following questions.</p> <p>(i) The applicant's evidence is that there is a need for an element of warehousing to be constructed and occupied in advance of the completion of the RT, both to help fund the rail infrastructure and to ensure occupier demand for the rail services once they are available. Having regard to that</p>
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		<p>evidence, do the parties consider that there are reasonable grounds for allowing up to 186,000 sq. m. of the proposed warehousing to be built and occupied prior to the opening of the RT?</p> <p>(ii) Without the flexibility sought by the applicant, a simplified form of Rail Requirement 4 would possibly read as follows:</p> <p><i>“The undertaker must complete the rail terminal works prior to the earliest of—</i></p> <p><i>(a) the occupation of more than 186,000 sq.m of warehousing; or</i></p> <p><i>(b) the sixth anniversary of the first occupation of more than 47,000 sq. m. of warehousing”.</i></p> <p>If there are reasonable grounds for allowing some warehousing to be occupied prior to the completion of the RT, would this simplified Requirement 4 provide the necessary certainty as to the delivery of the rail infrastructure?</p> <p>(iii) Do the parties agree, as a matter of principle, that the Rail Requirements should provide for a subsequent change to the timescale for completion of the RT to be approved either by the LPA or by any other statutory body/authority?</p>
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		<ul style="list-style-type: none">• Replace the references to “the local planning authority” LPA in paragraph (2) with the words “the Secretary of State;”• Require that copies of the report referred to in (2)(a) be sent to the LPA, the local highway authority and HE and to require that those bodies be consulted by the SoS before a decision is made;• Remove the suggested need for HE to issue its written consent to any approval of a change as this would not be necessary if the decision is to be taken by the SoS for Transport;• Remove the right to appeal as this would be a SoS decision in the first instance. <p>Rail Requirement 6 might also be reworded to replace the reference to “<i>local planning authority</i>” to “<i>Secretary of State</i>”.</p> <p>Under this approach they might also need to be an amendment to Part 3 of Schedule 2 to make it clear that the rights of appeal do not apply to decisions taken under the relevant Rail Requirements.</p> <p>At Appendix A to these questions the ExA has produced a tracked changes version of how amended Rail Requirements 4-6 might read if this approach was to be taken.</p> <p>If parties consider that there are grounds for the potential concerns identified in Question (v) would they please set out their views as to</p>
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		<p>whether those concerns would be allayed if Rail Requirements 4 and 6 were to amended along these lines and, if so, whether any other changes to the Rail Requirements would be needed?</p>
<p>CWC/WC Response</p>		<p>Failure to provide a rail connection could increase traffic flows through the Black Country, especially on the motorway network, and might make the development less attractive to investment which would in turn affect its deliverability. However, the question of whether varying the terms of the requirement to construct the rail terminal should be a matter for the Secretary of State or the local planning authority, and the potential impact of such a variation on the highway network, are matters for the Staffordshire local authorities and Highways England.</p>
<p>3.1.2</p>	<p>The applicant Local Authorities Highways England Stop WMI Group Other IPs</p> <p>Deadline 7</p>	<p>Clarity of the Rail Requirements in Part 2 of Schedule 2 as drafted The questions in this section have a different purpose to Q3.1.1 and are concerned only with the clarity of the wording of the Rail Requirements as currently drafted.</p> <p>(i) Rail Requirement 4(2) includes the wording "<i>the undertaker believes</i>". As there could potentially be difficulty as defining what any person or body may "believe" would additional clarity be added by amending this to read "<i>reasonably believes</i>" so to introduces an objective test?</p> <p>(ii) As drafted, Rail Requirement 4(2)(a)(ii) requires a revised timetable with "<i>substitute figures</i>" to those in 4(1)(a) and (b). This presupposes that any revised "timetable" would involve a change to the level of floorspace to be built and occupied prior to the completion of the RT rather than, for example a revised programme and agreed dates for achieving key milestones. Is it appropriate and reasonable that the Requirement be based on such an assumption?</p>

	<p>(iii) If the purpose of any change is to approve a revised timetable, is there a need to agree a change to the 186,000sq.m or 47,000 sq. m or could that purpose be achieved, for example, by changing the wording in 4(1)(a) from "<i>the occupation</i>" to "<i>the first anniversary of the occupation</i>" of 186,000 sq. m? or the wording in 4(1)(b) to "<i>the seventh anniversary</i>" rather than changing the area or floorspace to be occupied?</p> <p>(iv) There appears to be an inconsistency in that 4(2)(a) and 4(5) refer to "<i>substituted figures</i>" whereas the term "<i>substituted dates</i>" is used in 4(4)(a). Is a further amendment needed to remove that apparent inconsistency?</p> <p>(v) Would the use of "<i>substitute dates</i>" throughout Rail Requirement 4 add clarity whilst still providing a reasonable level of flexibility for the undertaker to seek some change in the programme if delivery of the RT is delayed due to matters outside of its control?</p> <p>(vi) New Rail Requirement 11 seeks to define "<i>matters outside the control of the undertaker.</i>" However, that term is not used consistently in all such references in Rail Requirement 4; for example, in 4(b). Should this not be consistent throughout the Requirements?</p> <p>(vii) In the revised wording in Schedule 2 Part 2 the term "<i>shall</i>" is used in various places whereas this has largely been replaced by "<i>must</i>" in most of the articles and requirements in line with the Office of Parliamentary Drafting Guidelines. Should these references be amended accordingly?</p>
<p>CWC/WC Response</p>	<p>Our response is the same as to question 3.1.1 above.</p>

3.2.2	City of Wolverhampton and Walsall Councils Deadline 8	The ExA requests that Wolverhampton and Walsall Councils should review any revised information submitted by the applicant at Deadline 7 in response Question 3.2.1. Having done so, the Councils are requested to submit any comments that they wish to make on that revised information to the Examination at Deadline 8 and to confirm whether that revised information affects or alters their conclusions as to the significance of the effects of the development on air quality and on the AQMAs within their administrative boundaries.
CWC/WC Response	We will respond once the applicant has provided this information.	