Rail Central
Northamptonshire

The Rail Central Rail Freight Interchange

Northampton Gateway Examination

Written Summary of Oral Submissions made at ISH2, ISH3 and CAH

Northampton Gateway PINS Reference Number
TR050006

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Written Summary of Oral Submissions

ISH2, ISH3 and CAH

19 and 20 December 2018

Appearances on behalf of Ashfield Land Management Ltd. and Gazeley GLP Northampton s.à.r.l. (the "Applicant for Rail Central")

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1. **ISH2: Environmental Matters**

Rail Central's concerns as to the adequacy of the Applicant's Environmental Statement (additional item raised by the ExA not on published agenda)

1.1 The Applicant for Rail Central was asked to make oral submissions as to its concerns in relation to Regulation 14 and Schedule 4 of the Infrastructure Planning (Environmental Impact Assessment) Regulations 2017 and the adequacy of the Applicant's Environmental Statement ("ES").

1.2 These are summarised in the Applicant for Rail Central's Deadline 1 response to the Examining Authority's Written Question (ExQ1 1.0.4 [REP1-033 pp. 1-3]) and in its Deadline 3 comments on the Applicant's Deadline 2 responses [REP3-016, §§4.1-4.8]. The Applicant for Rail Central did not repeat those concerns in its oral submissions.

1.3 The following further points were made during oral submissions.

2. **Unclear methodology**

2.1 The Applicant was wrong to suggest that the Applicant for Rail Central's 'main point' on this issue is the Applicant's failure to apply a certain methodology, i.e. that used by the Applicant for Rail Central to produce its own ES (see [REP2-011, §4.3]). That suggestion mischaracterises the issues. As a result, the Applicant failed to provide a substantive response to the Applicant for Rail Central's actual concerns.

2.2 The Applicant for Rail Central's underlying concern is to ensure two things. First, that the Cumulative Impact Assessment ("CIA") is carried out in a way that is both effective and fair and, secondly, any comparative assessment of environmental effects of the Northampton Gateway and Rail Central schemes (positive as well as negative) is undertaken on a fair and transparent basis.

2.3 The Applicant for Rail Central's concern is that the methodology employed in the ES is not adequately explained and justified. Nor is it then applied consistently. This makes the conclusions in the ES on significance unreliable. The concern is not, as the Applicant suggested, that Northampton Gateway must use a prescribed or the Applicant for Rail Central's methodology. It is the failure to adequately explain, justify and consistently apply its own methodology. Clarity of method is an essential part of proper environmental assessment and allows both the decision maker and, importantly, the public to understand the project and participate in the decision making process.

2.4 An example of a failure in this regard is in the Applicant's approach to cumulative assessment. No clarity has been provided on the approach to the identification and assessment of other development in the context of the CIA. Without this, there is no transparency as to how the CIA was undertaken, nor is it possible to fully comment on the reliability of the outcome of the Applicant's CIA. For example, the Rail Central cumulative assessment addressed over 30 potential cumulative projects (including Northampton Gateway), whereas the Applicant has addressed four (including Rail Central). If further projects were considered and scoped out, this should have been explained in the methodology. In absence of any proper explanation, it is difficult to see why these additional projects have not been accounted for. The omission of potentially relevant cumulative

projects will contribute to the general underestimation of the environmental effect caused by Northampton Gateway and therefore the comparative overestimation of the effect caused by Rail Central (the point is made at [REP3-016, §4.4]).

3. Inadequate description of development

3.1 A further key concern is the adequacy of the description of development (see [REP3-016, §§4.5-4.7]). The description of the development is a fundamental part of the environmental impact assessment process. It is the first legal requirement under Schedule 4 of the Infrastructure Planning (Environmental Impact Assessment) Regulations 2017 (S.I. 2017/57) ("EIA Regs."). It sets out the project to be assessed. If it does not properly reflect the project for which consent is sought there is a failure against Schedule 4, paragraph 1 and consequent necessary failures in the environmental assessment as in simple terms the project assessed is not the project for which consent is sought.

