



**Supplementary Report to the
Secretary of State for Transport and
the Secretary of State for
Communities and Local Government**

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FIHT**

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TRANSPORT AND WORKS ACT 1992

ACQUISITION OF LAND ACT 1981

THE NOTTINGHAM EXPRESS TRANSIT SYSTEM ORDER

Exchange Land Certificate (s19) Inquiry opened: 7 October 2008

TWA Inquiry re-opened: 9 October 2008

Ref: TWA/3/1/304; EMP 3035/271/77 & 78; EMP 3035/443/30 & 31 & 32;
EMP 3015/443/4 & 5; EMP 3015/271/5

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GLOSSARY

ALA	Acquisition of Land Act 1981
BoCC	Birds of Conservation Concern
EIA	Environmental Impact Assessment
ELC	Exchange Land Certificate
ENT	Environment Not Tram
ES	Environmental Statement
ha	hectare
NBGRC	Nottinghamshire Biological and Geological Records Centre
NET	Nottingham Express Transit (the Promoter)
NWT	Nottinghamshire Wildlife Trust
PROW	Public Right of Way
SINC	Site of Importance for Nature Conservation
SoM	Statement of Matters
TWA	Transport and Works Act 1992
TWAO	Transport and Works Act Order
ULDS	Urban and Landscape Design Statement

CASE DETAILS

- The Case Details relating to the draft Nottingham Express Transit System Order and Applications are as set out in the introduction to my main report to which this report forms a supplement.

Summary of Recommendations: I recommend:

- That the Order be confirmed, subject to the modifications proposed; and
 - That the Exchange Land Certificate be granted; and
 - That the application for deemed planning permission be granted, subject to conditions; and
 - That the applications for listed building and conservation area consent be granted, subject to conditions.
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1 PREAMBLE

1.1 I was appointed pursuant to Section 11 of the Transport and Works Act 1992 (TWA) and Section 13(2) of the Planning (Listed Buildings and Conservation Areas) Act 1990 to hold concurrent public inquiries into The Nottingham Express Transit System Order and Applications, and to report to the Secretary of State for Transport and the Secretary of State for Communities and Local Government. I conducted those inquiries between 6 November and 21 December 2007 and my report was submitted to the Secretaries of State on 15 August 2008¹.

The Re-opened TWA Inquiry

1.2 Following the closure of the main inquiry, the Secretary of State indicated [NET.Y1] that ~~she~~ intended to re-open the TWA inquiry into the application for the TWA Order on the basis of information received regarding the presence of certain species of birds in the area of the Clifton park and ride site. Six representations of objection and two letters of support have been received with respect to this matter [NET.Y7]. This inquiry sat for two days from Thursday 9 October 2008.

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The ELC Inquiry

1.3 I have also been appointed, pursuant to the Acquisition of Land Act 1981 (ALA), by the Secretary of State for ~~Communities and Local Government~~ to conduct an inquiry² into the Proposed Nottingham Express Transit System Order Application for a further Section 19 Certificate³.

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¹ In this report I refer to these as the main inquiry and the main report.

² I refer to this inquiry as the ELC inquiry

³ This application was referred to in my main report, paragraph MR1.13. The only land still at issue is that at Silverdale which would replace open space to be acquired in the Wilford railway corridor (the wildlife corridor) (the open space land in Rushcliffe Borough).

- 1.4 This ELC inquiry has been called by the Secretary of State with the purpose of considering unwithdrawn objections which have been made to the Secretary of State's intention to grant an Exchange Land Certificate (ELC) in relation to the 'replacement open space', more formally the 'Exchange Land', which the Promoter is offering in exchange for certain open space which may need to be acquired compulsorily for the NET Phase Two scheme. This relates to land owned by Rushcliffe Borough Council (RBC). This ELC inquiry sat for two days from Tuesday 7 October 2008. At the close of the inquiry there were seven unwithdrawn objections [NET.X5].
- 1.5 The Promoter confirmed compliance with the procedural requirements for both inquiries [NET.X20 and NET.Y15].
- 1.6 Both inquiries were held at the Notts County Football Ground, Meadow Lane, Nottingham and, as with the main inquiry, I was assisted by the independent Programme Officer, Ms Carmel Edwards who dealt with the administration and programming of the inquiry.

Site Inspections

- 1.7 I made unaccompanied site visits in the areas of the Clifton park and ride site and the Silverdale Exchange Land before the inquiry. I carried out a formal accompanied site inspection of the Wilford former railway (wildlife) corridor and the Silverdale Exchange Land on Wednesday 8 October 2008. I made a further unaccompanied site visit of the general area and the land around the Clifton park and ride site and Barton-in-Fabis after closing the inquiry on Friday 10 October 2008, having first established that the parties did not wish to accompany me.

Procedure Notes

- 1.8 In the absence of a pre-inquiry meeting I issued Inspector's Procedure Notes [INQ/Y/1 and INQ/X/1] for each inquiry in advance in order to assist those wishing to give evidence and to outline how the inquiry would be managed.

Statement of Matters and Tests

- 1.9 The relevant matters for the re-opened TWA inquiry to consider were set out in the Secretary of State's letter of 11 September 2008 [NET.Y2] as being:
 - i. The reasons why the Promoters did not consider it necessary to undertake a winter bird survey in respect of the proposed park and ride site at Clifton.
 - ii. In the light of evidence now available, whether the development of the proposed park and ride site is likely to cause significant disturbance and harm to bird species which have been recorded as using the site and to their habitats.
 - iii. The extent to which measures can or should appropriately be taken to mitigate any adverse effects on birds and their habitats, including the likely effects of proposals to landscape the park and ride site.
 - iv. Insofar as significant adverse effects may be unavoidable, whether any residual harm would be outweighed by the wider public benefits of the proposals that have previously been advanced by the Promoters.
- 1.10 As regards consideration of the objections to the Secretary of State's intention to grant an ELC then attention must focus on the legal test set out in Section 19(1) of the ALA. In essence the issue is whether, if the Phase Two Order is made so as to include power to compulsorily acquire RBC's land in the former Wilford railway corridor (the Open Space Land), the proposed Exchange Land:

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- i. should be not less in area than the Open Space Land; and
 - ii. should be equally advantageous to the persons, if any, entitled to rights of common or other rights, and to the public; and
 - iii. would be vested in the persons in whom the Open Space Land was vested, and subject to the like rights, trusts and incidents as attach to the Open Space Land.⁴

1.11 I have also had regard to the guidance as to the application of the tests in s19 of the ALA which is set out in Annex L of Circular 06/2004 [NET.D10], in particular, in paragraphs 25 and 26.

1.12 Both before the inquiries [see INQ/Y/1 and INQ/X/1] and during my openings I made it clear to the parties that only those matters relevant to the particular considerations of the inquiries would be considered. I further clarified that I would not hear evidence on matters previously dealt with at the main inquiry.

Report Format

1.13 This supplementary report deals with both the issues of birds in the Clifton area and the ELC matter. In each Chapter I deal separately with each of these matters and finally draw overall conclusions which refer back to, and should be read in conjunction with, the conclusions in my main report; references to paragraphs in the main report are indicated by the abbreviation "MR".

1.14 This report includes descriptions of the pertinent sites and their surroundings, the gist of the representations made at the Inquiry and my conclusions and recommendations. Lists of appearances and documents are attached as appendices.

2 DESCRIPTION OF THE SITES AND SURROUNDINGS

2.1 I describe first the area around the Clifton park and ride site, the area in which sightings of significant numbers of birds have been recorded during the last winter. I then move to describe the area of open space to be acquired in the Wilford area and the proposed Exchange Land in the Silverdale area.

Clifton Park and Ride Site

2.2 The site of the proposed Clifton park and ride sits alongside the south western fringe of the residential area of Clifton on agricultural land that is at the northern extremity of an extensive area of arable land largely devoid of hedges and trees, within the designated Green Belt. Some small areas of woodland, such as Heart Lees, Drift Lane Plantation and Millhill Spinney, survive among the intensive agriculture. The site includes parts of two arable fields⁵.

2.3 Immediately to the north of the park and ride site I observed that a new sheltered housing scheme for elderly persons, Lark Hill retirement village, is under construction. The western boundary of the park and ride site is formed by a weak hedge line. The eastern boundary is formed by the Nottingham Road. The park and ride site sits on higher ground with the land falling away gently to the south and east.

⁴ Open Space is defined in S19(4) as meaning '*...any land...used for the purpose of public recreation...'*.

⁵ The site may be seen in this context on the plan at NET.Y8/B, Appendix IMG3.

The Land to be Acquired and the Exchange Land

- 2.4 The land to be acquired comprises much of the former railway embankment – the wildlife corridor- that lies between Wilford Lane and Ruddington Lane. It passes through the residential areas of Wilford and Compton Acres. The central width of the corridor is grassed with a worn footpath, with dense scrub and trees on either side and running down and lining the embankment slopes for much of its length. The corridor is clearly a well used recreational facility and my several visits have revealed it to be a favourite route for local dog-walkers. It offers access from the adjacent residential areas at several points along the route.
- 2.5 The Exchange Land is an area of low lying agricultural land to the east of Fairham Brook, much of the land is arable and had been harvested and still contained stubble when I inspected the area. The western area had been mown. It is bounded on its northern side by residential properties on The Downs, whose rear boundaries with this land are generally securely fenced or hedged, although a few do contain gates.

3 THE CASE FOR NOTTINGHAM EXPRESS TRANSIT

The material points are:

THE BIRDS ISSUE

Preliminary Matters

- 3.1 Before addressing the issues and the matters of detail in which the Secretary of State is interested there are two preliminary points to be made and a number of contextual matters to consider.
- 3.2 Firstly what seems to have triggered the re-opening of the inquiry was the claim that the southern part of the park and ride site, and the rest of the arable field of which it forms part, had been designated as a Site of Importance for Nature Conservation (SINC) – which would undoubtedly have been a material change of circumstances since the close of the Inquiry.
- 3.3 Whilst it is true that designation was seriously considered, it is now common ground that no new SINC has been designated in this vicinity, and that, given the revised designation criteria [NET.Y5], this arable land could never be designated a SINC by reason of use by over-wintering birds. It is doubtful whether the site would have qualified for designation under the former criteria, given the paucity of recorded sightings within the previous five years.
- 3.4 Secondly the remaining trigger for the Inquiry, the significance of the presence of over-wintering birds in the vicinity, and in particular Golden Plover, and the claimed need for over-wintering bird surveys, was covered at the main inquiry. It was raised in evidence by an objector, Mrs Plowright, as indicated in the fourth paragraph of her letter of 16 May 2008 to the Secretary of State [NET.Y1]. She specifically referred to having seen Lapwing on the park and ride site, and to seeing a flock of 150 Golden Plover on 20 October 2007 from the farm track, but not actually on the park and ride site.
- 3.5 In NET's Closing Submissions to the main inquiry [NET.A42, page 50] reference was expressly made to "*evidence that some birds on the Red List are seen in*

the area ...of the Clifton park and ride" (Golden Plover and Northern Lapwing are not of course so endangered as to be on Red List, the former is not even on the Amber List), and it was concluded that "there is no need to suppose that there will be any significant impact on protected species [which include both Golden Plover for different reasons, and Lapwing]"⁶.

Existing Site Context and Characteristics

- 3.6 The exact extent of Clifton Pastures, upon which the proposed park and ride site would border, is not defined and they are part of a much larger low lying area of open fields. Figure IMG3.1 in Appendix IMG3 shows the Clifton park and ride site in the context of the area referred to as Clifton Pastures. The area shown as Clifton Pastures in Figure IMG3.1 is around 1,300 hectares.
- 3.7 Photograph IMG4.1 in Appendix IMG4 shows a panoramic view of Clifton Pastures, including the Clifton park and ride site from Nottingham Road, looking south east to north west. Photograph IMG4.2 is an aerial view of Clifton Pastures in 2007.
- 3.8 The current design of the Clifton park and ride site would result in the loss of around 4.5 hectares of agricultural land. This is less than the 5.7 hectares quoted in the Environmental Statement which corresponds to the wider planning application boundary. The larger area was intended to give a degree of flexibility in the location and layout of the park and ride site.
- 3.9 The northern field, which covers most of the park and ride site, is at present⁷ corn stubble, awaiting ploughing. The southern field is under beet, with a wide stubble headland. Photograph IMG5.1 in Appendix IMG5 shows a 180° panoramic view of the Clifton park and ride site, looking west, from the track off Nottingham Road. Photograph IMG5.2 is a view of the park and ride site from 800 metres south of the site on Nottingham Road, close to Heart Lees wood.

Importance of the Site as a Breeding and Wintering Bird Habitat

- 3.10 The features of the site and boundary treatment provide limited foraging and nesting habitats for breeding birds. The cultivated land has been stripped of in-situ biodiversity by intensive agricultural practices. While birds may use the whole of large arable fields, it is only the uncultivated headlands and hedgelines that are of any real value as habitat.
- 3.11 Guidance produced by the Nottinghamshire Biological and Geological Records Centre⁸ (NBGRC) in 2008 [NET.Y5] on the identification of avian SINC^s excludes arable farmland from areas that can qualify as a SINC. Golden Plovers and Northern Lapwings generally prefer permanent grassland areas and only tend to use arable areas, to any great degree, where these are close to established grassland.

Designation of an Avian SINC

- 3.12 SINC^s in Nottinghamshire are selected by applying a set of criteria based on

⁶ See AFL14 (revised), NET.Y9/B.

⁷ September 2008

⁸ The principal function of NBGRC is to map SINC^s and protected species.

the number of characteristic species present. Specific guidance is given on the criteria for the identification of avian SINC in 'Sites of Importance for Nature Conservation Criteria for the identification of avian sites in Nottinghamshire', updated by NBGRC in June 2008 [NET.Y5].

- 3.13 Out of the six criteria for the selection of an avian SINC set out in this 2008 NBGRC guidance, one is of relevance in this case; whether an area *"supports a significant proportion of the UK wintering population of a species"*. The 2008 NBGRC guidance goes on to state, more fully, in criterion 5 that this means the area *"regularly supports more than 0.5% of the wintering population of a [defined list of a] water bird or wading bird species"*. The 0.5% threshold for European Golden Plovers is stated to be 1,550.
- 3.14 The 2008 NBGRC guidance [NET.Y5] excludes designation of arable land as a SINC. It states on page 1 that *"Some sites, such as arable farmland where the bird interest changes from field to field over time, may not be suitable to be SINC. Consequently, we have not included arable farmland in the selection criteria for habitat-based SINC for breeding birds; however, traditional wintering sites for European Golden Plover on permanent grassland would be included"*.

