

11 December 2023

Norton Rose Fulbright LLP
3 More London Riverside
London SE1 2AQ
United Kingdom

Tel +44 20 7283 6000
Fax +44 20 7283 6500
DX 85 London
nortonrosefulbright.com

Direct line
+44 20 7444 3678

Email
Sarah.Fitzpatrick@nortonrosefulbright.com

Your reference	Our reference
TWA/21/APP/01/OBJ/8	SFIT/1001174320
TWA/23/APP/02	

The Inspector and the Programme Officer

Gateley Hamer
One Eleven
Edmund Street
Birmingham B3 2HJ

By email only

Attention: The Inspector and the Programme Officer
(Joanna Vincent)

Dear Sirs,

THE NETWORK RAIL (OLD OAK COMMON GREAT WESTERN MAINLINE TRACK ACCESS) ORDER 202[] (the draft Order)

We refer to the Inspector's note of 24 November 2023 (the **Inspector's Note**).

In particular, we refer to points 2, 3 and 4 of the Inspector's Note, reproduced below for reference:

- **Point 2:** *I've been thinking about how the "shared land" could be dealt with in the modified order. It occurs to me that one possible option for this would be for there to be three distinct rights in the Order:*
 - a. *Temporary Possession (with access rights to this land suspended) – for the Order land which is not to be shared*
 - b. *Temporary Rights to Use Land as a Temporary Construction Compound (for which I presume access rights would not need to be suspended) – for the Order land which is to be shared*
 - c. *Permanent Access rights – for plot 3 on the revised alignment.*
- **Point 3:** *A private agreement between the parties could then be reached setting out the exact details of how land sharing would operate in practice. In theory that agreement wouldn't need to be part of the Secretary of State's considerations on the Order. But on the basis of such an Order it would appear to be in the interests of all the relevant parties (ie NR, Bellaview and Stark/Jewson) to reach such an agreement.*
- **Point 4:** *We didn't get the opportunity on Wednesday to discuss whether or not consultation on the modified Order/Deemed Planning application is required. I would welcome thoughts on this but my current thinking is that further consultation would be necessary. Whilst the modified order would, in some ways, be less onerous than that originally proposed, the "site sharing" element of it would be very different from the original order and Stark/Jewson may well have views on this. Furthermore, whereas the original order would have, in effect, allowed only for the deemed planning application activities to take place on the site (ie mostly at night), the site sharing provides for this plus daytime activity related to Jewson and/or the construction of the Bellaview development. The modified order could therefore be arguably considered to have*

the potential to cause greater disturbance to local residents. So, my thinking is that it would not be appropriate for me to recommend to the Secretary of State that he should make the modified order (if that were to be my conclusion) without Stark/Jewson and the local community being given the opportunity to make their views on that known. And since we don't yet have the "finalised" modified order, I'm thinking that closing submissions in early January may not be feasible.

We also refer to Addleshaw Goddard's response of 29 November 2023 to the Inspector's Note and the Inspector's further note of 29 November 2023.

We respond to the above points as follows on behalf of Bellaview Properties Limited (**BPL**):

Point 2 – Modifications to the draft Order

In relation to point 2(a) (*Temporary Possession (with access rights to this land suspended) – for the Order land which is not to be shared*), we are not entirely clear what is intended by this, and in particular we are unclear as to the meaning of 'with access rights to this land suspended'.

We presume that what is meant by this point is that the draft Order would effectively make provision for Network Rail to have temporary rights as sought through the draft Order but the exercise of these rights, in terms of taking temporary possession, will be 'suspended' in relation to an area of the site which Network Rail has already admitted in evidence it does not need or require for the purposes of its temporary construction compound. Notwithstanding that it is uncertain how the draft Order could provide for the grant and then suspension of rights, given the evidence, we do not consider that the Secretary of State could reasonably conclude there to be a compelling case in the public interest for the draft Order to make provision for rights to be taken over the wider site other than those areas identified for shared use, or Plot 3, or the land coloured 'green' on the draft Order plans. However, if what is meant by point 2(a) is to only capture the land coloured 'green' on the draft Order plans, to be used exclusively by Network Rail, then this would need to be made clear.