3.2 Three examples were raised in the oral submissions:

(a) *Assessment of the 'whole development'*:

(i) Key information describing the project is currently outside Chapter 2 (which includes 'description of development'). For example, information on timing and parameters of the proposed mounding is provided in Chapter 4; construction working hours is provided in Chapter 8 and retention of existing features is provided in Chapter 5).

(ii) Where additional information regarding the project is provided outside Chapter 2, what certainty is there that these aspects are duly considered in other parts of the ES and therefore what certainty is there that the 'whole development' is assessed comprehensively across the whole ES? For example, proposed mounding requires adequate consideration when assessing the setting of heritage assets (as discussed below); construction working hours will be relevant to the consideration of construction lighting; and retention of existing features (e.g. ponds) will be a relevant receptor during the consideration of any construction of operational contamination sources.

(b) *Primary and secondary mitigation:*

(i) The ES is neither clear nor consistent in its approach to primary and secondary mitigation. Primary mitigation is designed into and forms part of the scheme itself. It is often referred to as embedded mitigation. Secondary mitigation is not an integral part of the development itself and, as such, will need to be secured (e.g. by requirement). The assessment of impacts should present the results of an assessment of the proposed scheme including primary mitigation, all of which should be clearly set out in the introductory sections of the ES. The residual effects should present the results of an assessment of the proposed scheme including primary mitigation and following the implementation of secondary mitigation (if there is an appropriate level of certainty with regard to the secondary mitigation).

(ii) In parts the ES treats the CEMP as embedded. In other parts (e.g. the Air Quality chapter) it does not. Whether or not the CEMP is properly speaking embedded or secondary mitigation the approach across the ES ought to be consistent. It is not.

(iii) This inconsistency in how mitigation is treated was demonstrated by the question raised on waste during ISH2, where the Examining Authority asked for clarity on the approach to mitigation in response to ExQ1 1.15.21. The Applicant did not clearly explain the approach and confirmed that certain mitigation was not relied upon in the assessment of residual effects, which is contrary to the assessment within Chapter 14 of the ES.

(iv) If the approach outlined above is not applied or applied inconsistently, there is no certainty as to: what mitigation is being consented as part of the project what needs to be secured; and what the results of the assessment are (both in terms of the effects of the project to be consented and the effects of the project following the securement of further, secondary mitigation).

(c) *Landscape*:

(i) The height of the bunds is an integral part of the Northampton Gateway scheme: it goes to the extent of cut and fill and waste and the mitigation of landscape and visual effects. Without a clear understanding of the parameters of the bunding, there cannot be an adequate assessment of landscape and visual effects (nor of the environmental consequences of the re-grading of the land).

(ii) Article 4 of the dDCO [REP2-006] requires the development to be carried out within the parameters shown on the parameters plan. The parameters plan [APP-065] states with regards the bunding: *"In turn there is a degree of flexibility in the height of the bunds which could vary depending on final building heights measured at AOD levels. The parameters established for the landscape bunds is that their height, relative to the buildings they screen, will be in accordance with the principles shown on and established by the landscape cross sections which are in: Landscape Cross Section drawings contained in ES Chapter 4.0 (Landscape and Visual)."*

(iii) The Landscape Cross Section Drawings [APP-084] show the approximate height of the bunds AOD but provide no explanation of the principles by which their height may vary relative to any change in height of the buildings they screen. Moreover, there is no explanation of phasing. How can the bunds vary in height relative to the building when the bunds will be built first and the buildings will follow, presumably, built to tenant demand and requirements?

(iv) It was said by the Applicant that a worst case was assumed and this meant assuming that this is the maximum height of the bunds. However, the bunds are said in part to be landscape and visual mitigation. Accordingly, the assumption of the bunds at their highest is in some respects a best case

scenario which is not a proper basis – as the Applicant has acknowledged in the context of the discussions on archaeology – for environmental assessment. What is required to be assessed is a realistic worst case, and that may vary depending on context. For example in LVIA assuming the maximum height and thus screening effect may be best case, whereas for impact on the historic environment this could be worst case (although, as the Applicant for Rail Central has pointed out, the effects of the bunds on the setting of heritage assets does not appear to have been assessed (either adequately or at all).

