**Network Rail (Old Oak Common Great Western Mainline Track Access) Order 202[X]**

**Network Rail's response to Bellaview's comments on the revised Order provided on 8 February 2024**

| **Article of Order** | **BPL Comments** | **Network Rail Response**  |
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| **Article 2 - Interpretation**  |
| Definition of "the associated development" | NRF have amended the definition to refer to the fact that the associated development is outside of the Order limits. The important point here is that the associated development at (a) below is RAIL SIDE i.e. NOT on BPL's land, and not within the boundaries of the Order land. The ramp is on BPL's land, but any works past that point are not. The associated development at (b) is also outside the Order land. This very important point is not made clear by AG's drafting. | The definition of "associated development" exists to explain the purposes for which the powers under the Order may be exercised. The Order does not contain powers to carry out the associated development. The proposed modification is unnecessary. |
| Article 2(2) | NR need to demonstrate that they have a compelling case in the public interest for all rights sought. * + 1. The Order does not refer to “rights over land”, it refers to a “right”in the singular. If this para (2) is to be retained, then the text should be changed to “a right over land” as we have amended it. The right sought by NR is a right of access, to access the Crown Land in the permanent situation only.
		2. There is no evidence before the inquiry of NR needing rights to do, place or maintain anything in or under the land or in its air-space above its surface whether in the temporary or permanent situation.
		3. NR have made it clear that they only need an easement of 5m in height, therefore seeking unrestricted rights over air-space is contrary to NR’s evidence.
		4. NR have led no evidence that they need to “place” “anything” “on” “land” in connection with the permanent right sought over plt 3. If NR did seek to place and maintain anything on plot 3 then this would be likely (depending on size and location) to prevent servicing access to the residential units, prevent customers from parking, prevent residents from accessing disabled spaces, prevent emergency egress from the apartments, prevent the builders merchants from servicing the store. Moreover, if NR sought to place anything at the start of plot 3, i.e. the entrance to the site from Horn Lane then this would prevent all vehicular traffic from accessing the site, including customers, residential deliveries, residential and commercial servicing traffic, as well as the emergency services. There is no justification for NR being given these powers, they have provided no evidence that they need these powers, and there is no compelling case in the public interest for NR to have such a wider ranging power given the disruption it could cause.
		5. There is no evidence before the inquiry that NR need rights to do “anything” i.e. anything whatsoever NR that fancy on the land. The only evidence before the inquiry is a need for an access right. Temporary possession i.e. pursuant to article 3 is separate to that singular right sought and rights being separate.
		6. This may be a model clause but it has to be appropriate for THIS order and the powers sought by NR for THIS development. If NR have the right to do, place or maintain anything in the "airspace" over plot 3 then (1) this could prevent the new building from being constructed and (2) could prevent it from being maintained. This entirely cuts across site sharing arrangements discussed.
 | This provision is consistent with article 1(2) of the Model Clauses.(a) Change made(b) to (e) The operative provision in this case is art 6(1) which allows for the acquisition of the rights specified in column (2) of Schedule 1 for the purpose specified in column (3) of that Schedule. In this case, that purpose is "permanent maintenance access for road rail vehicles onto the Great Western Mainline". There are two important points that flow from this:(i) the power is therefore not "wide-ranging" and NR can certainly not do 'anything they fancy on the land' – what they can do is acquire and exercise a right of access; (ii) the extent and nature of the rights is qualified and circumscribed by its purpose – this is a well understood aspect of any Transport and Works Act Order or indeed Compulsory Purchase Order and a review of any such orders will show very similar powers expressed in the same way. In this case the only right to be acquired is a right of access. Clearly, the exercise of a right of access for vehicles requires the ordinary ancillary rights of airspace and rights in, on and under the surface of the land to allow that right of access to be enjoyed. The total 'package' required is akin to that that applies to a right of highway. This is self-evident and requires no further 'evidence'. As is accepted, by NRF on behalf of BPL, there is evidence before the inquiry in relation to the need for an access right. If that need is established and accepted by the Secretary of State, then the 'package' of rights normally incident to a right of access automatically applies. The BPL comments focus in particular on the question of placing things on the land. Again, this is to be interpreted in accordance with what the right is – a right of access for vehicles – in such case, placing something that "prevents all vehicular traffic from accessing the site" would be entirely inconsistent with the exercise of the very right that Network Rail would have and such a concern is nonsensical. What Network Rail may well need to place on the land is adequate surfacing to allow passage for road vehicles – Network Rail need to be certain that the access will be suitable for road vehicles and cannot simply depend on the good maintenance of BPL or its successors in title. In order to seek to give BPL some greater comfort, we have amended the purpose in column (3) of schedule 1 to provide that vehicles require a distance above the ground surface of five metres, which is the standard minimum vertical clearance above highways. |