Current Site Status and Potential Qualification for Designation as an Avian SINC

- 3.15 The statement contained in the written representations to the DfT on the reopening of the Inquiry [NET.Y1] that the site is an avian SINC is incorrect. This has been confirmed in writing by the NBGRC in a letter dated 27 August 2008 [Appendix IMG7].
- 3.16 Designation of the Clifton park and ride site as a SINC was sought in March 2008 by Robert Hoare, based on his records of unusually large numbers of Golden Plover in the area in the Winter of 2007/8. In March 2008, Mr Hoare submitted completed bird SINC pro-forma for Golden Plover sightings on Clifton Pasture and Drift Lane recorded from December 2007 to March 2008 [Appendix IMG8]. This covered the whole of the Clifton park and ride site and a large area between the A453 and the Nottingham Road and beyond to the south and east.
- 3.17 A subsequent submission by Mr Hoare in April 2008 reduced the area for SINC notification to a much smaller area, the present beet field. Only a small part of this overlaps the park and ride site. A map showing the reduced area for consideration is attached to Mr Hoare's letter dated 27 April 2008 [Appendix IMG8].
- 3.18 The submission by Mr Hoare in April 2008 for SINC designation appeared to meet the 2004 NBGRC criteria [NET.Y4], which were in force at the time and predated the 2008 NBGRC guidance. The 2004 NBGRC guidance did not exclude arable land from designation.
- 3.19 A copy of NBGRC guidance showing the differences between the 2004 and 2008 text is provided in Appendix IMG9. The 2008 NBGRC guidance precludes designation of arable land as a SINC. The changes to the guidance were approved by the SINC panel meeting on 12 June 2008 and have the support of the author of the original guidance.
- 3.20 NET was not involved in the process of considering the SINC designation or the changes to the NBGRC guidance and only became aware of these after receipt of notification of the re-opening of the inquiry.

Protected Species as a Material Consideration

- 3.21 Although the Clifton park and ride site is not covered by any nature conservation designations, material consideration has to be given to the presence of any protected species on the site. One of the key principles of PPS9 Biodiversity and Geological Conservation (2005) [NET.C8] is that *"in taking decisions, local planning authorities should ensure that appropriate weight is attached to ... protected species"* (para 1(ii)).
- 3.22 The following wild bird species which have been recorded in the vicinity of the Clifton park and ride site, namely: Golden Plover; Northern Lapwing; Corn Bunting; Skylark; Linnet; and Yellow Wagtail, are all protected species as defined in PPS9.
- 3.23 ODPM Circular 06/2005 (Defra Circular 01/2005) complements the guidance in PPS9. Paragraph 98 states that *"the presence of a protected species is a material consideration when a planning authority is considering a development proposal that, if carried out, would be likely to result in harm to the species or its habitat"*. Planning authorities are required to give due weight to the presence of a European protected species on a development site in reaching a planning decision [NET.Y18, para 116].

The reasons why the Promoters did not consider it necessary to undertake a winter bird survey in respect of the proposed park and ride site at Clifton. (Matter i)

- 3.24 It was decided, when the Environmental Statement (ES) was being prepared, that there was no need to carry out winter surveys of birds as no parts of the routes were likely to give rise to significant effects on species of interest. There were no records of large populations of any over-wintering bird species on the Clifton site, at the time of the Environmental Impact Assessment (EIA), and the site was not considered especially suitable for over-wintering birds, being arable land which also suffers from disturbance from neighbouring uses.
- 3.25 This decision was endorsed by the key consultees during preparation of the ES, including Natural England, NWT and the RSPB.
- 3.26 The Objectors have produced records from the winter of 2007/8 in relation to large flocks of Golden Plover, but this appears to have been an unusual year. Very large flocks are rare [NET.Y9/B, Appendices AFL6 to AFL8]. The objectors accept that none have been seen in recent previous years on or close to the park and ride site, which reinforces the decision taken in 2002/2003 not to carry out over-wintering surveys.

In the Light of Evidence Now Available, Whether the Development of the Park and Ride Site is Likely to Cause Significant Disturbance and Harm to Bird Species and their Habitats. (Matter ii)

- 3.27 The results of the breeding bird surveys on this site were reported in the ES. Four breeding species, including three Birds of Conservation Concern (BoCC) Red-list species: Skylark, Linnet and Corn Bunting and one BoCC Amber-list species: Yellow Wagtail were recorded in the vicinity of the Clifton park and ride site. The area surveyed for breeding birds extended beyond the park and ride site and included the site now being developed as the Lark Hill retirement village. It is shown in Figure 9.13 in Volume 3 of the ES [NET.A17].
- 3.28 The ES concluded that in relation to the Clifton park and ride site that although *"habitat for BoCC Red-list farmland birds will be lost, no large or unusual*

populations are present. ... Mitigation measures will favour other bird species".
Due to the size of the area affected and the abundance of this habitat type in the locality, the conclusion of the ES was that "*the impact is not predicted to be significant*" (page 9-79).

Golden Plover and Northern Lapwing

- 3.29 Fields surrounding the proposed park and ride are used by these birds which tend to avoid fields less than 4ha in area. The field that had been proposed for SINC designation and encroached upon by the proposed park and ride site is some 14.8ha in size. Because of human disturbance the northern part of the field is likely to be avoided by Golden Plover and Northern Lapwing. However, the field is more than large enough for this not to matter.
- 3.30 The proposed park and ride site would encroach into the field previously proposed for SINC designation by 0.63ha, about 4.3% of that field⁹. This would make no significant difference to birds using the field.
- 3.31 The planting of the proposed shelter belt around the park and ride site would screen most of the disturbance. Golden Plover and Northern Lapwing are likely to avoid feeding close to any shelter such as trees but the size of the field is more than large enough for this not to significantly reduce the effective area available to birds.
- 3.32 An insignificant part of the feeding field would be lost to the proposed park and ride site, but the existing disturbance by people is likely to be reduced. There is also about 1,300 ha of suitable habitat nearby.
- 3.33 No significant residual effect on Golden Plover and Northern Lapwing or their habitat is expected.

Corn Bunting

- 3.34 New information is only presented for Corn Bunting by Mr Hoare. This species is on the Red List of Birds of Conservation Concern (BoCC), and the current population estimate is 8,500-12,000 territories in 2000.
- 3.35 A breeding bird survey for the scheme EIA turned up only one record of a singing male in the immediate area. Two further professional surveys show no Corn Buntings in the area of the park and ride site, but a maximum of 8 singing males in an area of about 1km² located about 1km to the south west [NET.Y100, Appendix 2].
- 3.36 One singing male territory might be predicted to be lost, however it is likely that this has already gone. The species is doing far better in the area than previously thought and the loss of one singing male is not seen as important. No other Corn Bunting territories would be affected.
- 3.37 There is strong evidence that there is suitable habitat to accommodate the territories identified, far in excess of the area of the proposed park and ride site. The recent survey at Clifton shows a density of about 5-8/km².

Summary

- 3.38 There is no new evidence that the proposed park and ride site is any more important to birds than previously thought. The habitat presently existing on

⁹ This may be seen in context by reference to the aerial photograph at NET.Y8/b, Appendix IMG4, Fig IMG4.2

the proposed park and ride site is not what would usually be regarded as good bird habitat and the amount of land which would be lost is extremely small in relation to the many hectares of similar habitat which exists in the vicinity. It is not considered that the development of the proposed park and ride site would be likely to cause significant disturbance and harm to the bird species which have been recorded as using the site and to their habitats.

The Extent to which Measures can be taken to Mitigate any Adverse Impacts on Birds, Including the likely Effects of Proposals to Landscape the Park and Ride site. (Matter iii)

- 3.39 It is acknowledged in the Environmental Statement that the park and ride site would result in the loss of some habitat for farmland birds. As mitigation, a minimum 10 metre width landscape belt of trees and shrubs would be planted around the site and within the site there would be tree and shrub planting. Nest boxes would be provided to encourage breeding birds.
- 3.40 The mitigation measures were not specifically designed to address the loss of an area reportedly used by wintering birds. The proposed measures however, would:
- effectively screen the visual impact of the park and ride site from all directions. It would be cut into the hill on the west and this would be reinforced by planting on this boundary, and on the north and east sides where it would abut the Lark Hill Village, the Nottingham Road and housing to the east; To the south, both the planting and the topography would screen the park and ride facility;
 - provide native tree and scrub planting that would enhance the area for woodland and woodland edge bird species;
 - provide screening and help to reduce disturbance to the rest of Clifton Pastures and would provide further nesting and foraging habitat for a range of species, including several of conservation concern;
 - provide a screen for and reduce disturbance to Golden Plovers outside the park and ride site from activity to the north of the field. Although Golden Plovers would not feed or roost close to this landscaped area, in any case, they make little use of areas close to housing because of the likely disturbance by people and pets; and
 - not harbour birds of prey affecting Golden Plovers. The height of trees would be no more than five to seven metres after 10 years (as a reasonable estimate), depending on species chosen.

Whether any Residual Harm would be Outweighed by the Wider Public Benefits of the Proposals Advanced by the Promoters. (Matter iv)

- 3.41 There are no significant residual impacts on breeding or over-wintering birds or their habitats that need to be outweighed. The wider public benefits of NET Phase Two were explored in depth during the main TWA inquiry. The Promoter's case as to those benefits was set out in the note responding to the TWA Statement of Matters [NET.A31].
- 3.42 Even if the view is taken that there would be some element of residual harm, this would be far outweighed by the wider public benefits of NET Phase Two.

THE ELC ISSUE

Legal Requirements and Considerations in Respect of Exchange Land

- 3.43 When proposing land to be given in exchange, there are three separate considerations, set out in section 19(1), as explained in Appendix¹⁰ L of ODPM Circular 06/2004 *Compulsory Purchase and the Crichel Down Rules* [NET.D10]:
- whether there are any *'persons....entitled to rights of common or other rights'* in the open space to be acquired;
 - whether the Exchange Land is *'not less in area'* than the open space to be acquired; and
 - whether the Exchange Land is *'equally advantageous'* to those having rights *'and to the public'* having regard to its existing and future condition, and accessibility and therefore delivers *'an overall equality of advantage'* as described in Appendix L.
- 3.44 The findings of the High Court Challenge (1993 ENV. L.R. 344) under s23 of the ALA to a decision to issue an Exchange Land Certificate, with respect of Oxleas Wood (the Greenwich case), provide useful clarification of a number of points relating to *'equality of advantage'* [NET.X9/B, Appendix IMG5]. Key considerations are:
- the material date for consideration of *'equality of advantage'* is the date of the acquisition of the existing open space, which will be the date of exchange [ibid, page 21];
 - *'equal advantage to the public must involve a consideration primarily of those members of the public who enjoy or might ordinarily be expected to enjoy the advantages of the open space, but may also include, as an ingredient in the equation, benefits to the public at large'* [page 21];
 - there is intended flexibility in the wording, leaving it to the Secretary of State's judgment *'whether advantages of one sort could be offset against advantages of a different sort'*. There need not be precise correspondence between the different advantages [page 21];
 - *'It is permissible when deciding whether at the date of exchange the Exchange Land will be equally advantageous to have regard to predicted future developments or occurrences which it is intended or anticipated will affect the Exchange Land'* [page 22]. This is repeated in para 25 of Appendix L, which states that regard may be given to *'any prospects of improvement to the Exchange Land which exist at that date'*;
 - *'the order land may be advantageous for reasons unconnected with public recreation and such advantageous [sic] are irrelevant'*. The assessment of equal advantage is not the assessment of equal ecological advantage but an

¹⁰ Inspector's Note: Throughout the evidence the Promoter consistently and erroneously refers to *Annex L* rather than Appendix L, a mistake repeated in some places by the objectors. I am satisfied that all parties were referring to Appendix L and I have reported accordingly.

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- assessment in terms of public recreation [page 22]; and
- the extent to which the public presently enjoy advantages over the Exchange Land is a relevant matter [page 23].
- 3.45 The concept of '*equally advantageous*' (or '*equality of advantage*') requires the Inspector to take into account a number of overlapping considerations:
- the present and likely future condition of the open space land to be acquired, the nature of its existing use and any wider benefits which it provides to the public at large; and
 - the likely condition of the Exchange Land, at the date of exchange and '*any prospects of improvement to the Exchange Land*' that will occur after that time. It is necessary to consider the extent to which it will provide both for those who, at present, use the open space to be acquired, but will also deliver wider benefits to the public at large.
- 3.46 It has previously been put to the main inquiry [NET.P6/A, paragraph 7.191] that the replacement open space at Silverdale (and Chilwell), offered in exchange, meets the criteria set out in paragraph 13 of PPG17¹¹. This states that the '*new land and facility should be at least as accessible to current and potential new users, and at least equivalent in terms of size, usefulness, attractiveness and quality*'.

Existence of Rights in the Open Space to be Acquired

- 3.47 All of the open space to be acquired is in the freehold ownership of Rushcliffe Borough Council. The recorded ownership and interests are set out in the Revised Book of Reference [NET.A19/2] and neither Rushcliffe Borough Council nor any other objector has claimed that there are any specific rights over the land which would need to be replicated in the Exchange Land.
- 3.48 The Exchange Land would vest in Rushcliffe Borough Council, and be subject to the like rights, trusts and incidents as attach to the existing open space, which is in accordance with the provisions of subsections (1)(a) and (3)(a) of s19 of the ALA.
- 3.49 There are specific safeguards provided in the draft Order, in Article 42B, which would give Rushcliffe Borough Council the power to prevent the exchange from taking place until it has certified that (a) the Rushcliffe Exchange Land is no less in area than the Rushcliffe open space; and (b) a scheme for the provision of the Rushcliffe Exchange Land as open space has been implemented to '*its satisfaction*'.

Area of Open Space to be Acquired and the Exchange Land¹²

- 3.50 The area of open space to be acquired comprises 23,840 square metres in total. It is required for the purposes of constructing Work Nos 14 and 14A, which include the authorised tramway, a new footpath and associated landscaping. Approximately 7,149 square metres, to the east of the tramway, would be improved and returned, after construction to use as a public footpath and associated planting. The area would be open space, suitable for its present recreational purposes. The net amount of open space to be permanently acquired would be 16,691 square metres.

¹¹ Inspector's Note: See main report paragraphs MR3.258-3.261

¹² NET.X9/A, paragraphs 3.9-3.16, see also NET.X9/B Appendices IMG1, IMG6 & IMG7

- 3.51 The Exchange Land comprises parcels with a total area of 36,582 square metres. Part of this area would be required for the permanent works, which cross this land. Based on the current designs, 6,911 square metres would be ultimately required for the permanent works and embankment slopes.
- 3.52 The Exchange Land to which the public would have access is therefore estimated to be at least 29,671 square metres, close to twice the area of the land to be permanently acquired and much larger than the useable area of the existing path. Furthermore it would be approached from the north via a new public footpath from Wilford Lane.