(v) This is an example of the failure to properly describe and identify the parameters of the development leading to an unreliable assessment of significance.

(d) *Noise*:

(i) Noise is a further example. The description of the development contained in the ES makes no attempt to identify the type of plant that may be used during operation. Indeed, the Applicant has stated that noise from warehouse mechanical plant at the main Strategic Rail Freight Interchange ("SRFI") site would be assessed at a later stage under Requirement 23 of the dDCO. The purpose of this assessment is said to be demonstrating compliance with Government and local policy on noise, rather than demonstrating that the noise will not exceed the effects of noise from such equipment assessed in the ES (which would be normal).

(ii) The assessment of whether or not the development complies with national and local policy on noise is not a matter that can properly be deferred post consent. It is squarely the business of the ES and duty of the decision-maker at this stage to assess noise impacts properly.

(iii) At this stage the likely effects must be assessed and it must be demonstrated whether or not significant effects are likely (i.e. whether there is a serious possibility of significant effects), and whether the likely effects are acceptable or can be mitigated to an acceptable level.

(iv) The current requirement defers this essential process post consent.

(v) The consequence of this approach is that the assessment of potentially significant noise sources that could lead to a significant adverse effect at receptors is deferred. It is a clear example of an *ex parte Hardy*[1] inappropriate deferment of the assessment of significant effects.

(vi) Other potentially significant noise sources, such as HGV trailer mounted chillers, have also been excluded from the assessment.

[1] An ES will not be adequate if it lacks a key piece of information necessary to ascertain whether significant effects are likely. It is not acceptable to leave the gathering of that additional information until after consent has been granted (*R v Cornwall County Council, ex parte Hardy* [2001] Env LR 25). That is to be distinguished from situations where it is possible to reach a conclusion on likely significant effects without certain information, but provision is made for that information to be gathered after permission is granted so as to inform mitigation measures etc (see, for example, *R (PPG 11 Ltd) v Dorset County Council* [2003] All ER (D) 68 (Jun)).

(vii) The Applicant has indicated that the proposed acoustic screening (i.e. the earth bunds) cannot be further enhanced and concludes that there is no further practicable mitigation that can be applied. In oral submissions, the Applicant then said mitigation at source would be available for warehouse mechanical plant. However, no mitigation at source has been proposed in the ES or its effects analysed. Precisely because the noise effects of potential sources of significant effects have not been assessed, the appropriate mitigation required has also not been identified and assessed (which amount to failures against paragraphs 5, 6 and 7 of Schedule 4 of the EIA Regulations.

(viii) The failure to properly describe the parameters of the earth bunds also undermines the noise assessment given that the bunds are also noise mitigation.

(ix) This is an example of the failure to properly describe the development leading to an unreliable assessment of likely significant effects, a consequent underestimation of significant effects as well as a consequent failure to address mitigation. It is an inappropriate deferment of assessment of potentially significant effects. This is legally impermissible (see *ex parte Hardy*). It also leads to an inappropriate and inaccurate comparison with Rail Central which has included this type of plant in its assessment.

(x) It is not enough as the Applicant sought to suggest to say that the particular type of plant is unknown at this stage. It is perfectly possible (and usual) in EIA to identify and assume a particular type of plant or range of types of plant available on the market today as a realistic worst case.

4. **A front loaded process**

4.1 The principle in *ex parte Hardy* is an expression of Recital (2) to Directive 2011/92/EU ("the EIA Directive") which provides: *"Effects on the environment should be taken into account at the earliest possible stage in all the technical planning and decision-making processes."*

4.2 The courts have also stressed the need to ensure that the environmental effects of a development including cumulative effects are assessed at the earliest possible opportunity in the development consent process (see, for example, *R (Brown) v Carlisle City Council* [2010] EWCA Civ 523 [2011] Env LR 5 and *R (on the application of Barker) v Bromley LBC* [2006] UKHL 52; [2007] Env LR 20 per Lord Hope at [22]).