| **Article 3 – Power to use and execute temporary works on land within the Order limits as a temporary construction compound for construction of the associated development** |
| Article 3 | It is simply not clear from this where the associated development is located. It is not clear whether it is on the land in column (2) of Schedule 2, hence the need to amend the definition of “associated development” as referred to above. | No powers are sought under the Order to authorise the associated development and further description is unnecessary. The reference here to the associated development is simply to limit the extent of user of the temporary construction compound.  |
| **Article 4 – Application of Part 1 of the 1965 Act** |
| Article 4(4) | NR does not need 5 years to exercise powers of temporary possession, the draft deemed planning permission gives NR 1 year to implement the permission. This creates inconsistency. The time periods for the exercise of temporary powers of possession and the acquisition of the permanent right should be disaggregated. Only the later should have a 5 year period for exercise | Articles 4 and 5 have been amended to provide that a notice to treat must be served, or a general vesting declaration served, within 5 years of the relevant date. New paragraphs (11) and (12) have been added to article 7 (temporary use of land in connection with the development) providing a period of 1 year for the exercise of powers of temporary possession and for the period to be extended in the event of a court challenge to powers under the Order. This is consistent with amendments to the vesting periods under section 4A of the Compulsory Purchase Act 1965 and section 5B of the Compulsory Purchase (Vesting Declarations) Act 1981 made by the Housing and Planning Act 2016 and amended by the Levelling-Up and Regeneration Act 2023.  |
| Article 5 – Application of the 1981 Act |
| Article 5(5) | The article should refer to a one year and five year period. | Our comment in relation to article 4 applies.  |
| **Article 6 – Power to acquire new right** |
| Article 6(2) | This paragraph (2) should be deleted. It unclear who is the arbiter of whether NR have a “necessary” interest. This para lacks transparency. BPL and the public need certainty as to when the new right will be created, that can be objectively identified, and not subjectively decided by e.g. NR determining if they have the “necessary” interest. There is simply no certainty or transparency as to when the date for the draw down of the new right will occur. This paragraph needs to be re-drafted accordingly. This is also without prejudice to BPL’s primary position that a TWAO should not include conditionality of this nature. The correct process should be NR acquiring an interest in plot 1 first, then seeking an order if agreement for access cannot be reached. | As was adduced in evidence to the Inquiry (Proof of evidence of Jonathan Sinclair, Appendix JS1), the Crown Estate have confirmed that a decision whether to sell Plot 1 to Network Rail is dependent on the Secretary of State's decision on the Transport and Works Act Order application to which this Inquiry relates. Accordingly, the argument that Plot 1 should be acquired before the TWAO application is submitted is not well-founded.Article 6(2) must be read alongside column (3) of Schedule 1. The right acquired in Plot 1 must be such interest as enables a permanent maintenance access for road rail vehicles onto the Great Western Mainline. That is an objectively verifiable test and should Network Rail proceed in an unreasonable manner, this would be subject to judicial review in the normal way. In reality, this condition will be fulfilled on the date on which the transfer of Plot 1 to Network Rail has been completed. However, this all only affects when the power becomes available and none of this affects the certainty or transparency of when the date for draw down of the new right will occur – that is clearly managed by art. 10 and the processes for acquisition (including service of notices) under the 1965 Act and the 1981 Act as applied by the Order.  |
| **Article 7 – Temporary use of land in connection with the development and the associated development** |
| Article 7(1) | NRF have deleted the reference to 'associated development'. The drafting is circular. The “development” is defined as “*the use and temporary works authorised by article 3*”. Article 3 permits NR to “*use the land specified in column (2) of Schedule 2 (land of which temporary possession may be taken) as a temporary construction compound, including provision of a temporary ramp, for the purposes of the construction of the associated development*.” It is therefore unnecessary in this Article 7 to refer to the temporary use of land in connection with both the development and the associated development as both are already covered by reference to the “development” by reference to Article 3 | We have amended article 7 to remove reference to associated development. |