Existing Condition of Open Space to be Acquired

- 3.53 The land to be acquired is a linear area of semi-natural open space along an embankment which is part of the former Great Central railway corridor extending northwards to the river [NET.X9/B, Appendix IMG7].
- 3.54 The railway corridor can be accessed by a number of formal access points [Photos IMG7.1, 7.2, 7.6, 7.7 and 7.9]. The railway embankment is a narrow green corridor, which is heavily vegetated up to the verges of the path. The site visits in July and September 2008 showed that vegetation had been cut back to maintain accessibility [Photo IMG7.3 to 7.5, 7.7 and 7.8]. The area used for walking is relatively narrow and informal in character. It is not laid out as a formal pathway [Photo IMG7.4]. Further south along the embankment, in the vicinity of Brierfield Avenue, [Photo IMG7.5] the path becomes narrower and less clearly marked.
- 3.55 At the southern end of the open space, the former railway has been blocked by the embankment carrying Ruddington Lane, which replaced a former bridge. The corridor to the South, which is in cutting, was provided with pedestrian access (Photo IMG7.10) but this and the whole cutting (Photo IMG7.11) is now inaccessible because of dense vegetation.
- 3.56 The embankment is a designated SINC, forming a wildlife corridor. Vegetation types on the railway embankment are typical of the kinds that develop readily on brownfield sites, such as disused railways, and have regenerated naturally during the thirty years or so since the railway finally closed.
- 3.57 The dense vegetation and linear nature make it unsuitable for use as a recreation area for informal ball games. Its present recreational use is as an informal footpath, with occasional cycling use.
- 3.58 The rights of way Definitive Map and statement show that the footpath, which runs north-south along the entire length of the land to be acquired, is not a Public Right of Way (PROW). Appendix IMG8 shows the existing points of access onto the corridor. There are seven points along the route which permit formal access onto the railway embankment.
- 3.59 The Promoter undertook surveys of the use made of the path along the railway in September 2005 and July/September 2006. These are tabulated in NET.X9/B, Appendix IMG9. Care must be taken in interpreting these surveys and, in particular, the results for 18 July 2006 were significantly inflated, because it had become known locally that the survey was being undertaken and an unusually large number of people was recorded. More generally, the number of users recorded on all dates in 2006 was significantly higher than 2005, which could well have arisen for a similar reason.
- 3.60 Overall levels of use, even during the summer, are relatively low. Daily usage in 2005 ranged from 223 to 432 people per day, and it is likely that around 25% are dog walkers. Each person was counted as they 'entered' the railway

corridor. Multiple trips on the same day and trips made on more than one day by the same person will all have been counted. Peak use is on weekday lunchtimes at the Industrial Estate and at Acorn Bank, during the morning and evening 'peaks' and at lunchtime. It appeared to be used by employees from the industrial estate for recreational and access purposes.

Design of the Tramway and Landscaping through the Open Space to be Acquired

- 3.61 The intention is to create a multi-purpose corridor, containing the tramway, a new public footpath to the east of the tramway and replacement landscape planting along both sides.
- 3.62 The key design principles, illustrated in the Urban and Landscape Design Statement (ULDS) drawings, in NET.X9/B, Appendix IMG3, are to:
- regrade the embankment and cutting, which maximises the corridor width available for a new path and planting;
 - generally keep the tramway on the western side of the corridor with a parallel footpath on the eastern side;
 - discourage public access to the tramway (and the landscaped area to the west) by means of a hedge and fence; and
 - replicate the existing pedestrian access points to the path.
- 3.63 The replacement path and landscaping to the east of the tramway would consist of a 2 metre footpath, a 1.5 metre strip containing the hedge and wildflower planting and a hedgerow/woodland strip varying from between 2.3 and 5.5 metres in width.
- 3.64 Once the vegetation has matured, the corridor would regain its character and feature as a predominantly green corridor. A substantial landscape belt of native woodland scrub and intermittent trees would be created on the western side of the tram to enhance screening and provide an undisturbed wildlife corridor, with no public access.
- 3.65 The significance of the replacement path in the context of this Exchange Land Certificate application is twofold;
- first, it means in practice the extent of land to be taken out of open space use along the former railway corridor would be considerably smaller than it would otherwise be; and
 - second, the provision of the replacement path would significantly add to the accessibility of the Exchange Land thereby contributing to the advantage the public would enjoy from the Exchange Land.

Existing Condition of the Exchange Land

- 3.66 The Exchange Land is an area of generally low-lying agricultural land to the east of Fairham Brook. Some objectors assert that this land has been used for recreational purposes by nearby residents. Evidence is based on site inspections, aerial photographs and conversations with the tenant farmer. Recent photographs are included in NET.X9/B, Appendix IMG11. The key features of the land at present are:
- the western area has been in 'set-aside' since 2003, but has now been tightly mown and has apparently been sprayed with weedkiller. It will be cultivated and returned to arable use later this winter;
 - the remainder has been in continuous arable use and was still carrying an unharvested crop of wheat on 11 September 2008.
- 3.67 The only proper pedestrian access onto the land is via the railway bridge from

Wilford Road. There is faint evidence from the grass strip behind the houses in Waingrove and around the end of the field fence/hedge that people have accessed the 'set -aside' land and there are faint paths across it. However, this land was virtually waterlogged at the time of the site visit and there were no footprints or other signs of recent use by pedestrians or dogs. Generally, the rear boundaries to the houses on The Downs are securely fenced or hedged. Five houses have installed gates. The only evidence that people had used these was recently cut hedges on the field side. There was no evidence along the boundary of the cropped area that people have been walking into or through the standing crop. Even at the western end, where the land was in 'set aside', there is no visible evidence of recent access.

- 3.68 Even if there had been any evidence of recreational use, the land is still in agricultural use and does not remotely approach the definition of land 'used for the purpose of public recreation' in s19 of the ALA.

Design of the Replacement Open Space on the Exchange Land

- 3.69 The design approach is to create an open, landscaped area with footpath access for pedestrians and a diversity of habitat types. The proposed open space/wildlife area is designed to maximise ecological quality, reintroduce the valuable linear aspects of a wildlife corridor and provide passive recreation value for local residents, in compensation for losses on the land to be acquired.
- 3.70 The site would be very accessible to the local population, particularly those living in Silverdale. Surfaced footpaths would be provided through the new landscaped area, in order to increase its amenity value and maximise accessibility but other paths would emerge. A new path would run east-west through the area to the north of the tramway. It would connect to the new path along the Wilford railway embankment at Ruddington Lane. The paths to the north of the tramway would be surfaced in self binding gravel. It would be possible to cross the tramway to the southern area of the Exchange Land.
- 3.71 The Exchange Land would provide an attractive and functional recreational environment, although it would take some years for trees and shrubs to mature. Over time, the diversity of plant species and fauna would increase. It adjoins the Fairham Brook SINC and would, in time, become an extended area of nature conservation interest.

Promoter's Conclusions in Relation to Existing and future condition of the Open Space and Exchange Land

- 3.72 For an Exchange Land Certificate, the date of assessment is the date of exchange, but account must be taken of the prospects for improvement after that date; this means the conditions after the landscaping has matured.
- 3.73 As soon as the new footpath alongside the tramway has been completed, local residents can resume their use of the path. Although part of the corridor would be permanently used for tramway, the land returned to public recreational use would, in effect, deliver very similar recreational benefits as the existing path. Indeed, the improved surface and more open aspect may make it more attractive to some users. From Ruddington Lane, south to The Downs and Clifton, there would be a continuous footpath, where none exists at present.
- 3.74 The Exchange Land would create a substantial new public recreation and nature conservation resource, in the form of paths and open areas for informal use. In terms of extent and quality of recreational and nature conservation provision, it would more than replace the 'open space to be acquired' permanently. The

value of the 'open space' that is being returned has to be added to the value of the Exchange Land, in order to draw a sensible conclusion about 'equality of advantage [NET.X9/B, Appendix IMG3].

Access to the Open Space to be Acquired and Exchange Land

- 3.75 An analysis of walk distances and times from selected local residential properties to the existing railway corridor and to the Exchange Land is presented [NET.X9/A, Section 6 and NET.X9/B, Appendix IMG12]. For each selected property, the distance and walk time to the existing railway corridor was calculated and compared with the distance and walk time to the Exchange Land.
- 3.76 Given the linear nature of the railway corridor and the location of the Exchange Land it would not be as close for residents at the northern end of the alignment. Table IMG12.1 shows that residents living along the northern part of the railway embankment for example in St Austell Drive and Heathervale, would have to walk for around 20 minutes to reach the Exchange Land as against one to five minutes to the open space to be acquired.
- 3.77 The Exchange Land would be easily accessible to its own local community, in particular Silverdale and parts of Clifton. For some residents, it would become the nearest substantial area of informal open space.

Access to Alternative Areas of Open Space

- 3.78 The residents of Wilford and Compton Acres who live on either side of the tram route are well provided with other areas of open space which can be used for informal recreation. Many of these are linked together to provide attractive walking routes. The relevance of these to this inquiry is that the availability of alternative areas of accessible open space should be taken into account when considering how advantageous the open space to be acquired is to the public.
- 3.79 Appendix IMG13 provides a description of those areas, a location plan and photographs. The analysis in Table IMG12.2 shows that for most residents there are alternative areas of open space that are closer, with associated shorter walking times, than the railway embankment. Some residents living close to the northern part of the railway corridor would have to walk further to use other areas of open space. However, the distances are small. Residents in St Austell Drive and Heathervale, for example, would have to walk between 100 and 320 metres further to use Finsbury Park Heath.
- 3.80 It is acknowledged that in terms of walking distance, the Exchange Land is further away from residents at the northern end of the corridor than the existing railway path. If for some reason, existing users of the railway path do not choose to use the new path, there are easily accessible and attractive alternative open spaces. The Exchange Land would attract 'new' users from the residents of Silverdale, for whom it is very convenient, and to a lesser extent, parts of Clifton.

Wider Public Benefits and the Overall 'Equality of Advantage'

Wider Benefits

- 3.81 The Exchange Land would create a substantial new public recreation and nature conservation facility. It is nearly twice as large as the land to be occupied permanently by the tramway in the existing railway corridor and can be used

for a wider range of recreational activities.

- 3.82 In practice, the replacement footpath along the railway would have a similar area accessible to the public as the existing footpath, before the Exchange Land is even taken into account.
- 3.83 NET's evidence to the TWA Inquiry was that, in nature conservation terms, the Exchange Land plus the nature conservation value of the existing corridor would, in due course, more than outweigh the losses from the open space land to be acquired (and any other nature conservation interests that are affected). That remains the position.
- 3.84 The Exchange Land would provide a new area for informal public recreation, particularly convenient for the residents of the southern part of Silverdale. This land would help the Nottingham City Council meet its policy objectives, which are to safeguard and develop its defined Open Space Network.
- 3.85 The creation of a new recreational footpath linking Clifton, Silverdale, Compton Acres and Wilford must be beneficial and would attract new users, not just from the immediate local residential area.
- 3.86 Although it is not possible to quantify the wider public benefit of the provision of the Exchange Land and the 'loss' of open space in the existing corridor, all of these benefits fall on one side of the equation, in favour of the contention that, overall, the provision of the Exchange Land is *'equally advantageous'*.

The 'Overall Equality of Advantage'

- 3.87 There is no doubt that nominally (and even more, in practice) the Exchange Land exceeds the area of open space to be lost [NET.X9/A, Section 3]. There are no individual interests (such as rights of common) to be taken into account.
- 3.88 The Exchange Land (and the open space to be 'returned' alongside the tram through Wilford) would be 'fit for purpose' as a recreational resource as soon as construction and landscaping are complete. This would be the 'date of exchange', which is the starting date for assessing the comparison between the open space to be acquired and the Exchange Land. The attractiveness and value of the Exchange Land as a nature conservation resource would increase as the landscaping matures and the diversity of flora and fauna increase. It is appropriate, taking the advice in para 25 of the Circular and the Oxleas Wood case, to take the 'mature' condition of the returned open space, and the Exchange Land into account when assessing *'equality of advantage'*.
- 3.89 The circumstances of this ELC application are unusual in that, in addition to the formal Exchange Land, part of the existing open space is to be returned to its former use, and in terms of its function as an informal path, it would be fully reinstated.
- 3.90 The Exchange Land is less accessible for some residents along the corridor but they would, in practice, not be disadvantaged because the existing path is being reinstated.
- 3.91 The Exchange Land would be more accessible and would provide a resource for new users from Silverdale and Clifton (who cannot easily access the existing open space) and the wider public.

4 THE CASE FOR THE SUPPORTERS

The material points are:

THE BIRDS ISSUE

Written Representations of Support

- 4.1 Alan Simpson MP stresses [NET.Y7(4)] that the area to the south of Nottingham, around the A453, is a large expanse of open arable land which suits Golden Plover. Furthermore there is a healthy population of these birds across the UK; they are not deemed to be in need of any special form of conservation protection.
- 4.2 Vast areas of open arable space would be left after completion of the park and ride site and would be available for Golden Plover and by the changing nature of arable land would not be appropriate or considered for SINC status. The 10 metre landscape buffer around the proposed park and ride site would provide ecological gain and add to the variety of birds and wildlife species.
- 4.3 Dr Frost (for BACIT) indicates [NET.Y7(7)] that the area has not been designated as a SINC and calls into question the validity of the objectors' evidence.

5 THE CASE FOR THE OBJECTORS

The material points are:

THE BIRDS ISSUE

Preliminary Matters

- 5.1 NET exhibits confusion regarding the description of Clifton Pastures, using it as a generic term for an ill-defined large area of land; whereas Clifton Pasture is a clearly defined area of 365 acres (some 148 ha) that is bordered by Fairham Brook to the east, the Nottingham Road to the west and Barton Moor to the south¹³.
- 5.2 Issue is taken with NET regarding the degree of use of cultivated land by Golden Plover; it is a valuable source of earthworms which are the principal food source for over-wintering Golden Plover. There is clear reference [NET.Y9/B, Appendix AFL 12] to the extensive use of arable fields as well as grasslands in North Yorkshire. Furthermore a more recent study by Gillings [Y102, Appendix 1] shows, in East Anglia, that previous pronounced preference by Golden Plover and Northern Lapwing for permanent pastures appears to be changing. Increasing numbers of Golden Plover winter in eastern Britain where arable fields dominate. It is therefore clear that the area around and adjacent to the park and ride site is very suitable for Golden Plover and such use would be likely to recur.
- 5.3 Furthermore the Gillings' study showed that out of a study area of 2063 ha Golden Plover used only some 160 ha. Therefore, in the local context it would be extremely unlikely that Golden Plover would use all the surrounding 1300 ha to which the Promoter refers.
- 5.4 Mr Hoare observed European Golden Plover on the ploughed field adjacent to the Larkhill Complex in December 2007, subsequent observations indicated that the flock was growing and was eventually recorded as exceeding a total of 2500 on two dates in March 2008 [NET.Y7(3)]. Such a count is deemed as the

¹³ Inspector's Note: Nothing turns on this; IMG3 clearly indicates the general wide area referred to in evidence by NET as Clifton Pastures. The smaller area of Clifton Pasture lies at the northern end of and is partly covered by Clifton Pastures.

threshold of a Nationally Important Flock as it constitutes 1% of the national total [NET.Y7(1), Attachment 3].