4.3 This means that where detail is to be left to a later stage, the decision-maker must understand the likely significant effects of the project as a whole when considering the grant of the in principle consent (see, for example, *R v London Borough of Bromley, ex parte Barker* [2006] UKHL 52). This can only be done if proper parameters are set at this stage (and hence why the failure to properly describe and thus fix the parameters of the bunds is a real issue with regards the adequacy of the Northampton Gateway ES) and if there is sufficient information by which to judge the effects of the project as a whole at the in principle stage (the *ex parte Hardy* principle).

5. Public participation

5.1 This leads to a further point in relation to the adequacy of the ES. If the Applicant for Rail Central, with the assistance of its professional advisors who are familiar with EIA of nationally significant infrastructure projects, is experiencing difficulty in understanding what actually has been assessed in various parts of the ES, a member of the public without the Applicant for Rail Central's advantages is likely to have greater difficulties understanding the project and its environmental effects, and would thus be hampered from participating effectively in the decision-making process.

5.2 Public participation is a fundamental part of the EIA regime. Recitals (16)-(21) of Directive 2011/92/EU ("the EIA Directive") makes this clear. Indeed, it specifically identifies the fact that the EU is a signatory to the Aarhus Convention which seeks to guarantee public participation in environmental decision-making and guarantee access to the courts to ensure that decisions are taken properly.

5.3 As the Advocate General Elmer stated in *Commission of the European Communities v Federal Republic of Germany (Case C-431/92*) [1995] ECR I-2189, 2208-2209: *"the provisions of the Directive are essentially of a procedural nature. By the inclusion of information on the environment in the consent procedure it is ensured that the environmental impact of the project shall be included in the public debate and that the decision as to whether consent is to be given shall be adopted on an appropriate basis."*

5.4 He further said in *Aannemersbedrijf P K Kraaijeveld BV v Gedeputeerde Staten van Zuid-Holland (Case C-72/95)* [1996] ECR I-5403, 5427, para 70: *"Where a member state's implementation of the Directive is such that projects which are likely to have significant effects on the environment are not made the subject of an environmental impact assessment, the citizen is prevented from exercising his right to be heard."*

5.5 The Applicant suggested at ISH2 that ultimately the ES material was for the benefit of the decision maker and not the Applicant for Rail Central. That submission is patently flawed, because it overlooks a fundamental role of the ES which is to enable the public to participate effectively in the scrutiny of the proposed decision and to make informed and effective representations to the decision-maker. The decision as to its adequacy may be for the decision maker, but in coming to that decision the decision maker will need to take account of the extent to which the information was available and properly accessible to the public, and its sufficiency to enable the public to properly participate in the consenting process. A failure to properly describe the development critically undermines public participation.

6. **ISH3: dDCO**

6.1 The Applicant for Rail Central's submissions on the adequacy of the ES in ISH2 on Environmental Matters are relevant to the dDCO for the reasons explained in the ISH2 hearing (e.g. Requirement 23 in relation to noise).

6.2 In the context of the dDCO hearing, the Applicant for Rail Central's submissions dealt with three items:

Item 2: The section 106 agreement

Item 3: The relationship between the DCO and the EIA

Item 4: Archaeology

6.3 The Applicant for Rail Central would also have wished to make oral submissions on other items on the agenda, but was unable to do so because of the shortage of time and thus any such points will be made at Deadline 5 following consideration of the revised dDCO that the Applicant is to submit at Deadline 4.

7. **Item 2: The section 106 agreement**

7.1 In the course of the discussion of the approach to be taken to the relevance and importance of the section 106 obligations (against the background of the Applicant for Rail Central's concerns as to whether the community fund had been demonstrated to meet the test of necessity (see REP2-016, the Applicant for Rail Central's Comments on Deadline 1 Responses, Comments on Doc 6.4A Draft Section 106 Agreement), the Applicant for Rail Central made the following submissions.

7.2 In the context of the Planning Act 2008 ("PA 2008"), there is a distinction to be drawn between a matter which is "important and relevant" for the purposes of section 104(2)(d), and a matter which is a material consideration for the purposes of a determination of an application for planning permission pursuant to the Town and Country Planning Act 1990 ("TCPA 1990").

