

The Secretary of State for Transport
C/O Planning Inspectorate
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Dear Mr. Ranger

Planning Act 2018 (as amended) – Four Ashes Limited

Application for an order granting development consent for the construction of rail freight interchange and associated development (West Midlands Interchange) – Applicant's further representation.

We refer to the approval of the Northampton Gateway Rail Freight Interchange Order by the Secretary of State for Transport as set out in his letter of 9 October 2019.

We are writing because the interpretation of the National Policy Statement for National Networks ('NPSNN') by the Northampton Gateway Examining Authority (with which the Secretary of State did not explicitly disagree) is relevant to matters raised during the Examination into the West Midlands Interchange DCO application. We specifically refer to the interpretation of paragraphs 4.83, 4.88 and 4.89 of the NPSNN, in relation to the timing of the provision of the rail terminal, as adopted by the Northampton Gateway Examining Authority. In this respect, we believe both that, when interpreting that policy, it is necessary to have very close regard to the particular wording of the NPSNN, and that the policy should be applied in a way that reflects the particular circumstances of the application in question. As such we do not consider that the policy interpretation advanced in the report of the Northampton Gateway Examining Authority should be uncritically applied in determination of the West Midlands Interchange application, especially in light of the interpretation which was adopted by the Secretary of State in determining to grant the East Midlands Gateway DCO.

The purpose behind this submission is to ensure that the Secretary of State is clear with regard to the compliance of the West Midlands Interchange application with the NPSNN and, in approving the Order (should he be so minded), appropriately deals with the matter of the interpretation of the NPSNN raised by the decisions in respect of the Northampton Gateway and East Midlands Gateway DCO applications.

Compliance of WMI with the NPSNN

The particular focus of this submission is Paragraphs 4.83, 4.88 and 4.89 of the NPSNN which in varying ways relate to the nature and timing of the provision of the rail terminal (rail connection) element of the NSIP.

Firstly, as regards Paragraph 4.83 NPSNN.

The Applicant agrees with the way in which Paragraph 4.83 was dealt with by the Examining Authority for Northampton Gateway ('NGExA'). The relevant clause of the policy in this regard, is that which states

"...from the outset, a rail freight interchange (RFI) should be developed in a form that can accommodate both rail and non-rail activities".

The NGExA agreed with the interpretation adopted by the Secretary of State in approving the East Midlands Gateway DCO, namely that this policy objective will be met if, *"from the outset [an] SRFI is being developed in a form that can (that is, will be able to) accommodate rail activities"*. As such the NGExA confirmed that the policy objective in Paragraph 4.83 will be satisfied if the rail provision is capable of being accommodated in the future.

There is no issue therefore that arises in relation to 4.83; there is no suggestion that West Midlands Interchange could not accommodate rail activities.

Secondly, as regards Paragraphs 4.88 and 4.89 NPSNN.

At the West Midlands Interchange Examination there was some considerable debate in relation to Paragraphs 4.88 and 4.89 and the Applicant's position in relation to those paragraphs was explained both orally at the hearings and also on several occasions in writing. For convenience the different elements of those two paragraphs are set out below along with the West Midlands Interchange Applicant's interpretation which confirms that the West Midland Interchange proposals are consistent with the NPSNN.

Before doing so however, we would make the obvious point that there is a distinction between elements of the NPSNN where the word "should" is used and where the word "must" is used.

The elements where "should" is used clearly admit of some discretion and require an element of judgement to be made in the exercise of that discretion. It is clear that such characteristics as the NPSNN introduces by use of the mechanism 'should' (as in 'should provide', or 'should be developed') are objectives that the policy seeks to deliver. However, it is not an absolute requirement that all such objectives be provided.

Significantly, that there is some degree of flexibility inherent in respect of such policy objectives was expressly recognised by the East Midlands Gateway Examining Authority ('EMGExA'). Such objectives ("should") can readily be distinguished from policy requirements, which are introduced in the NPSNN by use of the term "must". The NPSNN, in that it uses the term "must" where appropriate, clearly recognises that distinction.