- 5.5 NET's insistence that large flocks are rare is not sustainable. This general area is regularly used by very large, often mixed, flocks of over-wintering birds, including Golden Plover. The absence of reported sightings does not prove anything, particularly when it is acknowledged that feeding Golden Plover are difficult to see [NET.Y102, Appendix 3 photos].
- 5.6 Barton in Fabis Parish Council stresses that at the time it wrote to the Secretary of State the facts regarding avian SINC status were presented accurately. The Objector understood that the SINC status had been accepted in respect of the European Golden Plover flock in excess of 1550 birds. However the avian SINC criterion relating to the inclusion of arable land has now been removed.
- 5.7 The key issue to note is that whether the area is a SINC, whilst important, is secondary to the fact that the overall environmental impact of the proposals was never properly assessed – the occurrence of a significant flock of Golden Plover, along with other bird sightings, illustrates this. This leads on to the core issues for the Inquiry.

Core Issues

- 5.8 The ES is inadequate regarding over-wintering birds. Secondly, disturbance to significant listed bird populations would occur both during construction and subsequent operations if the park and ride site were to be developed.

Bird Sightings

- 5.9 Local observations between October 2007 and March 2008 of the land to the south of the proposed park and ride site show that some of the most threatened species of farmland birds rely on this area of land to feed and roost during the winter [NET.Y7(1)]. A thorough over-wintering bird survey and breeding bird survey should have been done, not just on the park and ride site, but of the arable land to the south and south west (stretching to Drift Lane and Heart Lees) [see map in NET.Y7(1), Section 4]. It is considered that building the park and ride site would cause displacement to the species using the surrounding fields.

Disturbance and Mitigation¹⁴

- 5.10 European Golden Plover roost and feed on large areas of open (un-hedged) land, it is postulated that they feel safe in such areas as predators can be seen easily. Landscaping of the park and ride site would be contrary to these requirements.
- 5.11 The increase of flock from around 350 observed in October 2007 to some 2515+ in March 2008 shows that disturbance from fast moving vehicular traffic on Nottingham Road is not an issue. It is disturbance from human activity that would have a significant effect on birds in the surrounding area. The mitigation would not do anything to significantly reduce this disturbance; birds would still be affected by the lighting and the noise emanating from the site.
- 5.12 The park and ride site area currently acts as a buffer zone, protecting wildlife in the area from disturbance, the loss of this would impinge on and significantly

¹⁴ NET.Y7(1), Section 5

deplete the adjacent land which would not be capable of supporting these important over-wintering bird assemblages at such nationally significant levels.

5.13 The Objectors' evidence with regard to the Statement of Matters is set out below.

The reasons why the Promoters did not consider it necessary to undertake a winter bird survey in respect of the proposed park and ride site at Clifton. (Matter i)

5.14 The Promoter's assumption, upon which its decision not to undertake a winter bird survey, was flawed, as evidenced by the sightings during the winter of 2007-2008 and submitted in evidence.

5.15 The Promoter relies on the fact that none of the bodies consulted on the EIA suggested that such a survey should have been undertaken. However lack of access to detailed documentation on this consultation makes it difficult to comment on whether the consultation was objective or leading¹⁵.

In the Light of Evidence Now Available, Whether the Development of the Park and Ride Site is Likely to Cause Significant Disturbance and Harm to Bird Species and their Habitats. (Matter ii)

5.16 NET's calculation of the proportion of Clifton Pastures which would be affected by the proposed park and ride site takes no account of the nature of the land or of its suitability for birds. This is borne out by examination of the result of Gillings' work [NET.Y102, Appendix 1]. This indicates that over very large areas Golden Plover concentrate into very few fields with individual fields being consistently preferred.

5.17 Evidence of the recent winter surveys indicates that the development of the park and ride site would, on the balance of probability, cause significant disturbance to locally and nationally important flocks of Golden Plovers. Use of previous surveys for other developments, which do not make reference to the park and ride site, does not prove that the area was not used – merely instances were not recorded.

5.18 In particular it has been established through reliable evidence that there are sound reasons to believe that the field adjoining the proposed park and ride site is likely to attract very significant numbers of Golden Plovers in future years. The Promoter's evidence to the contrary does not stand up to examination.

5.19 Surveys of the breeding population of Corn Bunting in this area indicate an important local population of some 14 pairs of this species which is in critical decline nationally. It is a species that is very easily disturbed [NET.Y7(3)].

The Extent to which Measures can be taken to Mitigate any Adverse Impacts on Birds, Including the likely Effects of Proposals to Landscape the Park and Ride site. (Matter iii)

5.20 The current proposals have not been designed to mitigate any effects on

¹⁵ Inspector's Note: This was clearly a matter of concern to Barton in Fabis Parish Council. However Mr Kaczmarczuk did not pursue it through detailed cross-examination of the appropriate NET witness, Mr Gilder. I have seen nothing in the ES to indicate that the consultations were not effected properly.

Golden Plover, as the presence of significant numbers adjacent to the proposed development had not been recognised by the designers.

- 5.21 The Promoter's assertion that the proposed landscaping features would reduce the impact on Golden Plovers has not been supported by reliable evidence.
- 5.22 The lack of comprehensive surveys of breeding birds and over-wintering birds, which have constantly been requested by the Barton in Fabis Parish Council, means that a proper assessment of the effect of the proposals on bird habitats and populations can not be carried out.

Whether any Residual Harm would be Outweighed by the Wider Public Benefits of the Proposals Advanced by the Promoters. (Matter iv)

- 5.23 The totality of the adverse effects of the proposals has been understated as the issues raised have not been previously identified.
- 5.24 There is no justification for the NET claim that there are another 1300 ha of suitable land, on the balance of probability there is likely to be a significant residual harmful effect.
- 5.25 The overall balance between residual harm and environmental and financial costs and any wider public benefits has been changed in light of evidence brought forward by the objectors. This change is detrimental and introduces additional residual harm compared with what was previously concluded [NET.Y102, paragraph 1.17.3].

Written Representations of Objection

- 5.26 Nottinghamshire Wildlife Trust (NWT) stresses [NET.Y7(5)] that whilst the site does not meet the criteria for SINC status, if it continues to attract large numbers of European Golden Plovers it would, in time, qualify as a SINC.
- 5.27 The absence of comprehensive local bird records for this area highlights the need for further surveys to enable full assessment of the impact of the Clifton park and ride site and to address appropriate action and mitigation, a point reiterated by Mr & Mrs Britton with respect to the Toton Lane ('Chilwell') park and ride site [NET.Y7(8)].
- 5.28 NWT also stresses that European Golden Plover, Northern Lapwing and Corn Bunting rely on land that is open in aspect and undisturbed. The NET route and the park and ride site would bisect the land being used by these birds and would result in loss of habitats and in disturbance. Birds would avoid some 150 metres width of land adjacent to the development. The loss of a winter feeding site could affect the local bird population's viability.
- 5.29 In mitigation the Promoter should provide and guarantee future management of large areas of open undisturbed land similar in size to that affected (ie a 1:1 ratio).
- 5.30 In considering the public benefits of the proposals against the impacts on biodiversity, consideration must be given to the sustainability of the proposals and the cost to the public's quality of life through loss of biodiversity.
- 5.31 Rushcliffe Borough Council reflects this approach [NET.Y(6)], asking that the site's importance for birds be given due consideration and doubting further the suitability of this aspect of the TWAO, in the light of unsatisfactory evidence regarding the adverse effect on the identified bird species.

THE ELC ISSUE

Inspector's Note: One Objector, Environment Not Tram (ENT), raises a number of matters that were covered in the main inquiry (notably ecological impact, environmental damage, subsidence, flooding risk and associated flood defences and security issues) and that do not go to the issues before this inquiry. I indicated [see paragraph 1.12 above] that these could play no part in my consideration of the relevant matters and I have reported accordingly.

The Rushcliffe Open Space

- 5.32 The open space to be acquired, the wildlife corridor, is a wonderful amenity that is enjoyed by the local community who can exercise themselves and their pets whilst enjoying the delights of the habitat and species within this nature corridor.
- 5.33 It is an enjoyable, well used, very convenient and a local peaceful, natural haven for plants and wildlife, and offers total safety to walkers of all ages. If NET's proposals came to pass this would become a footpath next to a tramroad where trams, running at up to 50 mph, would be hurtling by. Such an environment would not be pleasant, peaceful or enjoyable.
- 5.34 The 2006 Barker Report on Land Use advised on different social values per hectare of land [NET.X14, Appendix 8(1)]. The Exchange Land is agricultural and has one of the lowest social values (Interim Barker Report 2006 page 155). Although not specifically identified in the report, the existing open space land (to be acquired) would clearly have a higher social value as it is a SINC, therefore the Exchange Land cannot be considered to be equally advantageous to the public.

Accessibility

- 5.35 The Exchange Land is not as accessible to that section of the public that has hitherto benefited from the Rushcliffe open space. Much of the public who currently benefit from the Rushcliffe open space use the land for casual, rural recreational walking close to home. These users include residents from the Compton Acres area and also from Wilford. Accessibility to the Rushcliffe open space for these users is a short walk; it is almost on their doorstep.
- 5.36 The Exchange Land however would be a mile to a mile and a half of walking for these people and the shortest route of access for many if not most of them would necessitate walking much of that distance on a footpath next to a tramroad with passing trams, running at up to 50 mph.
- 5.37 The Exchange Land would therefore be far from equally advantageous to that section of the public that has hitherto benefited from the Rushcliffe open space.
- 5.38 The Exchange Land is located outside of the Borough of Rushcliffe. The population density around the Rushcliffe open space is significantly greater than around the Exchange Land making it quickly and more readily accessible to larger numbers of people than the Exchange Land.
- 5.39 Accordingly, the Exchange Land cannot be equally advantageous to the wider

public at large as the Rushcliffe open space currently is.

Area of Proposed Exchange Land

- 5.40 The Exchange Land parcels are said to total 29,671 square metres after deduction of the tramroad that would bisect the land. However around half of the Exchange Land would be south of the tramroad and west of Fairham Brook – apparently making it inaccessible. If this understanding is correct then the actual area of usable Exchange Land reduces to around 15,000 square metres which is substantially less than the area of the existing Rushcliffe open space. It is the Promoter's responsibility to demonstrate that the Exchange Land parcels are not less in area and they do not appear to have discharged that responsibility effectively.
- 5.41 Exchange Land of less effective area than the existing Rushcliffe open space would be significantly less advantageous to the public.
- 5.42 From the point of view of quality of land, the proposed Exchange Land is seemingly frequently flooded in some parts, whereas the raised former railway embankment does not get this saturated effect, the ground being effectively drained at all times by the nature of its original construction. Furthermore the Exchange Land contains none of the wildlife attractions which aid recreation of the open space and would not do so for some considerable time.

Land which is already used by the public

- 5.43 ODPM Circular 06/2004 says at paragraph 25 of Annex L; *But land which is already subject to rights of common or to other rights, or used by the public, even informally, for recreation, cannot usually be given as Exchange Land, since this would reduce the amount of such land, which would be disadvantageous to the persons concerned.*
- 5.44 The land proposed to be provided by the Promoter as Exchange Land is already used by the public informally. Local residents can be seen walking out across the land, in some cases walking dogs, on a daily basis. Furthermore a number of the houses along The Downs that back onto the proposed Exchange Land have gates in their back fences to facilitate easy access out onto the land.
- 5.45 Representatives of ENT have walked the land on numerous occasions entering from Whilwell Cutting and from The Downs. On a recent Sunday morning ENT representatives visited The Downs and spoke with local residents out walking. These residents of The Downs area volunteered statements confirming that;
- They walk out on the proposed Exchange Land on a daily basis.
 - They see other people walking there on a daily basis.
- Several local residents also took copies of forms to pass on to neighbours for completion. Thirteen residents' statements are included as Appendix 3 [NET.X14].
- 5.46 An aerial view (taken from Google Earth) clearly shows informal footpaths across and around the proposed Exchange Land [NET.X14, Appendix 4].
- 5.47 ODPM Circular 06/2004 says at paragraph 24 of Annex L; *The Secretary of State must decline to give a certificate if he is not satisfied that the requirements of the section (19) have been complied with. Where Exchange Land is to be provided for land used by the public for recreation, the relevant Secretary of State will have regard (in particular) to the case of LB Greenwich and others v Secretary of State for the Environment, and Secretary of State for Transport (East London River Crossing: OxleasWood).*
- 5.48 The Promoter has not properly researched and understood the extent of current

- usage of the proposed Exchange Land. The area is already used for recreation and as an amenity. As a result of this, it falls into the category of "open space".
- 5.49 It is inappropriate to put it forward in exchange for the Rushcliffe open space because to do so would reduce the amount of open space land available to the public which would be disadvantageous to the persons concerned.
- 5.50 The requirements of section 19 of the ALA have not been met and the Secretary of State must therefore decline to give a certificate.

Rebuttal to NET by ENT¹⁶

Inspector's Note: ENT submitted substantial evidence in rebuttal to NET's evidence [NET.X18a & b]. Much of this effectively repeated the matters reported above. However I have reported here those issues which are new or which add to the matters set out in the Case for the Objectors above.

The Tests

- 5.51 The test, in Circular 06/2004, Appendix L, gives discretion to consider *'the respective merits of order'* of the land in question. This would allow consideration of all aspects of the Open Space and its functions as a piece of land (flood defence, recreational, etc). Furthermore the Circular makes no reference to restricting the use to recreational use only.
- 5.52 The guidance also provides *'For example, in the case of open space, a relatively small recreation ground may be used predominantly by local people, perhaps from a particular housing estate. In such circumstances, the Secretary of State would normally expect Exchange Land to be equally accessible to residents of that estate'*.
- 5.53 The Open Space is used in such a manner by local residents, who would not be able to access the Exchange Land readily because of the distance of travel involved.