In relation to point 2(b) (*Temporary Rights to Use Land as a Temporary Construction Compound (for which I presume access rights would not need to be suspended) – for the Order land which is to be shared*), we see no reason why the draft Order cannot make provision for site sharing even if, as suggested by Addleshaw Goddard, this would constitute a departure from model clauses. We consider that it would be perfectly possible, and legally robust, to draft (say) a Schedule to the draft Order that dealt with site sharing. This could provide for the grant of temporary possession but NOT suspend the operation of existing rights, it is considered that this approach would be within the scope of powers of the Transport and Works Act 1992. There is therefore no obvious obstacle to making provision for site sharing within the draft Order itself. The draft Order could therefore provide the legal mechanism for site sharing, with the details of how site sharing will work in practice to be included in a side agreement to be agreed between the parties. Please see below at point 3 our more specific comments on the nature of such an agreement and the Option Agreement suggested by Addleshaw Goddard.

In relation to point 2(c) (*Permanent Access rights – for plot 3 on the revised alignment*), we do not consider this to be a controversial or disputed point and would agree that the draft Order would need to make provision for this.

Point 3 – Private agreement between the parties

We note that in their letter to the Inspector, Addleshaw Goddard refer to the draft Option Agreement they have shared with us. Whilst we appreciate that the Inspector has not seen a copy of this agreement, we think it is important to explain in broad terms why we do not consider the Option Agreement to be in principle an appropriate and suitable mechanism. We are providing a more detailed response on the Option Agreement directly to Addleshaw Goddard.

Whilst, as explained at point 2 above, we consider that a side agreement would be an appropriate way of dealing with the practical aspects of site sharing between the parties, with the legal aspects of site sharing

covered in the draft Order, any type of agreement reached needs to be clear, open and transparent. As drafted, the Option Agreement is unnecessarily complicated and goes well beyond what we consider is required. In broad terms, we have concerns in relation to the lack of clarity within the Option Agreement as to the type of interest(s) Network Rail would effectively be acquiring over the site and how, in turn, such interests would be transferred back by BPL. The Option Agreement appears to be seeking a freehold purchase by Network Rail of the site, and it also appears to us that the option for BPL to 'buy' back the site would not be automatic as it would not only require BPL to serve a notice, but it would also require a 'form of Transfer' to be agreed between the parties. There is no clarity as to the form of transfer being envisaged by Network Rail and whether this would contradict and/or go beyond the powers granted to Network Rail pursuant to the draft Order, particularly if, as seems, a freehold transfer to Network Rail is intended. In addition, the Option Agreement includes provisions which seem to protect BPL's ability to operate a builders' merchant from the site (or redevelop the site pursuant to BPL's planning permission). However, these provisions are very heavily caveated in favour of Network Rail, with Network Rail having absolute discretion to exercise its rights as required in relation to the safety and/or operation of the railway. This does not give BPL sufficient confidence that the arrangement would ultimately work, and would make it near impossible to tender a construction contract for the redevelopment. It is also contrary to the evidence submitted by Network Rail to the inquiry which was presented on the basis that it does not need to acquire a freehold or indeed leasehold interest in the site, but that temporary possession and the grant of rights is sufficient for its purposes, that site sharing is acceptable, and that BPL's development can be constructed at the same time as Network Rail are in temporary possession. It is wholly unacceptable for Network Rail to now seek to row back from Network Rail's stated position to the inspector at the inquiry.

Furthermore, we consider that any agreement of this type would need to be presented to the Secretary of State to allow him to properly consider the draft Order. Unless the Secretary of State is given the opportunity to fully understand how site sharing would work on site, he cannot be satisfied that the terms of the draft Order are justified. This reinforces our submission that such agreement would need to be accessible and not overly complex in order to allow a proper evaluation to be made not only by BPL but also by the Secretary of State.