Dealing firstly with paragraph 4.88, the first sentence of which reads:

"Applications for a proposed SRFI should provide for a number of rail connected or rail accessible buildings for initial take-up..."

This sentence is expressed as a "should" rather than a "must". It is therefore an objective, rather than a requirement. The lack of such provision does not render an application 'contrary to policy'.

As a subsidiary point, it should be noted that there is no explanation of what is meant by the term "initial take-up" in this context. In particular, it is not clear whether it is meant that a number of the buildings should be rail connected/accessible when those buildings are initially 'taken up' (i.e. occupied). This is the most probable meaning of the term. It should be noted that at West Midlands Interchange no less than 75% of the buildings will only be available for first occupation on a rail connected/accessible basis (i.e. they may only be occupied once the rail terminal has been provided). Thus the West Midlands Interchange application is consistent with this objective.

Paragraph 4.88 continues:

"The initial stages of the development must provide an operational rail network connection and areas for intermodal handling and container storage".

This sentence is expressed as an imperative ("must"); such a requirement can clearly be distinguished from the objective ("should") referred to in the previous paragraph. However, it is important to note that the requirement is concerned with the "initial stages" of the development. There is no guidance as to what precisely constitutes "initial stages", however it is clear from the words themselves that the imperative to provide a rail connection does not relate simply to the first element of the development, or indeed even the first phase. Rather, the reference is to initial stages, i.e. in the plural. The reference to provision of infrastructure within a range of multiple phases necessarily allows for such provision to take place other than at the beginning of the development.

The West Midlands Interchange proposal guarantees for the rail connection to be in place prior to occupation of anything more than 25% of the warehousing permitted. In the context of the scale of development overall, a constraint which precludes occupation of 75% of the accommodation prior to the rail connection being provided self-evidently satisfies the requirement that the rail connection be provided in the "initial stages" of the development. Significantly, such constraint (at 25%) is materially more restrictive than the 47% previously considered acceptable by the Secretary of State when granting the DCO in respect of East Midlands Gateway.

The third sentence of 4.88 reads:

"It is not essential for all buildings on the site to be rail connected from the outset, but a significant element should be".

Again, this objective is couched in terms of "should", rather than as a requirement ("must"). However, in any event the application does allow for buildings in the area of the site known as Zones A1 and A2 to be rail connected from the outset of their (i.e. the buildings') development. The application therefore complies with this policy objective. This is consistent with the interpretation in the NGEA Report.

Lastly, and turning to paragraph 4.89:

"As a minimum, a SRFI should be capable of handling four trains per day and, where possible, should be capable of increasing the number of trains handled. SRFI should, where possible, have the capability to handle 775 metre trains with appropriately configured on-site infrastructure and layout. This should seek to minimise the need for on-site rail shunting and provide for a configuration which, ideally, will allow main line access for trains from either direction".

The West Midlands Interchange proposals satisfy all of the objectives of paragraph 4.89. These do not in fact relate to the *timing* of provision of the rail connection, but instead to the constituent elements of the SRFI. The rail terminal will be capable of handling four trains per day from construction, a capability which will increase further when Phase 2 is built. The SRFI will have the ability to handle 775 metre trains and the configuration of the terminal does minimise the need for on-site rail shunting and facilitates main line access for trains from either direction. None of these factors were contested during the Examination.

The particular circumstances of any individual application will be relevant to the application of the NPSNN as a whole. As the Planning Act makes clear, the overall objective is that the NSIP "when constructed" meets the criteria. It is entirely appropriate to consider scheme specific evidence regarding the practicality of delivery in any particular case (as recognised by the EMG decision).

Interpretation of the NPSNN by Northampton Gateway Examining Authority

The sole aspect of the approach adopted in NGExA report which might initially be thought to differ from that advocated by the Applicant at the WMI Examination, is that relating to the timing of the provision of the rail connection.

In its report the NGExA considered a requirement which stipulated that the rail terminal be constructed before the occupation of any warehousing and concluded that such a requirement was necessary. The Applicant had included such a requirement in its draft DCO but had also suggested a tailpiece which would have allowed the absolute bar on occupations to be relaxed with the agreement of the local authority, subject to a longstop of the occupation of 140,000 sq. m. of warehousing.