Legal Considerations

- 5.54 The Promoter refers to case law from Oxleas Wood (Greenwich) from 1993. There are, however, significant differences in the current Public Inquiry from the Oxleas Wood case.
- 5.55 In Oxleas Wood it was accepted that proper environmental studies had taken place. In case of the current Open Space the contention is these have not been undertaken. In particular subsidence surveying and the use of the Open Space as part of flood defences has not been adequately considered, nor have they been picked up as special conditions by the Promoter as required by Annex L of Circular 06/2004.
- 5.56 The Oxleas Wood project, despite victory in the High Court for the developers in 1993, was later abandoned by the Government because of the European Directive on Environmental Impact Assessment. It has no value as legal precedent. Reference to this case by the Promoter should therefore be struck out of evidence [NET.X101].
- 5.57 Guidance in Appendix L paragraph 25 *'But land which is already subject to rights of common or to other rights or used by the public, even informally, for recreation, cannot usually be given as Exchange Land..'* should prevail.

¹⁶ NET.X18a & b

5.58 The other legal matter relates to the status of the Exchange Land. It is ENT's view that it may be deemed to be dedicated as a PROW by virtue of its use for more than 20 years [NET.X105]. Proformas returned by residents show one or more residents have used it for more than 20 years [NET.X14, Appendix 3].

Written Representations of Objection

5.59 A number of written representations of objection have been submitted [NET.X5, X12, X13, X15, X16 & X19]. The points raised by the objectors reflect and are included in those reported in the Case for those who appeared at the inquiry above.

6 REBUTTAL BY NOTTINGHAM EXPRESS TRANSIT

THE BIRDS ISSUE

Preliminary Considerations

- 6.1 The matters which have come to light in connection with the re-opening of the inquiry are, in particular, that firstly the 14.8 ha field south of the park and ride site has been used by flocks of Golden Plover from time to time in 2007/8. The figures for use of Site A are given in the agreed consolidated table [NET.Y17/2], although Site A is more extensive than that field [NET.Y17].
- 6.2 Secondly, Site B was also used by Golden Plover in the same period as shown in the same table. Although flocks on Site B were smaller than some of the flocks on Site A, on at least four occasions they were of 1,000 or more birds.
- 6.3 Thirdly, an extensive colony of Corn Buntings exists to the south of the park and ride site on both sides of Nottingham Road, with the greatest concentration of activity, and the only identified nests located at a considerable distance (1-2 km) from the park and ride site. One breeding male has been identified alongside the Nottingham Road relatively close to the park and ride site but the possibility of a (probably different) Corn Bunting had already been identified in the ES.
- 6.4 Turning to the Gillings' study, the statistical analysis [Y102, Appendix 1, p515] indicates that there is undoubtedly site selection by Golden Plover. However the results are actually measuring a tendency to aggregate over time. The results indicate that the birds favoured sugar beet stubble. The birds notably made use of 50% of the study area over time, which in the local context would point to use of some 650 ha of the available 1300 ha.
- 6.5 However data are not available to assert that the birds using a particular field in one winter would be likely to return regularly to that field. Neither the Gillings' study nor local observations [NET.Y9/B, Appendices AFL9 & AFL10] over recent years support this contention.
- 6.6 Golden Plover still range far and wide depending on factors such as food availability, land cultivation and correlation with the use of manure¹⁷.
- 6.7 What Gillings did show was a pattern of movement around an area. It may be postulated that regular visits and observations in the Clifton area during the

¹⁷ Mr Gilder in cross-examination on Day 1

2007/8 winter would have shown Golden Plover using fields elsewhere in the area.

Objectors' Issues

- 6.8 Between them the objectors raise four principal matters; firstly that surveys of over-wintering birds should have been carried out (presumably in the winter of 2003/4) by the Promoter, instead of solely breeding bird surveys. (The latter had not been criticised by anyone until the receipt of Mr. Kazcmarczuk's rebuttal NET.Y102, para. 1.12.1.) This has given rise to item (i) in the Statement of Matters (SoM).
- 6.9 Secondly that in the light of the new information in relation (in particular) to Golden Plover and Corn Bunting, the TWA Order (TWAO) should not be made so as to include the Clifton park and ride site. This has given rise to items (ii) and (iv) in the SoM.
- 6.10 Alternatively a decision on the TWAO should be deferred until a survey of over-wintering birds (presumably to be conducted over the winter of 2008/9) is available as part of the ES. This may be said to be implicit within item (i) of the SoM.
- 6.11 A third alternative is that a decision on the TWAO should be deferred, or the TWAO refused, in the absence of additional mitigation measures. This has given rise to item (iii) in the SoM.
- 6.12 It is clear¹⁸ that the objectors' main concern is that, given this new information, bird interests should be given proper consideration, along with all other issues.
- 6.13 The four Matters raised in the SoM are addressed below, since the conclusions drawn in respect of those four matters provide the answers to the principal matters raised by objectors highlighted above.
- 6.14 One other issue raised by Mr & Mrs Britton relates to their suggestion of the need for over-wintering species and more particularly on the 'Chilwell' park and ride site. Whilst this is outside the scope of this inquiry the 'Chilwell' park and ride site is located in a relatively narrow green corridor between Stapleford and Chilwell but is still only a small part of that corridor. There are no records of large numbers of wintering birds, such as Golden Plover, visiting the Chilwell site [NET.Y8/A, paragraphs 5.16-5.18].

The reasons why the promoters did not consider it necessary to undertake a winter bird survey in respect of the proposed park and ride site at Clifton. (Matter i)

- 6.15 An ES has to contain such information relating to "aspects of the environment *likely to be significantly affected* by the proposed project" as is "*reasonably...* required in order to assess the environmental effects of the proposed works and which the applicant can, having regard in particular to current knowledge and methods of assessment, *reasonably* be required to compile", including "the data required to identify and assess the *main effects* which the proposed works are likely to have on the environment" (reg 4(1) and 11 and Sch 1 of the T&W (A&OP) (E&W) Rules 2006) [NET.D4].
- 6.16 In *R v Cornwall CC ex p Hardy* [2001] Env LR 473, 485, Harrison J said that an ES did not have "*to contain every conceivable scrap of environmental*

¹⁸ Confirmed by Mr Hoare and Mr Kaczmarczuk in cross-examination on Day 2

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- information about a particular project"*, and it was only likely significant effects that had to be assessed [NET.Y13, para 41]. (This passage was cited with approval in *Maureen Smith v Secretary of State for the Environment* [2003] EWCA Civ 262 para 27 [NET.Y12, para 27]).
- 6.17 Quite apart from the two express references in the Rules to what is "*reasonably required*", it has been held that (in any event) there "*must be imported into the statutory obligation a concept of reasonableness...The fact that the environmental statement does not cover every topic and explore every avenue advocated by experts does not invalidate or require a finding that it does not substantially comply with the statutes and the regulations*": *Prineas v Forestry Commission of NSW* (1983) 49 LGRA 402, 417, the latter part of which was cited by Lord Hoffmann in *BACONGO v Department of Environment of Belize* [2003] 1 WLR 2839 para 43 [NET.Y14, para 43].
- 6.18 Here no expert at or prior to the opening of the main inquiry advocated the carrying out of surveys of over-wintering birds. Only Mrs Plowright did (and that only by inference in her letter of 17 August 2007, referring to "*tight timescale*").
- 6.19 Significantly NWT, who now refer to "*the lack of bird survey information [as] a serious omission in the ecological data contained within the EIA*" [NET.Y7(5), p.2] made no mention of over-wintering birds in its proof to the main inquiry, and in its Statement of Case (which referred only to breeding birds at the Clifton park and ride site) praised the Promoter's ecological work as "*generally fair and accurate*". In addition, NWT's response to the draft ecology chapter of the ES, together with those of English Nature/Natural England, and the RSPB Nottingham Group, is described in NET.Y8/A paras 4.5-4.10, which also deals with the Promoter's approach to that chapter. In particular, English Nature's consultation response [NET.Y8/B, Appendix IMG13] was that the surveys of protected species "*seem to have been comprehensive and appear to have followed guideline publications where they are available*".
- 6.20 Nor were there at any time before 27 December 2008 any sightings of significant numbers of over-wintering birds (especially Golden Plover) in the vicinity of the park and ride site, as may be seen from the Nottinghamshire Birdwatchers' Annual Reports for 2004, 2005 and 2006 [NET.Y9/B, Appendix AFL6, 7 and 8].
- 6.21 Further information about over-wintering birds in the vicinity comes from the records 1996-2006 for Barton in Fabis supplied by Nottingham Birdwatchers in relation to the nearby proposed A453 Dualling Scheme [NET.Y9/B, Appendix AFL 9], which, in addition to not recording Golden Plovers in 1996, 1997, 2000, 2003, 2005 and 2006, shows as the largest a flock of only 500 (by the A453 on 30 January 2004). Similarly for Northern Lapwing, there were only 5 recordings of more than 400 over that long period, and only one of more than 504 (1200 on 12 February 2000).
- 6.22 In short, it is wholly unsurprising that no surveys of over-wintering birds were conducted for the ES. Exactly the same decision not to conduct such surveys was reached by consultants acting for the Highways Agency in relation to the A453, whose ES was prepared several years later than that for NET Phase 2. They "scoped out" an over-wintering bird survey, having examined the data supplied by Nottingham Birdwatchers for 1996-2006 [NET.Y9/B, Appendix AFL9].
- 6.23 It is thus clear that there were no reasons in 2003 to conduct over-wintering bird surveys, and therefore the decision not to conduct such surveys was a reasonable one. Furthermore, given the extent of the information now
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available in relation to over-wintering birds in 2007/08, there can be no conceivable justification for any further over-wintering bird surveys.

In the Light of Evidence Now Available, Whether the Development of the Park and Ride Site is Likely to Cause Significant Disturbance and Harm to Bird Species and their Habitats. (Matter ii)

Golden Plover

- 6.24 Objectors' concerns have focused on over-wintering birds (Lapwings and more particularly Golden Plovers). There remains a difference of opinion concerning the consequences of any likely disturbance. The Promoter's case can be summarized under four principal heads, as follows.
- 6.25 The Golden Plover, despite its protected status under the 1979 Birds Directive, now has only Green listing, which indicates that there is no longer any clear threat to the species. One objector, Mr Hoare, gave evidence that this was the position in Europe generally. It is recognised, however, that Lapwing is Amber listed, even though its numbers are far greater, and the concentration at the present inquiry has been on Golden Plover.
- 6.26 Secondly, additional traffic on Nottingham Road caused by the park and ride site would not disturb over-wintering birds. This accords with the evidence of Mr. Kaczmarczuk and Mr Hoare and is agreed by Mr Leitch (for NET).
- 6.27 Thirdly, any disturbances to over-wintering birds caused by a combination of the operations on the park and ride site and any predation from the new shelter belt are likely to be confined to an area of between 100 and 200 metres from the new shelter belt¹⁹. On Mr Leitch and Mr Gilder's evidence (100 metres buffer) the only part of the 15 hectare field which may be less attractive to over-wintering birds is the area within the red line on the Planning Direction Drawings. There would still be left approximately 12 hectares of the field on which Golden Plover have been observed in 2007/08. On Mr Hoare's view (on which Mr Kaczmarczuk relies) a 200 metre buffer would result in two-thirds (or approximately 10 hectares) of the existing field remaining available to Golden Plover. Mr Hoare accepted²⁰ that Golden Plover would continue to use those 10 hectares, if the crop conditions were suitable, and this accords broadly with the lower drawing in Appendix 3 to NET.Y102.
- 6.28 Finally, in addition to those 10-12 hectares, there are also available to over-wintering birds the Clifton Pastures area generally and particularly at least three other areas in the vicinity which would be wholly unaffected by the construction and operation of the park and ride site. There is evidence that each of these three areas has attracted Golden Plover (and therefore most probably Lapwing) in 2007/8. These areas are [see NET.Y17] –
- other parts of Drift Lane;
 - Site B, east of Nottingham Road; and
 - Site C to the west
- 6.29 Mr Hoare confirmed the recent use of part of Site B by large numbers of Golden Plover.

¹⁹ Inspector's Note: It is interesting to note that this range is confirmed in the written representation of NWT, which refers to a 'buffer zone' of some 150 metres [NET.Y7(5), p3].

²⁰ In cross-examination Day2

6.30 Therefore for the reasons given by Mr Leitch [NET.Y9a, paras 3.2 to 3.6] and Mr Gilder [NET.Y8a, paras 4.12 to 4.19], there is unlikely to be any significant disturbance or harm to over-wintering bird species. This would remain the case even were the Secretary of State to assume the worst case, in accordance with the precautionary principle - as discussed on Day 2 with Mr Kaczmarczuk - that Golden Plover were present in the area *over several* winters in large numbers, and that they would not use a 200 metre buffer zone.

Corn Bunting

- 6.31 Mr Hoare in particular has raised concerns about other breeding birds, especially Corn Bunting. As a Red List species the Promoter accepts that any effects on Corn Bunting need to be properly scrutinised. This task is simplified by the very thorough *Map of singing and nesting Corn Bunting 2008* (part of NET.Y7/3) resulting from the survey carried out on Corn Bunting by Mr Hoare "*throughout the breeding season*", i.e. March to August 2008 and over a wide local area.
- 6.32 From the evidence it may be concluded that the majority of existing Corn Bunting activity lies 1-2 kms from the southern boundary of the park and ride site, including territory to the east and west of Nottingham Road. Corn Bunting in this distant area would not be disturbed and despite Mr Hoare's fears there is simply no credible evidence that they would be.
- 6.33 So far as concerns the one Corn Bunting recorded reasonably close to the southern boundary of the park and ride site, it is not possible to say whether it would be disturbed but if it is there is abundant suitable breeding land further south. It is noteworthy that Mr Hoare's survey was undertaken after the adjacent Larkhill development had been underway for several months and yet it showed a thriving, relatively local, Corn Bunting population. No other Corn Buntings would be disturbed.
- 6.34 The possible loss of one Corn Bunting territory is not a significant adverse effect [NET.Y9/A, paras 4.3 to 4.4]. Mr Hoare's concern about extinction of the Corn Bunting habitat is at odds with the evidence of his own breeding survey.
- 6.35 So far as other breeding birds are concerned, there should be no significant impacts and some may even benefit from the new shelter belt and grass strip which forms part of the proposed landscaping.

The Extent to which Measures can be taken to Mitigate any Adverse Impacts on Birds, Including the likely Effects of Proposals to Landscape the Park and Ride site. (Matter iii)

- 6.36 The question of further mitigation measures does not arise unless there are likely to be any significant adverse effects. No Objector has proposed individual mitigation measures save for the request of NWT for extensive areas of land to be identified and provided as replacement habitat. This is not only unreasonable but an unnecessary request.
- 6.37 The shelter belt which forms part of the Promoter's mitigation proposals is regarded as essential for landscaping reasons, which should prevail over any adverse effect the shelter belt may have in terms of predation. However, in any event the shelter belt and its grass strip would serve a useful purpose in screening birds from the sight of people in the park and ride site and could be beneficial for other types of birds. In addition, and as mentioned above, 10 to 12 hectares of the large field would remain available to the Golden Plover and would be far enough away from the shelter belt to avoid predators.

