

Our reference ELSEM/VOLOT/43283-4013

13 December 2023

FAO The Inspector, c/o the Programme Officer
By email: joanna.vincent@gateleyhamer.com

Dear Sir

**Transport and Works Act 1992
Network Rail (Old Oak Common Great Western Main Line) Track Access Order (Order)
239 Horn Lane, Acton, London W3 9ED (Property)**

We refer to your note of 24 November 2023 (**Inspector's Note**) and Norton Rose Fulbright's (**NRF**) letter of 11 December 2023. We set out Network Rail's position, as well as our responses to the individual points raised by NRF, below.

Point 2 – Modifications to the draft Order

It has never been Network Rail's position that the inclusion of site sharing arrangements in the Order is outside the scope of the Transport and Works Act 1992 or that it is impossible for them to be incorporated into the Order. However, we maintain, given the complex and detailed nature of the proposed arrangements, that it is not appropriate for them to be dealt with in the draft Order and they are more appropriately dealt with by way of a side agreement (an Option Agreement in this case, as further outlined below) between Network Rail and Bellaview Properties Limited (**BPL**). If the Option Agreement cannot be agreed with BPL, the site-sharing arrangements can, instead, be secured by way of a Unilateral Undertaking which will restrict the exercise of powers by Network Rail under the Order if it is granted (as further set out in our letter of 29 November 2023).

It is an industry standard practice for arrangements similar to the proposed site-sharing arrangements, to be secured by way of private agreements between the relevant parties or by way of an undertaking. We continue to have extensive negotiations with BPL and NRF have provided their client's express confirmation that *"BPL are supportive of a side agreement, and are willing to negotiate the same"*.

Point 3 – Private agreement between the parties – Option Agreement

We summarise the terms of the proposed Option Agreement as follows.

The Option Agreement would be conditional on Network Rail's acquisition of rights in the Property pursuant to the Order and it allows BPL to buy back any rights so acquired, subject to Network Rail reserving the rights it needs for its scheme. The Agreement provides for two Scenarios; Scenario One in operation of the builders merchants continues, and Scenario Two, in which BPL build out their proposed residential scheme.

Scenario One (where BPL continues operating a builders' merchant from the building currently present at the Property)

1. Over land shown coloured pink and hatched on Land Plan 9:

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- a. a right of way at all times with or without vehicles up to the Maximum Vehicle Size (being up to 18m long, up to 3.2m wide and up to 5m high and carrying up to maximum axle weights, as defined in the Road Vehicles (Authorised Weight) Regulations 1998;
- b. a right to install a gate and associated fencing and to operate a gate at all times in a location to be determined by Network Rail following consultation with BPL and acting reasonably (save in respect of the safety and/or operation of the railway and/or operation of Network Rail in their capacity as the railway infrastructure manager where Network Rail will retain absolute discretion) subject to BPL being permitted access through such gate;

The draft Option Agreement specifically provides that the above will not restrict BPL's ability to operate a builders' merchant from the building currently present at the Property;

- c. a right to park vehicles, reprofile the surface, to undertake utilities works and other associated works for the ground lowering and/or store materials for the purposes of constructing the new road rail access point on the part of such land abutting the railway for a period of up to 4 weeks subject to Network Rail giving BPL not less than 10 working days' notice; and
 - d. a right to park vehicles and to store materials either at any times outside of the hours of 6.30am to 5pm on Mondays to Fridays inclusive and 6.30am to midday on Saturdays and/or within such times where Network Rail have obtained railway possessions for the works on its neighbouring railway and gives BPL not less than 6 months' notice of these.
2. Over land shown coloured green and hatched on Land Plan 9 either at any times outside of the hours of 6.30am to 5pm on Mondays to Fridays inclusive and 6.30am to midday on Saturdays and/or within such times where Network Rail has obtained railway possessions for the works on its neighbouring railway and gives to BPL not less than 6 months' notice of these:
- a. a right of way with or without vehicles up to the Maximum Vehicle Size;
 - b. a right to park vehicles; and
 - c. a right to store materials.
3. Over land shown coloured green and hatched on Land Plan 9:
- a. a right to install a fence and a gate and to operate a gate at all time in a location to be determined by BPL (for the avoidance of doubt, gate to be installed in not in addition to the gate referred to above) following consultation with BPL and acting reasonably save in respect of the safety and/or operation of the railway where Network Rail have absolute discretion subject to BPLC being permitted access through such gate, provided always that BPL will not be restricted from operating a builders merchant from the building currently present at the Property save where such exercise of this right is required in relation to the safety and/or operation of the railway and/or operation of Network Rail in their capacity as the railway infrastructure manager.