The NGExA concluded as follows, in Paragraph 4.7.5:

"Req 3(3) of the dDCO with the amendments we recommend, which is considered in detail in Chapter 11 of this Report, would ensure that an operational rail terminal is completed and available prior to occupation of any warehousing unit. As such, we consider there would be clear compliance with paragraph 4.88 of the NPSNN. This requires the initial stages of the development to provide an operational rail; network connection and areas for intermodal handling and container storage. The version of Req 3(3) in the last version of the dDCO [REP6-006], whilst it required a rail terminal to be provided prior to occupation of any warehousing, would have allowed up to 140,400 sq.m. of warehousing to be occupied of the Relevant Planning Authority (RPA) approved. We discuss this at Chapter 11 below and conclude that such a "tailpiece wording would not meet the policy in paragraphs 4.88 and 4.89."

Whilst the above paragraph clearly establishes that the provision of a terminal prior to the occupation of any warehousing satisfies the requirements of Paragraphs 4.88 and 4.89 NPSNN, it does not provide a basis for concluding that the later provision of a terminal would necessarily be in conflict with those paragraphs. For the basis of the conclusion that the tailpiece was unacceptable in that instance it is necessary to look to Chapter 11.

In Chapter 11 the NGExA rejected the proposed tailpiece, stating, in paragraph 11.4.132:

"In the result, our recommendation to the SoS is to delete the tailpiece to Req 3(3). The Proposed Development (i) may not provide rail connected/accessible buildings for initial take-up; (ii) the initial stages may not provide an operational rail network; (iii) there may not be a significant element of rail-connected buildings from the outset; (iv) there may not be the capability of handling four trains per day as minimum; because of the tailpiece. These are essential according to paragraph 4.88 (items (i)-(iii) and 4.89 (item iv)."

We respectfully disagree with the views expressed by the NGExA in this paragraph of its report. The NGExA has incorrectly identified the elements referred to in items (i), (iii) and (iv) as all being "essential" when they are not all expressed as absolute requirements in the NPSNN. As regards item (ii), which is the only element expressed as an imperative in the NPSNN, the NGExA does not identify how it interprets the term "the initial stages of the development". Certainly, it entirely fails to grapple with the fact that the reference in the NPSNN is not to a single phase, but instead to *multiple* phases. The NGExA approaches policy as set out in the relevant paragraphs of the NPSNN as allowing only development where the rail terminal is available prior to the occupation of *any* warehousing. Such a rigid interpretation is not contained in the NPSNN nor is it consistent with the Secretary of State's decision in East Midlands Gateway.

Whether or not the provision of a rail terminal where at least 75% of the warehousing remains still to be occupied is properly regarded as being provided in the "initial stages" of the development is a matter of judgement, based on all the relevant circumstances, as explored during the Examination. As set out in its submissions, the Applicant is firmly of the view that such provision would indeed be within the initial stages of delivering the West Midlands Interchange. That only 25% of warehousing would be capable of occupation prior to provision of the rail connection is a constraint materially more restrictive than that regarded as

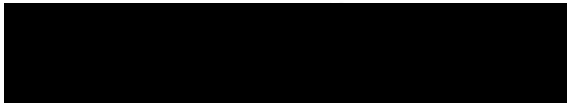
acceptable at East Midlands Gateway (47%), and is broadly similar to that allowed in the DIRFT III DCO (22%).

Conclusion

In conclusion, we would invite the Secretary of State:

1. to agree with the interpretation of the relevant paragraphs of the NPSNN put forward on behalf of the WMI Applicant as indicated above;
2. to conclude that the development proposed by the WMI Applicant is, having regard to the relevant paragraphs of the NPSNN, and the circumstances of the WMI proposal, compliant with that policy.
3. to acknowledge, explain and justify any extent to which the approach of the Secretary of State in determining the WMI application departs from that adopted by the NGExA (and by extension the Secretary of State) in determining the Northampton Gateway DCO application.

Yours sincerely

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Eversheds Sutherland (International) LLP