6.38 The new evidence at this re-opened inquiry does not require or support the imposition of additional mitigation measures, whether by amended draft Planning Conditions or otherwise.

Whether any Residual Harm would be Outweighed by the Wider Public Benefits of the Proposals Advanced by the Promoters. (Matter iv)

- 6.39 Neither Mr Hoare nor Mr Kaczmarczuk is saying that the TWAO should not be made, or should not be made in its present form, because of likely significant adverse effects on bird populations and/or their habitats. What *is* urged, and the Promoter agrees, is that any effects (significantly adverse or otherwise) should be properly evaluated as part of the decision-making process. In doing this, it has to be borne in mind that the field adjoining the park and ride site is not a SINC and on the current criteria can never be, although even if it were this would not preclude the present scheme from being approved.
- 6.40 In conclusion it may be stated that there should be no significant adverse effect on either over wintering or breeding birds, for the reasons already given.
- 6.41 Even if the effect on birds, and in particular Golden Plover and Corn Bunting, were likely to be significant, this is not a factor which on its own, or taken together with any other significant adverse effects of the Phase Two scheme, outweighs the scheme's significant economic, planning and transportation benefits.

THE ELC ISSUE

Drainage of the Exchange Land

- 6.42 The design of the Rushcliffe Exchange Land is described at paragraphs 5.25 onwards of NET.X9/A. The details of the hard and soft landscaping of the tram corridor would have to be approved by Nottingham City Council, as local planning authority, pursuant to draft Planning Condition 5 proposed to be attached to the deemed planning permission [NET.P6/V]. All hard surfaced areas to be used by vehicles or pedestrians would also have to be approved by the local planning authority (draft Planning Condition 3(j)).
- 6.43 The design, as illustrated in the ULDS [NET.A18], of the Exchange Land would encompass surfaced footpaths, including paths surfaced in self-binding gravel to give a durable finish. Slopes of embankments would be graded to natural contours with additional moulding to give the landscape a varied topography and allowing for the formation of marshy scrapes and ponds in some areas. This overall design and all related drainage facilities would require approval not just by Nottingham City Council as local planning authority, but by Rushcliffe Borough Council under the provisions of article 42B of the filled-up draft Order [NET.A39]. A copy of this article is included as NET.X17/1.
- 6.44 Drainage issues would be addressed as part of these approvals required to be given by the local planning authority and Rushcliffe Borough Council.

Potential Subsidence – Mine Workings

- 6.45 The matter of subsidence has been fully investigated with the Coal Authority, a copy of all correspondence is at NET.X17/2, this accords with Rule 13(3) of, and paragraph 13 of Schedule 5 to, the Transport and Works (Applications and Objections Procedure) (England and Wales) Rules 2000. This correspondence

dates from September 2004 until March 2007. The Coal Authority indicates in their letter of 1 March 2007 that the developers should take account of any coal mining related hazards to stability in their proposals but that due to the age and depth of coal mining in the area, any coal mining-related ground movement should by now have ceased. Furthermore a note summarising the consideration given to coal mining matters in the development of the Order proposals, including the proposals for the Exchange Land, and that note is set out at NET.X17/3.

Further Considerations Regarding Access to Open Space

- 6.46 Given the availability of substantial other open space close to the northern end of the former railway corridor, considerable weight can be attached to the recreational benefit derived by those members of the public who would use the Exchange Land. There is nothing in section 19 which says that more weight should be given to the recreational benefits of existing users rather than to those members of the public who would use the Exchange Land, and who may not now use the wildlife corridor (the open space land).
- 6.47 There is no evidence that anyone is at present "entitled to rights of common or other rights" over the Open Space Land or the Exchange Land. There is no evidence to assume that either any individual or the public has any form of legal right over either piece of land. Furthermore, the fact that a "few"/"occasional" individuals, primarily dog walkers, trespass on the Exchange Land is not a reason to exclude it from consideration as Exchange Land. It is, however, a matter to which the decision maker can have regard but the weight to attach to it depends on (a) whether there is any evidence that large numbers have been involved - there is no such evidence - and (b) the fact that the trespass could be ended by fencing, prohibitory notices and legal proceedings at any time. The present set-aside regime is about to end and more intensive agriculture is obviously likely to act as a deterrent to recreational use. The few users at Silverdale²⁷, on whom ENT and RBC rely, would have far greater potential to enjoy access to the land with the Promoter's proposals than if the present situation continued. Therefore the Promoter's case is that some, but very little weight should attach to the existing recreational use of the Exchange Land, such as it is.
- 6.48 In approaching the meaning of "the public" particular consideration should be given to present users but –
- in the case of any linear open space there would always be disadvantage to some users of that open space and it cannot be the intention of section 19 that the test for replacement open space is more difficult to satisfy or rendered impossible to meet in any circumstances, in these type of cases; and
 - availability or lack of other open space in the vicinity is relevant to the

²⁷ The extent and significance of this trespasser use of this arable land is disputed. It is certainly not such as to constitute "rights of common or other rights" within s.19(1)(a) of the ALA 1981. The land is neither a registered common (over which rights of common are exercisable) nor a registered village green (over which certain local inhabitants have recreational rights). In the *Greenwich* case, the judge found that "the public have access to [the Exchange Land] already – though their entitlement to do so was apparently open to some dispute" (page 6). This, as here, fell far short of a situation where "the public already enjoyed extensive public rights of way affording equivalent recreational access [to that enjoyed over the Open Space Land (page 22)]", though this appears to be claimed here by ENT and Mr Collard].

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- advantageousness of the existing open space. Open space surrounded by other open space of a similar nature must be of less advantage than open space that is not surrounded by other open space of a similar nature.
- 6.49 Paragraph 26 of the Circular says that the Secretary of State takes the view that "the public" means principally the section of the public which has hitherto benefited from the open space (so, current users) and, more generally, the public at large. This is plainly not a case, to quote para. 26, of the embankment being a relatively small recreational ground used predominantly by local people from a small housing estate. Therefore there is no expectation that the Exchange Land should be equally accessible to all existing users. This is a case of the embankment being used as a recreational facility by some living close to it but also by a wider cross-section of the public, and so there can be no necessity for it to be replaced by Exchange Land in the immediate area.
- 6.50 Focussing on current users, the exercise that needs to be undertaken by the decision maker is to weigh up the various characteristics of the Open Space Land and to compare them with the equivalent expected characteristics of the Exchange Land, as at the exchange date. There is nothing in section 19 saying that more weight should be given to some of these characteristics than to others. Other than size, these characteristics are principally locational/distance and the recreational 'value'.
- 6.51 It is right that the Exchange Land is further away for those living at the northern end of the embankment, e.g. in Heathervale and St. Austell Drive. But their actual experience, given the new footpath down the former railway embankment, would be relatively unchanged and so not materially disadvantaged because their access to the Exchange Land would be through a congenial environment (as opposed to a situation where they had to walk down various urban streets in order to get to the Exchange Land, i.e. an uncongenial environment).
- 6.52 Turning to recreational value, four components may be identified. Firstly the ecological value of the open space, so far as relevant to recreation, compared with the ecological value of the Exchange Land, so far as relevant to recreation. Secondly the wooded, etc., nature of the open space, so far as relevant to recreation, compared with the expected landscaping, etc., value of the Exchange Land, so far as relevant to recreation.
- 6.53 Thirdly the undisturbed nature of the open space compared with the Exchange Land with trams passing through. Some may perceive the presence of the tram as a detractor from their recreational enjoyment; others might see it as a benefit²². Therefore whilst some weight can be attached to the presence of the tram lines, this should not be seen as a significant detractor, whether on the Exchange Land or alongside Work No.14A.
- 6.54 Finally the "usability" of the open space compared with the Exchange Land, which includes not only questions of size but vulnerability to flooding.
- 6.55 The decision maker has to exercise his judgement rather than carry out any mathematical calculation. On the present evidence the two areas would be very different but the recreational advantage would be similar. For some people there would be recreational disadvantage, e.g. those living at the northern end of the Open Space Land; for other people there would be considerable benefit. It is not simply a question of counting the number of

²² Accepted by Mr Silver (for ENT) in cross-examination

users. The Promoters rely in particular on each of the six matters set out below:

- The substantially greater size of the Exchange Land (around 25%).
- The reality of this is however much greater. When account is taken of the returned Open Space in the former railway corridor, the comparison becomes between about 36,820 m² (i.e. 29,671 m² + 7,149 m²) and about 16,691 m² (i.e. 23,840 – 7,149). This is an increase of well over 100%.
- No more than 4,380 m² of the Open Space Land is currently effectively usable for recreation [NET.X/9/A para 3.15], which when compared to the Exchange Land shows an even greater increase. In making the comparison of advantage in Greenwich, the "*advantages*", the Secretary of State took into account the degree to which access in the order land had been "*restricted in practice to the network of paths and rides*", the rest being "*frequently impenetrable*" (p.25). This was notwithstanding the ecological interest of the impenetrable parts.
- The current prime function of the Open Space Land as an informal footpath would be substantially replaced by the landscaped new public footpath in the former railway corridor (see IMG3, CLI/09 ff, showing "Landscape area maximized around footpath to increase quality of experience for pedestrians within the NET corridor").
- The shape and extent of the Exchange Land would afford the potential for the creation of ecological areas more extensive, and of as great, or greater, ecological interest, as anything on the Open Space Land, particularly when account is taken of its immediate proximity to the Fairham Brook (SINC), and the scope for the creation of "Marsh type wet grassland habitat", as shown on IMG3, CLI/13, and described in NET.X17 para 2.4.
- The shape and extent of the Exchange Land would afford different types of recreational experience north and south of the tram embankment, including a crossing-point over the tram where it is at-grade (this crossing-point is not shown on IMG 2, Sheet No.20; IMG3, CLI/12, but its position can readily be inferred). There would be a hard-surfaced track to the north of the tram alignment, and informal paths to the south. Some existing water-logging would be resolved by field-drainage measures.

Legal Considerations

- 6.56 A response to ENT's legal submission regarding the value of the Oxleas Wood (Greenwich) case as legal precedent is set out at NET.X28. It is concluded that it is wholly wrong in law of ENT to contend that the Greenwich case has no precedent setting value; it has precisely that.
- 6.57 The second point relates to the status of the Exchange Land. As a point of law it is not a PROW, to achieve such status it must be proven through proper testing at inquiry, one person cannot establish a PROW.

7 CONCLUSIONS

Inspector's Note: In this section references in square brackets [] indicate the paragraph(s) in which the relevant source material can be found. Where a reference is made to the main report the preface "MR" is used before the paragraph number.

7.1 Bearing in mind the submissions and representations I have reported, the information contained in the Environmental Statement, representations made about the environmental effects of the development, and all other environmental information supplied, I have reached the following conclusions.

THE BIRDS ISSUE

Preliminary Matters

- 7.2 It is common ground that none of the land that would be occupied by the park and ride site or land in the surrounding area carries any protective designation. It is not a SINC. [3.3][3.15-3.21][5.5]
- 7.3 Furthermore I note that in light of the revised criteria in the NBGRC guidance, which excludes arable farmland, this land would be unlikely to attract avian SINC status. [3.11]
- 7.4 However it is clear that there have been sightings and recording of protected bird species in this area. [3.16][5.8-5.11] This is not at issue.
- 7.5 It is not disputed that in coming to any decision on the use of this land some weight must be given to the presence of European protected species and I have done so in arriving at my conclusions and recommendations. [3.21-3.23][5.30]
- 7.6 The Gillings' Study is presented by objectors to support the contention that habitats for Golden Plover are changing to arable land, that the increased use of this local area by this species is likely to recur and that over very large areas Golden Plover concentrate into very few fields, thereby again underlining the importance of the area of the park and ride site for the future winter use by Golden Plover, in the objectors' views. [5.2][5.16][5.18]
- 7.7 However I do not share the objectors' interpretations of the results of the Gillings' work with respect to their direct applicability to the case before me. In my view their interpretations are not supported by the evidence, which to my mind shows that these birds would range over a wider area than the objectors contend. Nothing in the Gillings' study leads me to believe that it would be safe to conclude that the birds would regularly return to the same field. [6.4-6.7] I conclude that only limited weight should apply to this strand of evidence insofar as it relates to the Clifton park and ride site.
- 7.8 I turn now to address the individual matters upon which the Secretary of State has invited further evidence.

The reasons why the promoters did not consider it necessary to undertake a winter bird survey in respect of the proposed park and ride site at Clifton. (Matter i)

- 7.9 Nothing in evidence before me supports the objectors' contention that the decision by the Promoter in 2002/3, not to effect a winter bird survey, was flawed. Sightings during the winter of 2007/8 are, in my view, irrelevant to that decision, which was taken as part of the legitimate preparation of the EIA some five years earlier. [5.14-5.15]
- 7.10 It seems clear that at the time that the EIA was in preparation there were no

records of large populations of any over-wintering bird species in the area of the Clifton park and ride site: a fact accepted by the objectors and endorsed at the time by the relevant consultees during the preparation of the ES. [3.24-3.26][6.18-6.20]

- 7.11 Furthermore I am satisfied that, given that the Promoter was only reasonably required to gather appropriate information relating to environmental aspects likely to be significantly affected and given the information available on over-wintering birds at that time, the Promoter acted correctly in not undertaking a winter bird survey in this area. [6.15-6.17] In my view the appropriateness of this decision was subsequently borne out by a similar, but independent, decision by the Highways Agency in relation to the nearby A453 scheme. [6.21-6.22]
- 7.12 In view of the above I conclude that the Promoter had sound and legitimate reasons not undertake a winter bird survey in respect of the proposed park and ride site at Clifton.