Point 4 – Requirement for further consultation

In relation to point 4 of the Inspector's Note, we agree with the Inspector that a further consultation on the modified draft Order and deemed planning application is required and necessary in the interest of fairness. We also agree that, as suggested by the Inspector, 42 days for such further consultation would be adequate.

Section 13(4) of the Transport and Works Act 1992 – which has been cited by Addleshaw Goddard in their letter – provides that:

(4) Where the Secretary of State proposes to make an order which gives effect to the proposals concerned with modifications which will in his opinion make a substantial change in the proposals—

(a) he shall notify any person who appears to him to be likely to be affected by the modifications,

(b) he shall give that person an opportunity of making representations to him about the modifications within such period as he may specify in the notice, and

(c) he shall before making the order consider any representations duly made to him.

The modifications to the draft Order introduced by Network Rail are a 'substantial change in the proposals'. The changes not only significantly reduce the amount of land take sought by the draft Order, but the effect of the changes is that Network Rail's works and activities would exist alongside either an operational builders' merchant, or a construction site for the redevelopment of BPL's land. The cumulative impacts of these operations taking place alongside one another are a substantial new element introduced by the draft Order and planning application sought by Network Rail which have, to date, not been subject to public consultation. Moreover, we note that the evidence to the Inquiry was that no assessment of any cumulative effects has been undertaken by Network Rail. There is clearly the potential for greater noise and disruption for neighbours with two operations being undertaken partially on the same site, and in any event side by side, than a single

operation as Network Rail had originally proposed (i.e., possession by Network Rail of the whole site) when it originally consulted on the draft Order. It is considered that fairness requires that the public understand the level of potential noise and disturbance in its entirety.

We note that Addleshaw Goddard refers to the fact that BPL (or Jewson)'s activities on the site are already governed by either the existing planning permission for the builders' merchant or the planning permission relating to BPL's redevelopment. We do not consider these matters to be directly relevant to the question as to whether further consultation is required as it is Network Rail's application which is the issue here and which the public has the right to give their views on.

It is clear, therefore, that taken together this constitutes a 'substantial change' and, in the interests of fairness such further consultation should take place.

The Land Plans

Whilst we are sending comments back to Addleshaw Goddard in relation to the Land Plans (Land Plans 9 – 12), we would ask the Inspector to note that some wording has been introduced on Land Plans 10 and 11 relating to plot 3 (but not Land Plans 9 or 12) that reads as follows:

"5m Height clearance required

Easement to cater for maximum axle weights in the Road Vehicle (Authorised Weight) Regulations 1998".

- Land Plan 9 relates to the use by BPL of the existing warehouse and Network Rail's temporary possession;
- Land Plans 10 and 11 relate to the construction of the new BPL development (the only difference being that Land Plan 11 includes an area of parking for Network Rail outside the Order Limits) and Network Rail's temporary possession;
- Land Plan 12 just shows plot 3 in the temporary or permanent situation.

We have several observations in relation to this wording:

- No evidence was given to the Inquiry in relation to maximum axle weights that the easement needed to be capable of catering for;
- No warranty can or will be given by BPL in relation to the existing route and it would be unreasonable for BPL to have to test and potentially re-lay the existing easement route during construction of its development;
- It is noted that Network Rail have not asked for plot 2 to be capable of catering for such axle weights, and given that Network Rail's vehicles will be using plot 2 and plot 3 it makes little sense for the axle weight requirement just to apply to plot 3;
- We assume that the wording has not been added to Land Plans 9 and 12 because Network Rail only require the height clearance and axle weights catering for during construction of BPL's redevelopment and at no other time;
- Whilst we have not seen the draft revised Order, the draft Order at present refers to the alignment on the horizontal alignment Land Plan and not any other parameter, any other detail/annotation on the Land Plans does not therefore concern the scope of any rights given by the draft Order.

We have copied this letter to Addleshaw Goddard.

Yours faithfully

Norton Rose Fulbright LLP

Norton Rose Fulbright LLP

Copies to: Marnix.Elsenaar@addleshawgoddard.com
Tatiana.Volodina@addleshawgoddard.com
Victoria.Pearson@addleshawgoddard.com