7.3 Section 104(2) identifies those matters to which the Secretary of State "*must*" have regard, in other words it creates a statutory obligation to take certain matters into account. They include at (d) *"any other matters which <u>the Secretary of State thinks</u> are <u>both important and relevant</u> to the Secretary of State's decision"* (emphasis added).

7.4 The statutory formulation thereby obliges the Secretary of State to take other matters into account only where he thinks they are not just relevant, but also important.

7.5 That is to be contrasted with the position under the TCPA 1990, where the statutory obligation as expressed in section 70(2) is to have regard to *"the provisions of the development plan, so far as material to the application, and to any other material considerations".*

7.6 Whereas under section 104(2)(d) the determination of what is *"both important and relevant"* is a matter explicitly for the Secretary of State (the obligation is limited to matters he

"thinks" fall into this category), whether or not a particular consideration is material for the purposes of section 70(2) of the TCPA 1990 is a matter of law for the court (see e.g. *Tesco Stores v. Secretary of State for the Environment* [1995] 1 WLR 759, per Lord Keith at p. 764). Moreover, the weight that attaches to a "material consideration" is a matter for the decision maker, who would be at liberty to give it "*no weight at all*" (*Tesco*, per Lord Hoffman at 780). As Lord Hoffman observed:

"The fact that the law regards something as a material consideration therefore involves no view about the part, if any, which it should play in the decision-making process"

7.7 That is plainly conceptually different from a matter falling within section 104(2)(d) of the PA 2008, which the decision-maker has decided is not only "*relevant*" but also "*important*" to the decision.

7.8 A matter falling within section 104(2)(d) of the PA 2008 can be regarded as an 'obligatory' material consideration, i.e. something the statute expressly or impliedly requires to be taken into account. A failure to take such a consideration into account will lead to intervention by the court.

7.9 That is to be contrasted with a 'discretionary' material consideration, i.e. something the decision maker is entitled (but no obliged) to take into account as he thinks fit.

7.10 The distinction between 'obligatory' and 'discretionary' material considerations is well-established as a principle of administrative law (see e.g. the helpful summary of the principle by Pill LJ in *R (on the application of ICO Satellite Ltd. v Office of Communications* [2011] EWCA Civ. 1121 at [49]-[52]).

7.11 In this case the Government's policy on when section 106 obligations should be taken into account (i.e. when the obligation is, amongst other things, *"necessary to make the development acceptable in planning terms"*) is to be found in the NPS at paragraph 4.10. There can be no doubt that the policy is an obligatory material consideration in this case, because section 104(2)(a) obliges the Secretary of State to have regard to it.

7.12 Furthermore, section 104(3) provides that the Secretary of State *"must decide the application in accordance with*" the policy in the NPS except to the extent that one or more of subsections (4) to (8) applies. Hence the status of policy in the NPS is elevated above other matters which the Secretary of State is obliged to take into account by virtue of subsection (2)(d). In some ways the NPS has a policy status within the PA 2008 akin to that of the development plan under the TCPA 1990, albeit there are much more limited circumstances in which a decision which is not in accordance with the NPS can be justified.

7.13 If the payment of the community fund is not regarded as being necessary to make the SRFI development acceptable in planning terms, directly related to the proposed development and fairly and reasonably related in scale and kind to the development then in accordance with the NPS is should not be regarded by the Secretary of State as a material consideration.

7.14 The policy tests reflect the statutory tests in regulation 122 of the CIL Regulations, albeit that regulation does not apply to decisions under the PA 2008.

7.15 Whilst as a matter of law the Secretary of State is not strictly obliged to adhere to his stated policy in paragraph 4.10 of the NPS, provided that he takes that policy into account,

recognises that he is departing from it and identifies a good reason for departing from it, it is nevertheless difficult to conceive of a lawful basis for the payment of the community fund playing any part in the decision-making here.

7.16 There are at least three obstacles that would have to be overcome before that could happen.

(a) Firstly, the Secretary of State would need to be persuaded that there was a sufficient connection between the payment of the community fund and the development of the SRFI. On the material submitted by the Applicant in support of the application, and during the examination, this is far from clear and has not been demonstrated. If that cannot be done, then it the obligation to make that payment would not even be capable of being a discretionary material consideration (see per Lord Hoffman in *Tesco* at 782).