In the Light of Evidence Now Available, Whether the Development of the Park and Ride Site is Likely to Cause Significant Disturbance and Harm to Bird Species and their Habitats. (Matter ii)

Golden Plover and Northern Lapwing

- 7.13 The objectors concentrate their arguments on the impact of the proposed scheme on the field adjoining the park and ride site. The park and ride site together with its associated landscaping would encroach into this 14.8 ha field by some 0.63 ha. It is common ground that traffic on Nottingham Road does not disturb the birds in this field. It is agreed that although the activity at the park and ride site could cause disturbance to the birds, the landscaping belt would shield this and that an effective buffer would exist. Assuming a precautionary approach and adopting the objectors' worst case scenario of a 200 metre buffer zone would result in some 10 ha of this field remaining effectively available for Golden Plover and Northern Lapwing. It is accepted by the objectors that, with appropriate crops, this area could continue to be used by wintering Golden Plover. [3.30-3.31][5.18][5.28][6.26-6.27][6.30]
- 7.14 Furthermore I heard no objective evidence to undermine the argument that significant areas of suitable habitat, up to some 1300 ha, are also available in the general surrounding area; as I indicate above, the Gillings' work does not robustly counter this. These are areas which have attracted Golden Plover and which would not be affected by the construction and operation of the park and ride site. [3.32][5.16-5.17][6.28-6.29]
- 7.15 Finally, as regards the species, Golden Plover has been moved to BoCC Green list status as there is no longer any clear threat to the species. Whilst Northern Lapwing is Amber listed, its numbers are far greater than Golden Plover and it is with the Golden Plover that objectors show main concern. [6.25]
- 7.16 From the evidence presented I conclude that there would be some limited disturbance to wintering Golden Plover and Northern Lapwing by encroachment into part of the field upon which they have recently been observed.
- 7.17 However, given the balance of the field that would remain after construction, the presence of the landscaping shelter belt, the availability of other significant areas of suitable local habitat, and the strength in numbers of these species, I conclude that the development of the park and ride site would not be likely to cause significant disturbance and harm to Golden Plover or Northern Lapwing

and to their habitats.

7.18 I turn now to consider the other species for which evidence is presented, the Corn Bunting.

Corn Bunting

7.19 One Corn Bunting territory lies reasonably close to the southern boundary of the proposed park and ride site, although it was unaffected by the recent construction of the Larkhill development and may not be adversely affected by the proposed park and ride site. [3.35][5.19][6.31-6.33]

7.20 A number of other territories of singing males lie some 1 to 2 km to the south. It is generally accepted that these would not be affected by the park and ride site. From all that I heard and saw, notwithstanding its national decline, this species is faring well in the area and there would be suitable habitat in the surrounding area well in excess of the park and ride site area. [3.35-3.36][5.19][6.32-6.33]

7.21 I concur with the evidence that the possible loss of one Corn Bunting territory would not be a significant adverse effect in the above circumstances and overall I conclude that the development of the park and ride site would not be likely to cause significant disturbance and harm to Corn Bunting. [3.36-3.37][6.34]

The Extent to which Measures can be taken to Mitigate any Adverse Impacts on Birds, Including the likely Effects of Proposals to Landscape the Park and Ride site. (Matter iii)

7.22 The proposed 10 metre-wide landscaping belt of trees, shrubs and grass, which was identified in the ES, stands as appropriate mitigation for the immediate impact of the park and ride site on farmland birds. [3.39]

7.23 It would also provide effective screening for Golden Plover from disturbance by users of the park and ride site and from predation. [3.40]

7.24 Given the evidence referred to above [7.14] regarding the availability of satisfactory habitats in the area, I am not persuaded by the NWT argument that extensive areas of replacement habitat would be either necessary or reasonable.

7.25 I am satisfied that in the absence of significant adverse effects on birds species and their habitats, then no further mitigation measures would be necessary. [6.36][6.38]

Whether any Residual Harm would be Outweighed by the Wider Public Benefits of the Proposals Advanced by the Promoters. (Matter iv)

7.26 The objectors correctly indicate that the overall balance between residual harm and the wider public benefits would be changed in the light of evidence they have brought forward. [5.25]

7.27 However in view of all the above; with only some limited disturbance to wintering Golden Plover and Northern Lapwing, and overall no significant disturbance and harm to bird species and to their habitats and no necessity for further mitigation measures, I conclude that there would only be a marginal increase in residual harm. This must be added to the remaining adverse environmental impacts that must be weighed against the compelling case for the scheme in the public interest that I have identified [see MR7.175].

7.28 Taken as a whole I conclude that this small amount of residual harm, together with all the other harm I have previously identified, would not outweigh the significant wider public benefits of the proposals.

7.29 Put another way, my overall conclusions set out in MR7.237 would not be changed by the additional evidence I heard in the re-opened inquiry.

THE ELC ISSUE

Legal Considerations

7.30 As I pointed out in the inquiry I am not in a position to draw conclusions on legal submissions, however it seems to me that the following considerations are relevant.

Open Space Use

7.31 I note ENT's view that Appendix L of Circular 06/2004 makes no reference to restricting consideration of recreational use only for open space. However I cannot accept ENT's interpretation. It seems to me that ALA S19(1) clearly refers to the purchase of 'open space' (as in this case) and this is defined in S19(4) as meaning '...any land...used for the purpose of public recreation...'. [1.10(footnote)][5.51]

The Greenwich Case

7.32 ENT takes issue with the applicability of the Oxleas Wood (Greenwich) case and its value as legal precedent. ENT also argues that advice in Circular 06/2004 should prevail over this case law. The objector also refers back to question the adequacy of the ES in this argument. [5.54-5.57]

7.33 However I note that paragraph 24 of Appendix L to Circular 06/2004 indicates that the Secretary of State will have regard to the Greenwich case where Exchange Land is to be provided for land used by the public for recreation. The fact that the Oxleas Wood scheme was subsequently abandoned had nothing to do with the interpretation or application to Oxleas Wood of S19 of ALA. In my view the Greenwich case clearly should be treated as precedent. [6.56]

7.34 On the issue of the adequacy of the ES, which ENT questions, I have already concluded elsewhere that the ES complies with the relevant European and UK directives and is adequate. Nothing that I have heard since drafting my main report alters this conclusion. [MR7.176-7.182]

Exchange Land Status

7.35 I note ENT's claim that the Exchange Land may be deemed to be dedicated as a PROW. However I have seen nothing to prove that it has been taken through the proper procedures to achieve such status. [5.58][6.57]

The Section 19(1)(a) Tests

7.36 I turn now to the tests set out in S19(1)(a); the Secretary of State must be satisfied that the Exchange Land would be (i) not less in area (than the open space to be acquired); (ii) equally advantageous to the persons, if any, entitled to rights of common or other rights, and to the public, and (iii) vested in the persons in whom the land purchased was vested, and subject to like rights, trusts and incidents as attach to the land purchased. [1.10]

7.37 I deal with the first and third elements of the test before finally turning to comparisons of the advantages of the Exchange Land with those of the open

space to be acquired.

Area of Exchange Land

- 7.38 The total area of the Exchange Land would be some 36,582 square metres, of which some 29,671 would be accessible to the public following tram route construction; the area of open space to be acquired comprises some 23,840 square metres. [3.50-3.52]
- 7.39 ENT argues that only 15,000 square metres of the Exchange Land would be usable; the objector suggests that the remainder of the land, lying to the south of the proposed tramway, would be inaccessible and therefore should not be included in the considerations. [5.40-5.42]
- 7.40 However it is clear to me that all the proposed Exchange Land would be accessible to the public. [6.55, bp6]
- 7.41 I conclude therefore that the proposed Exchange Land would be not less in area than the open space to be acquired.

Rights in the Open Space to be Acquired

- 7.42 The open space to be acquired is vested in Rushcliffe Borough Council, as would be the Exchange Land. I am satisfied that there are no specific rights over the land which would need to be replicated in the Exchange Land. [3.47]
- 7.43 Furthermore I note that the Exchange Land would be vested in Rushcliffe Borough Council and be subject to like rights, trusts and incidents as attach to the existing open space. I am reassured that there are safeguards in the draft Order to ensure that the exchange would not take place unless it was to the satisfaction of the landowner, the Borough Council. [3.48-3.49]
- 7.44 I conclude therefore that the third element of the S19(1)(a) test would be satisfied.

The 'Equally Advantageous' Test

- 7.45 Before effecting a comparison of the two areas of land and of the advantages that they do or would provide to the public, I first consider some detailed points that arise in the application of this test.
- 7.46 The first point is that I am satisfied that only advantages connected with public recreation may be considered, this was underpinned by the Greenwich judgment. [3.44 bp5][5.51][7.31]
- 7.47 Secondly, ENT draws attention to that element of the guidance in paragraph 25 of Appendix L of Circular 06/2004 that indicates that land already used by the public, even informally, for recreation cannot usually be given as Exchange Land. [5.43] The evidence before me and my observations indicate that, whilst there are no formal or defined well-used footpaths across the land, there is clearly currently some limited informal access on to this private land. [1.7][2.5][5.44-5.46]
- 7.48 However, taking into account all that I heard and saw I am of the view that, as in the Greenwich case, this is clearly not a situation where the public already enjoy extensive public rights of way over the Exchange Land affording equivalent recreational access to that enjoyed over the Open Space Land. [3.67-3.68][6.47 and footnote 19] On this second matter therefore, following the Greenwich judgment, I conclude that the subject area of land at Silverdale may be used as Exchange Land.
- 7.49 The third detailed matter emanates from the argument put forward by ENT regarding the meaning of 'the public' in S19, which is clarified in paragraph 26

of Appendix L of Circular 06/2004. ENT insists that the open space to be acquired should be considered as a relatively small recreation ground used predominantly by local people, perhaps from a particular housing estate. In such cases it may normally be expected that the Exchange Land would be equally accessible to residents of that estate. [5.52-5.53]

- 7.50 However, in my view this description is too restrictive and does not represent the situation I find in the Wilford former railway corridor. It is a long linear facility which is accessible from a number of points to a relatively wide area and also serves some of the recreational needs of employees at an industrial establishment near the southern end of the route. [2.4][3.53-3.54][3.60]
- 7.51 I consider that this is not only used as a local recreational facility by those living close but also by a wider cross-section of the public. In accordance with the guidance therefore I conclude that it may not need to be replaced by Exchange Land in the immediate area. [6.49]
- 7.52 I turn now to consider the matters which must be addressed in weighing the balance as to whether the Exchange Land would be equally advantageous to any persons as the land to be taken. I consider this under two general headings; Enjoyment of Recreation and Accessibility for Recreation.

Enjoyment of Recreation

- 7.53 Objectors highlight the tranquil amenity that is provided by the footpath along the wildlife corridor and underline how well used and valued this enjoyable local recreational facility is. They argue that this facility would not be replicated on the Exchange Land, which is largely open, frequently flooded in part and of little ecological value in the enhancement of recreational enjoyment. Furthermore in future people using this area or the Exchange Land would have their recreational enjoyment spoiled by the passage of trams at up to 50mph. For these reasons, they argue, the Exchange Land would not be equally advantageous. [5.32-5.34][5.42]
- 7.54 In considering the facilities for enjoyment of recreation of the Exchange Land it is clear that I must take into account any prospects of improvement of the Exchange Land. [3.45 bp2][3.72]
- 7.55 Examination of the proposals indicates that the Exchange Land would undergo significant improvement and given the nature and breadth of the planned enhancement of this area I consider that it would amply replace the open space to be acquired, notwithstanding the passage of trams through the area. [3.69-3.71][3.74][3.81][3.83-3.84] I attach little weight to the objectors' concerns regarding the possibility of trams spoiling people's enjoyment of the area. As was conceded in the inquiry there would be those who might also see it as a benefit. [6.52]
- 7.56 In view of all the above I conclude that, in terms of the enjoyment or value of recreation, the Exchange Land would be equally advantageous as the land to be taken.

Accessibility for Recreation

- 7.57 The fundamental issue raised by objectors is the fact that many of the users of the wildlife corridor live close to the footpath in Compton Acres and Wilford, at the northern end of this facility. Access to the Exchange Land would involve a

walk of over 1 mile along the new footpath, in close proximity to trams. They argue that it would therefore not be equally advantageous to that section of the public that has hitherto benefited from the open space to be acquired. [5.35-5.37]

- 7.58 However, in my view, this argument must be tempered by the fact that the people who live in these areas are well provided, not only with a retained footpath link to the Exchange Land, but also with other existing areas of accessible open space in the surrounding area which can be used for informal recreation. [3.78-3.79]
- 7.59 I attach little weight to the objectors' argument that the Exchange Land has less value to the public at large because of relative population densities of the respective adjacent residential areas. [3.80] It seems clear to me that the Exchange Land would be readily available to residents of Silverdale, to parts of Clifton and the southern parts of Compton Acres and Wilford, as well as to the remainder of Compton Acres and Wilford via the new footpath. [3.75-3.77]
- 7.60 Taking all these matters into account I conclude that, in so far as locational and accessibility matters are concerned, the Exchange Land would be equally advantageous as the land to be taken.

Summary Conclusion - ELC Issue

- 7.61 To summarise on the ELC issue therefore I conclude that the Exchange Land at Silverdale would meet the ALA s19(1) tests and that the Exchange Land Certificate may be granted for this area of land. [7.41][7.44][7.56][7.60]

Overall Conclusions

- 7.62 I turn now to the overall conclusion on the Order and refer back to the conclusions in my main report, paragraphs MR7.237 and MR7.238. As set out above [7.28-7.29] I conclude that nothing that I have heard or seen in the re-opened TWA inquiry alters my overall conclusion as reported in MR7.237.
- 7.63 In my opinion, the wide-ranging regeneration, transportation and socio-economic benefits of providing NET Phase Two from Nottingham Railway Station to Chilwell via Beeston and to Clifton via Wilford would clearly outweigh the effects of the proposal on the local environment, and particularly the ecological impacts and the effect on living conditions by reason of noise.
- 7.64 I conclude that the case for making the Order, as amended, and conferring on NET the CPO powers contained therein is compelling and in the public interest. I likewise conclude that it would be in the public interest to grant the associated application for deemed planning consent subject to conditions.

8 RECOMMENDATIONS

8.1 In the light of my conclusions above, I recommend:

1. That the Nottingham Express Transit System Order be modified by the changes as referred to in paragraph MR3.299 and set out in the revised filled-up draft Order at NET.A39 and in the up to date schedule of the deposited plans and sections and planning direction drawings at NET.A30, A30/1 and A30/2 and that the Order so modified be made.
2. That the Exchange Land Certificate be granted.
3. That deemed planning permission be granted for the development

proposed in the Order, subject to the conditions set out in Appendix C to the main report.

4. That all the applications for listed building consent and conservation area consent should be granted subject to conditions as set out in paragraphs 164, 172, 177, 185, 193, 198, 202 and 207 of the Assistant Inspector's report at Appendix D to the main report. Also, that the Promoter takes note of the adverse effects indicated on the settings of listed buildings and conservation areas of the demolition of unlisted buildings outside the boundaries of conservation areas and does all that is possible to mitigate those effects.