Scenario Two (where BPL redevelops the Property pursuant to planning permission to be granted under reference 225069/FUL)

1. Over land shown coloured pink and hatched on Land Plan 10:
- a. a right of way at all times with or without vehicles up to the Maximum Vehicle Size;
 - b. a right to install a fence and a gate and to operate a gate at all times in a location to be determined by Network Rail following consultation with BPL and acting reasonably save in respect of the safety and/or operation of the railway and/or operation of Network Rail in their capacity as the railway infrastructure manager where Network Rail have absolute discretion subject to BPL being permitted access through such gate;

The draft Option Agreement specifically provides that the above will not restrict BPL's ability to redevelop the Property pursuant to planning permission to be granted under reference 225069/FUL save where the exercise of such right is required in relation to the safety and/or operation of the railway and/or operation of the Network Rail in their capacity as the railway infrastructure manager;

- c. a right to park vehicles, reprofile the surface, to undertake utilities works and other associated works for the ground lowering and/or store materials for the purposes of constructing the new road rail access point on the part of such land abutting the railway for a period of up to 4 weeks subject to Network Rail giving BPL not less than 10 working days' notice;
 - d. a right to park vehicles and to store materials either at any times outside of the hours of 7am to 6pm on Mondays to Fridays inclusive and 7am to 1pm on Saturdays and/or within such times where Network Rail has obtained railway possessions for the works on its neighbouring railway and gives to BPL not less than 6 months' notice of these.
2. Over land shown coloured green and hatched on Land Plan 10 either at any times outside of the hours of 7am to 6pm on Mondays to Fridays inclusive and 7am to 1pm on Saturdays and/or within such times where Network Rail has obtained railway possessions for the works on its neighbouring railway and gives to BPL not less than 6 months' notice of these:
- a. a right of way with or without vehicles up to the Maximum Vehicle Size;
 - b. a right to park vehicles; and
 - c. a right to store materials;

The Option Agreement provides that BPL may, on giving not less than 6 months' notice to Network Rail of each suspension, suspend such rights for up to 4 separate periods each of up to 2 weeks only, over such land as is required by BPL for the purposes of constructing the columns comprising part of the development pursuant to planning permission to be granted under reference 225069/FUL, and which time periods are approved by Network Rail (acting reasonably save in respect of the safety and/or operation of the railway and/or operation of Network Rail in their capacity as the railway infrastructure manager where Network Rail will have absolute discretion);

3. Over land shown coloured green and hatched on Land Plan 10:
- a. a right to install a fence and a gate and to operate a gate at all times in a location to be determined by Network Rail (and for the avoidance of doubt, gate to be installed is not in addition to the gate referred to above) following consultation with BPL and acting reasonably save in respect of the safety and/or operation of the railway where Network Rail will have absolute discretion subject to BPL being permitted access through such gate, provided that the exercise of this right shall not restrict BPL's ability to redevelop the Property pursuant to the planning permission to be granted under reference 225069/FUL save where the exercise of such right is required in relation to the safety and/or operation of the railway and/or operation of Network Rail in their capacity as the railway infrastructure manager (as to which Network Rail shall have absolute discretion).

Point 3 – Private agreement between the parties – concerns raised by NRF

NRF's letter to you of 11 December 2023 raises a number of specific concerns in relation to the draft Option Agreement. We have responded to NRF directly in respect of those concerns and summarise Network Rail's position below:

1. NRF's suggestion that the Option Agreement seeks a freehold purchase of the Property is incorrect. Network Rail does not require and/or intend to acquire powers/interests above or beyond those sought under the draft Order. This is reflected in the Option Agreement, which expressly refers to Network Rail's acquisition of "*such right, title of interest **as the [Network Rail] may acquire from [BPL] pursuant to the proposed TWAO [...]***" (emphasis added). The draft Option Agreement is directly linked to the draft Order and does not propose to extend

powers sought under the draft Order in any way. Indeed, there is no way in which Network Rail could acquire a freehold interest in the Property because the draft Order does not provide it with such a power.

2. NRF also raise concerns in relation to Network Rail retaining absolute discretion when it comes to *"matters relating to the safety and/or operation of the railway"*. In this regard, we note that Network Rail is under a duty as regards the safety of rail infrastructure of Great Britain, principally under the Railways and Other Guided Transport Systems (Safety) Regulations 2006 and, as such, cannot allow for the safe operation of the railway to be compromised in any way.
3. NRF's position is that any agreement needs to be presented to the Secretary of State to allow him to properly consider the draft Order. We have no objections to sharing the proposed site sharing arrangements with you. We have provided a summary of the draft Option Agreement, which we hope to agree with BPL, above. As said previously, if the Option Agreement is not agreed, we propose to submit a Unilateral Undertaking to ensure that site sharing arrangements are complied with.

Point 4 – Requirement for further consultation

Network Rail accepts that further consultation will be undertaken on the following documents:

- Modified Order;
- Modified Land Plans;
- Proposed agreement/undertaking; and
- Modified Deemed Planning Permission application plan.

The Land Plans

In terms of the Land Plans, we note NRF have raised concerns in relation to the following wording that has been introduced on land Plans 10 and 11 relating to Plot 3:

"5m Height clearance required

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

Rights sought in relation to Plot 3 under the draft Order allow for the passage of vehicles of any height over Plot 3. Network Rail notes that the proposed site sharing arrangements will enable BPL to construct its mixed use development, including part of the development which will be constructed on columns and will overhang the Order Land, including Plot 3. Network Rail requires a clearance of at least 5m for vehicles to pass along Plot 3.

The plans provided to NRF and Mr Gent on 21 November 2023 included the same information and we had understood that it is acceptable to BPL as no concerns were raised in Mr Gent's response of 22 November 2023.

We trust the above clarifies the position. However, please let us know if you have any questions or require any further information.

Yours faithfully

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