(b) Secondly, assuming the first obstacle could be overcome, the Secretary of State would have to decide that there were good reasons why in this particular case it was appropriate to regard as material a payment of money which was not necessary to make the development acceptable in planning terms and/or was not fairly and reasonably related to that development in scale and kind. Bearing in mind the underlying purpose of the longstanding and consistently applied policy approach, namely to ensure that development consent cannot be bought or sold, and is seen not to be bought and sold, the harm to the public interest of any breach of that principle, and the absence of any feature to distinguish the material facts of this case from other equivalent decisions, it is difficult to see what good reasons might be said to exist. The Applicant has certainly not suggested any.

(c) Thirdly, even assuming that the first two obstacles could be overcome and the payment of the unnecessary sum of money could be treated as a material consideration notwithstanding the clear and consistent policy to the contrary effect, the Secretary of State would then have to identify good reasons for attaching any weight at all to the payment. Again, no such reasons exist and the Applicant has not suggested any.

7.17 In short, unless the Applicant can persuade the Secretary of State that the payment of the community fund would meet the tests in paragraph 4.10 of the NPS it is effectively inconceivable that it could play any material part on the decision whether to grant development consent in this case without exposing any such decision to the risk of successful legal challenge.

8. Item 3: The relationship between the DCO and the EIA

8.1 In the context of a discussion of the Applicant's proposed changes to the drafting of the final part of Article 4 and its relationship to Schedule 2 paragraph 13 of the EIA Regs, the Applicant for Rail Central made reference to the existence of authorities on the approach to determining whether a change to an authorised EIA development may have significant adverse effects on the environment. It did so because Rail Central's dDCO contains an equivalent provision to Article 4 and it has a common interest in seeking to identify the most appropriate form of words to encapsulate the requisite degree of flexibility whilst conforming to the legal requirements arising from the application of the EIA Regs.

8.2 The two authorities are *R (Baker) v. Bath and North East Somerset Council* [2009] EWHC 595 (Admin), and *Thomas v. Carmarthenshire Council* [2013] EWHC 783 (Admin).

8.3 *Baker* is the leading case on this case, and at paragraphs 22 and 23 Mr Justice Collins said this:

"22. It is not surprising that it is considered unnecessary to have an automatic need for an environmental impact assessment where there is a modification of an existing Annex I project because if it falls within Annex II , which it clearly will, it will be possible, indeed necessary, to consider the overall effect of the modification and to decide whether because of that there is a need for environmental impact assessment. An existing Annex 1 development will have had an environmental impact assessment and so indeed will not be necessary unless there is some additional impact. It may well be that modifications within themselves will really be such as to require an independent assessment, but it is clearly desirable that that should take place, if they are of sufficient magnitude or likely adverse effect that such would be required. But it is equally desirable, in my view, that the effect of those could be considered and that is what Annex II is dealing with at paragraph 13. It is very difficult to divorce changes and extensions from the effect of those changes or extensions, and for reasons which will become apparent, it would, in my judgment, be contrary to the whole approach that has been adopted by the European Court of Justice to the construction of the Directive and, indeed, to the purpose of the Directive if the overall effect of the changes or extensions or modifications was not able to be taken into account.

23. There is a direction given to Member States as to the approach they should adopt to identify the relevant projects which fall within Annex II . They have to apply the criteria set out in Annex III and it is important to note that in one of those criteria is described as the cumulation with other projects. That, again, shows that the approach designed by the Directive is that there should not be consideration of projects in isolation. It is necessary to see how they inter-react with other projects and to consider the overall effect. That that is the position in relation to projects which are apparently unrelated in the sense that they are not involved with precisely the same original project, makes it all the more clear, in my view, that it must apply to projects which involve the modification whether by extension or other changes to existing projects."

8.4 Further assistance is to be found at paragraphs 44 and 45:

"44. It seems to me that that is clearly not only consistent with but applies the approach that it is necessary to look at the effect of any modification or modifications on the project, or on the development, and to see whether the whole, as modified, has or is likely to have other significant effects which need to be taken into account and may require an environmental impact assessment, albeit they do not fall themselves within the criteria which have been adopted by the Member State.