R M Barker

INSPECTOR

APPENDICES

APPENDIX A

APPEARANCES

The Re-opened TWA Inquiry

FOR THE PROMOTER

NOTTINGHAM CITY COUNCIL &

**NOTTINGHAMSHIRE COUNTY
COUNCIL**

represented by

Mr Charles George QC

Instructed by Bircham Dyson Bell,

50 Broadway, Westminster, London

SW1H OBL

He called:

Mr Ian Gilder

Head of Planning,
ERM Ltd., 8 Cavendish Square, London,
W1C 0ER

Mr Alan Leitch

Ecological Consultant
2 Burgess Terrace, Edinburgh
EH9 2BD

FOR THE OBJECTORS

Barton-in-Fabis Parish Council

The Forge, Barton in Fabis, Nottingham,
NG11 OAE

Represented by **Mr P Kacmarczuk**

Mr Robert Hoare

125 Bridgenorth Drive
Clifton, Nottingham
NG11 8DP

APPENDIX B

APPEARANCES

The Section 19 ELC Inquiry

FOR THE PROMOTER

**NOTTINGHAM CITY
COUNCIL &**

**NOTTINGHAMSHIRE
COUNTY COUNCIL**

represented by

Mr Charles George QC Instructed by Bircham Dyson Bell,
50 Broadway, Westminster, London SW1H 0BL

He called:

Mr Ian Gilder Head of Planning,
ERM Ltd., 8 Cavendish Square, London, W1C
0ER

Mr Callum Gibson Associate,
Mott MacDonald, Spring Bank House, 33
Stamford Street, Altrincham, Cheshire, United
WA14 1ES

FOR THE OBJECTORS

Environment Not Trams 29 Lyme Park, West Bridgford, Nottingham,
NG2 7TR

Represented by **Mr G
Wheeler**

He called:

Mr J Silver

APPENDIX C

INQUIRY DOCUMENT LIST

RE-OPENED TWA INQUIRY

INQ/Y/1 - Inspector's Procedural Note of 24 September 2008

NET.Y1 – Letter from DfT of 22nd August 2008

NET.Y2 – Letter from DfT of 11th September 2008 confirming details for
reopening and matters to be considered

NET.Y3 – Letter from Mrs B Saunders dated 3rd September 2008

NET.Y4 – Nottinghamshire Biological and Geological Records Centre selection
criteria for Sites of Importance for Nature Conservation (SINCs) for Birds, 2004

NET.Y5 – Nottinghamshire Biological and Geological Records Centre selection
criteria for Sites of Importance for Nature Conservation (SINCs) for Birds, 2004
as amended

- NET.Y6 – Promoters Statement of Cased dated 19th September 2008
NET.Y7 – Representations received from the DfT on 23rd September 2008:
NET.Y7 (1) – Proof of Evidence submitted by Barton in Fabis Parish
Council to DfT (with covering email dated 16th September 2008)
NET.Y7 (2) – Email from John White to DfT dated 27th August
2008
NET.Y7 (3) – Proof of Evidence submitted by Robert Hoare to DfT
NET.Y7 (4) – Letter from Alan Simpson MP to DfT dated 18th
September 2008
NET.Y7 (5) – Letter from Nottinghamshire Wildlife Trust to DfT dated 16th
September 2008
NET.Y7 (6) – Letter from Rushcliffe Borough Council to DfT dated 19th
September 2008
NET.Y7 (7) – Email from BACIT to DfT dated 4th September 2008
NET.Y7 (8) – Letter from Mr and Mrs Britton to DfT dated 28th August
2008
NET.Y8/A – Proof of Evidence to the Re-opened TWA Inquiry of Ian Gilder.
Environmental Impact Assessment – Birds
NET.Y8/B – Appendices to Proof of Evidence of Ian Gilder - Re-opened TWA
Inquiry Environmental Impact Assessment – Birds
NET.Y8/C – Summary Proof of Evidence of Ian Gilder Re-opened TWA Inquiry
Environmental Impact Assessment – Birds
NET.Y9/A – Proof of Evidence to the Re-opened TWA Inquiry of Alan Leitch.
Impact on Birds and their Habitats
NET.Y9/B – Appendices to Proof of Evidence of Alan Leitch Re-opened TWA
Inquiry Impact on Birds and their Habitats
NET.Y9/C – Summary Proof of Evidence of Alan Leitch Re-opened TWA Inquiry
Impact on Birds and their Habitats
NET.Y10 – Promoters’ Rebuttal of evidence submitted by Barton in Fabis Parish
Council
NET.Y11 – Promoters’ Opening Submissions
NET.Y12 – Smith v Secretary of State for the Environment, Transport and the
Regions [2003] EWCA Civ 262, [2003] Env LR 32
NET.Y13 – R. v Cornwall County Council [2001] Env LR 25
NET.Y14 – Belize Alliance of Conservation Non-Governmental Organizations v
The Department of the Environment, Belize Electric Company Limited, 2004 WL
412962
NET.Y15 – Note on Compliance with Rules
NET.Y16 – RSPB, *The Population Status of Birds in the UK – Birds of
Conservation Concern: 2002-2007*
NET.Y17 – Consolidated Data on Golden Plover
NET.Y17/1 – Revised Consolidated Data
NET.Y17/2 – Agreed Revised Consolidation Data with plan
NET.Y18 – ODPM Circular 06/2005, DEFRA Circular 01/2005 – *Biodiversity and
Geological Conservation – Statutory Obligations and their impact on the planning
system*
NET.Y19 – Barton in Fabis’ Statement of Case to the main TWA inquiry
(Obj/561)
NET.Y20 – Promoters’ Closing
NET.Y21 – C.V. of Mr Richard Penson, White Young Green
NET.Y100 – Rebuttal Proof of Evidence of Mr Hoare
NET.Y101 – *not used*
NET.Y102 – Rebuttal Proof of Evidence of Mr Kaczmarczuk, Barton-in-Fabis

NET.Y103 – Environmental Scoping Report Consultation letter
NET.Y104 – Email correspondence from Andrew Dodd to Paul Kaczmarczuk of 12 September 2008
NET.Y105 – Email correspondence between Carl Cornish and Paul Kaczmarczuk of March 2008
NET.Y106 – Further observation figures provided by Mr Hoare
NET.Y107 – Closing submissions of Mr Kaczmarczuk of Barton-in-Fabis
NET.Y108 – OS map of Barton-in-Fabis

Documents produced in relation to TWA public inquiry - November and December 2007

NET.A14 Environmental Statement Volume 1: Main Report
NET.A15 Environmental Statement Volume 2 Part 1: Appendices
NET.A17 Environmental Statement Volume 3: Figures and Plans
NET.A18 Environmental Statement Volume 4: Urban Landscape and Design Statement
NET.A19/2 Further Revised Book of Reference
NET.A27 The Secretary of State for Transport's Statement of Matters dated 29 August 2007
NET.A31 Promoters' Note on their evidence relevant to the Statement of Matters of the Secretary of State for Transport dated 29 August 2007
NET.A39 Filled-up draft Order
NET.B10/1 Technical Development Drawings, August 2007: Chilwell via QMC and Beeston
NET.B10/2 Technical Development Drawings, August 2007: Clifton via Wilford
NET.D1 Part 1 of the Transport and Works Act 1992
NET.D10 Extracts of ODPM Circular 06/2004: Compulsory Purchase and the Criche Down Rules dated 31 October 2004
NET.P1/A Chris Deas: Main Proof
NET.P1/B Chris Deas: Appendices
NET.P1/C Chris Deas: Summary Proof
NET.P2/A Callum Gibson: Main Proof
NET.P2/B Callum Gibson: Appendices
NET.P2/C Callum Gibson: Summary Proof
NET.P3/A Dave Carter: Main Proof
NET.P3/C Dave Carter: Summary Proof
NET.P4/A Dominic Walley: Main Proof
NET.P4/B Dominic Walley: Appendices
NET.P4/C Dominic Walley: Summary Proof
NET.P6/A Ian Gilder: Main Proof
NET.P6/B Ian Gilder: Appendices
NET.P6/C Ian Gilder: Summary Proof
NET.P6/D Ian Gilder: Supplementary Proof
NET.P6/E Responses of Ian Gilder to the Inspector's Questions
NET.P6/K Proposed Park and Ride site at Clifton, 6 December 2007
NET.P6/U Schedule of Environmental Mitigation Measures
NET.P6/V Final Draft of Proposed Planning Conditions
NET.P8 Objection Response Proof
NET.R1/11/10 Correspondence as submitted to the main inquiry between the Promoters and Ms A Plowright
NET.R1/17/34 Correspondence as submitted to the main inquiry between the Promoters and Mr P Kaczmarczuk
NET.R1/18/57 Correspondence as submitted to the main inquiry between the Promoters and Mrs B Saunders

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NET.R1/21/33 Correspondence as submitted to the main inquiry between the Promoters and the Nottinghamshire Wildlife Trust
NET.R92 Promoters' Rebuttal of Proof of Evidence in relation to the objection of Nottinghamshire Wildlife Trust (Obj/1033).
NET.X6 Composite Filled-Up Works and Land Plans relating to the draft Order

APPENDIX D

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INQUIRY DOCUMENT LIST

SECTION 19 ELC INQUIRY

INQ/X/1	Inspector's Procedural Note of 12 September 2008
NET.X1	Notice of the Secretary of State's intention to give the ELC dated 20 December 2007
NET.X2	Notice of the Secretary of State's intention to give the ELC dated 9 January 2008
NET.X3	Notice of the decision of the Secretary of State to hold an inquiry dated 1 May 2008
NET.X4 the ELC	List of objections to and letters of support for the proposal to give
NET.X5	Copies of objections to and letters of support for the proposal to

give the ELC

- NET.X6 Composite Filled-Up Works and Land Plans relating to the draft Order
- NET.X7 Compulsory Purchase (Inquiries Procedure) Rules 2007, S.I. 2007/3617
- NET.X8 The Promoters' Statement of Case
- NET.X9/A Inquiry into application for certificate under Section 19 of the Acquisition of Land Act 1981. Evidence of Ian Gilder: Main Proof
- NET.X9/B Inquiry into application for certificate under Section 19 of the Acquisition of Land Act 1981. Evidence of Ian Gilder: Appendices
- NET.X9/C Inquiry into application for certificate under Section 19 of the Acquisition of Land Act 1981. Evidence of Ian Gilder: Summary Proof
- NET.X9/D Supplemental note of Ian Gilder on location of residents submitting statements to ENT (appended to [NET.X11])
- NET.X10 Statement of Case submitted by Mr Collard
- NET.X11 Statement of Case submitted by ENT (Environment not Trams) (Mr Wheeler and Mr Silver)
- NET.X12 Statement of Case submitted by Nottinghamshire Wildlife Trust
- NET.X13 Proof of Evidence submitted by Mr Collard
- NET.X14 Proof of Evidence submitted by ENT (Environment not Trams) (Mr Wheeler and Mr Silver)
- NET.X15 Representation submitted by Rushcliffe Borough Council
- NET.X16 Statement of Case submitted by Open Spaces Society
- NET.X17 Promoters' rebuttal of ENT's Proof of Evidence
- NET.X18a ENT's rebuttal of Promoters' Proof of Evidence (Mr Wheeler)
- NET.X18b ENT's rebuttal of Promoters' Proof of Evidence (Mr Silver)
- NET.X19 Mr Collard's rebuttal of Promoters' Proof of Evidence
- NET.X20 Note on compliance with Procedural Requirements
- NET.X21 Promoters' Opening Submissions
- NET.X22 *Waltham Forest Case* – [1994] J.P.L 655
- NET.X23 Note on Ground Investigation Works
- NET.X24 Original letter of objection of Miss J Bennett, 6 June 2007 (Obj/908)
- NET.X25 Note on planning application relating to land at the south of Wilford Lane
- NET.X26 Note on discussions held with the Environment Agency
- NET.X27 Note on information provided to Mr Silver of ENT
- NET.X28 Promoters' response to the legal submissions of ENT in NET.X101
- NET.X29 Promoters' Closing statement
- NET.X100 Further photographs submitted by ENT
- NET.X101 Legal submission of ENT
- NET.X102 ENT's answer, submitted 7 October 2008 to NET's Rebuttal
- NET.X103 Email correspondence between S Taylor of the Environment Agency and Mr Silver, submitted by ENT on 7 October 2008
- NET.X104 Proof of Dr Cowley on behalf of NWT and Appendices
- NET.X105 Rights of way information submitted by ENT
- NET.X106 Finsbury Park Heath planning application map submitted by ENT
- NET.X107 Summary Points of ENT's Closing
- NET.X108 Closing of Dr Cowley on behalf of NWT

Documents produced in relation to TWA public inquiry - November and December 2007

NET.A14	Environmental Statement Volume 1: Main Report
NET.A15	Environmental Statement Volume 2 Part 1: Appendices
NET.A17	Environmental Statement Volume 3: Figures and Plans
NET.A18	Environmental Statement Volume 4: Urban Landscape and Design Statement
NET.A19/2	Further Revised Book of Reference
NET.A20/4	Open Space and Exchange Land Plans (Sheets 1 to 10)
NET.A20/6	Revised Open Space and Exchange Land Plan (Sheet 7)
NET.A24	Application for Certificate in respect of Open Space and Exchange Land dated 27 April 2007 together with subsequent correspondence with GOEM and public notice
NET.A27	Statement of Matters of the Secretary of State for Transport dated 29 August 2007
NET.A36	Second Application for a Certificate in respect of Open Space and Exchange Land dated 7 November 2007
NET.A39	Filled-up draft Order
NET.B10/1	Technical Development Drawings, August 2007: Chilwell via QMC and Beeston
NET.B10/2	Technical Development Drawings, August 2007: Clifton via Wilford
NET.B14/2	Broxtowe Borough Council Cabinet Report of the Acting Director of Technical and Works Services and Director of Planning and Community Development of 29 April 2004
NET.B14/8	Joint report of the Director of Planning and Community Development, the Director of Technical and Works Services and the Director of Housing, Health and Leisure dated 10 October 2007
NET.C12	Planning Policy Guidance 17: Planning for Open Space, Sport and Recreation, July 2002
NET.C34	Rushcliffe Borough Non-statutory Replacement Local Plan and Proposals Map, adopted December 2006
NET.C35	Broxtowe Borough Local Plan and Proposals Map, adopted September 2004
NET.D1	Part 1 of the Transport and Works Act 1992
NET.D6	Section 19 of the Acquisition of Land Act 1981
NET.D10	Extracts of ODPM Circular 06/2004: Compulsory Purchase and the Crichel Down Rules dated 31 October 2004
NET.P2/A	Callum Gibson: Main Proof
NET.P2/B	Callum Gibson: Appendices
NET.P2/C	Callum Gibson: Summary Proof
NET.P2/L	Note on Wilford Embankment Flood Defence
NET.P6/A	Ian Gilder: Main Proof
NET.P6/B	Ian Gilder: Appendices
NET.P6/C	Ian Gilder: Summary Proof
NET.P6/D	Ian Gilder: Supplementary Proof
NET.P6/E	Responses of Ian Gilder to Inspector's questions
NET.P6/V	Final Draft Proposed Planning Conditions, 20 December 2007
NET.R47/1	Draft Agreement with Broxtowe Borough Council, October 2007
NET.R71/4	Further information requested by Mr Silver ENT, 17 December 2007

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