45. That approach has been supported by a more recent case, Ecologistas en Accion-Coda v Ayuntamiento de Madrid [2008] C-142/07, judgment delivered on 25 July 2008. That was a case involving the construction of a ring road round Madrid and there had been a number of different applications or development proposals which split the project into, as it were, small amounts. Paragraph 44 of the judgment in that case said this:

"Lastly, as the Court has already noted with regard to Directive 85/227, the purpose of the amended directive cannot be circumvented by the splitting of projects and the failure to take account of the cumulative effect of several projects must not mean in practice that they all escape the obligation to carry out an assessment when, taken together, they are likely to have significant effects on the environment within the meaning of Article 2(1) …

46. Therefore, the answer to the first three questions must be that the amended directive must be interpreted as meaning that it provides for environmental impact assessment of refurbishment and improvement projects for urban roads, either where they are projects covered by [relevant points in the] Annex I to the directive, or where they are projects covered by the first … indent of point 13 thereof, which are likely, by virtue of their nature, size or location and, if appropriate, having regard to their interaction with other projects, to have significant effects on the environment."

The obvious interaction is the effect on the existing project which is to be modified. It seems to me that it is plain beyond any peradventure that it is not appropriate, in the light of the jurisprudence of the court and the purpose behind the Directive, to regard only the modification itself and not the effect on the development as a whole of any such modification to it."

8.5 In *Thomas*, the Hon Mr Justice Burton found that the words "*may have*" are to be regarded as imposing the same test as "*likely to have*", hence the issue is whether there is a serious possibility of significant adverse effects as a result of the change or extension to the approved project.

9. **Item 4: Archaeology**

9.1 In the time available for its own oral submissions in support of those made on behalf of Northamptonshire County Council, the Applicant for Rail Central simply confirmed the relevant extent of trial trenching at Rail Central (733 trenches (3-4% of main site) and at Northampton Gateway (58 (0.3% of main site)), figures which were given in the Applicant for Rail Central's response to the Applicant's Doc 7.8 (REP2-016).

10. **CAH**

10.1 The Applicant for Rail Central provided an update in relation to its objection to the compulsory acquisition of the parcels of land in which it is interested (Parcels 1/7 and 1/12).

10.2 The Applicant for Rail Central's position on compulsory acquisition is set out in its written representation [REP1-029, §§11.1-11.16] and in its comments at Deadline 3 on the Applicant's response to the Applicant for Rail Central's [REP3-016, §§5.1-5.44]. These written submissions were taken as read and not repeated at the CAH.

10.3 The Applicant for Rail Central's essential concern is to ensure that the exercise of compulsory purchase powers does not have the effect of preventing the Rail Central scheme being developed in an acceptable form. The Rail Central scheme has been specifically designed to accommodate the loss of the land sought to be acquired by the Applicant. However, that land remains of importance to Rail Central because it is an area of interaction between the two schemes (in relation to footpaths and landscaping). The Applicant for Rail Central requires some form of protection to ensure that, however the scheme or schemes are developed, an acceptable scheme for footpaths and landscaping can be implemented.

10.4 As to the form of the protection, the Applicant for Rail Central is open-minded (as had been indicated at ISH1 (see Summary of Oral Submissions [REP1-028, §7.1]). It submitted draft protective provisions. These have not found favour with the Applicant. However, in response the Applicant has indicated that it will draft requirements to provide the required protection.

10.5 In those circumstances, the Applicant for Rail Central does not seek to push its draft protective provisions at this stage and will respond to the Applicant's proposals at Deadline 5. In parallel, the Applicant for Rail Central will consider and develop its own suggested suite of requirements and other provisions which will be included in the Applicant for Rail Central's Deadline 5 submission.

10.6 Whilst the Applicant for Rail Central expressed concerns in its written representation with regards to the Applicant's failure to engage with the Applicant for Rail Central at an early stage, the Applicant for Rail Central did not seek to expand on those points at the oral hearing (albeit the Applicant for Rail Central stands by them). The Applicant for Rail Central's focus now is on ensuring adequate protection is included in the dDCO.