| Article 7(1)(c) | NRF: This paragraph (c) should be deleted. (i) Notwithstanding that this is a model provision it has to be appropriate for THIS Order. NR have provided no evidence to the inquiry that they need to construct temporary works beyond the temporary ramp referred to in Art 3, and the draft deemed planning permission. NR have not demonstrated a compelling case in the public interest for the acquisition of these wide ranging rights. If NR have an unfettered right to construct "temporary works" and a "means of access" on plots 2, 3 and 4 that this could affect BPL's ability to operate the existing store, or construct the new development, or operate the new store, or interfere with residential servicing, commercial servicing, customer parking, blue badge disabled parking, emergency vehicle access, and emergency residential egress. There is no evidence before the inquiry of a need for generic "temporary works" or "means of access" and therefore no compelling case for such wide ranging rights to be granted. (ii) It is entirely unclear how a further “means of access” could be created given the site constraints. NR have not made it clear what the “means of access” is that is being referred to here. The land referred to in column (2) of schedule 2 to which the temporary use in this Artcle refers are plots 2, 3 and 4. It not clear what the “means of access” is that NR intend to construct, unless this is a reference to breaching the rear boundary of BPL’s site, and installing a gate to the railway corridor. However, it was understood that this was considered by NR as works falling within the railway corridor and therefore fell within HS2 powers, and therefore falls within he “associated works”. If this if a reference to the gate in the rear boundary, then this is only on plot 3. There is no compelling case therefore for NR to have such powers in relation to plots 2 and 4, unless they can demonstrate that they need an access in both plots. If the “means of access” is something else, then NR needs to make it clear what the “means of access” is that is being referred to here.. This right sought is also contrary to site sharing discussions(iii) If the reference to “construct temporary works” is only a reference to the ramp, then again, this is only on plot 3, and there is no evidence, and no compelling case for NR to have such powers over plots 2 and 4. The para should therefore be revised. If the “temporary works” are something else, then NR needs to make it clear what the “temporary works” are that are being referred to here. There is no evidence before the inquiry that any other “temporary works” are required, and therefore no compelling case in the public interest. | Article 7(1)(c) that provides for the construction of temporary works (including means of access) relates only to the period of Network Rail's temporary possession of the Order Land. This is a standard provision in Transport and Works Act order and is consistent with article 24(1)(c) of the Model Clauses. The temporary works that would be permitted are not unlimited; they must relate to the development as defined in article 3. Temporary works might include fencing within the compound, storage sheds and shelters, lighting columns or similar things, which it is neither practical nor necessary to define, hence the position of the Model Clause which is common practice across very many TWAOs The security gate that Network Rail will need to install is an example of what could be included in "means of access". The proposed gate will be located on plots 2, 3 and 4. We note that condition 4 of the draft conditions received from the Inspector on 14 February 2024 provides that the siting, design and operation of any gate must be approved by the local planning authority.  |
| Article 7(2)  | NRF have amended the reference from "14 days" to "28 days". Notwithstanding that 14 days is a model provision it has to be appropriate for THIS order, NR have given evidence that site sharing can work, and therefore the parties need to work together to ensure practical arrangements are agreed. Imposing 14 days is not practical. 28 days’ notice is likely to be needed for site sharing arrangements to work. Construction programmes are developed months in advance, 14 days notice to change a construction programme, alter construction sequencing, contractors, subcontractors and materials deliveries is not adequate. It is not considered credible that NR wont know 28 days in advance of when they plan to start works. NR have welcomed a collaborative and solution focussed approach to site sharing. 14 days notice is the antithesis of that approach. | 14 days is consistent with article 24(2) of the Model Clauses and Network Rail does not agree to the notice period being increased. NRF have not set any reasons why BPL requires any special provision. In light of the expedited 1 year period for implementation of the permission, Network Rail will need to get on site as quickly as possible. The BPL comments refer to a construction programme and the need to alter the programme and construction sequencing. We assume that those references relate to the implementation and building out of the planning permission for a new warehouse and residential accommodation that BPL have obtained. Network Rail notes that BPL have stated in their Comments on the Unilateral Undertaking, provided to the Inspector on 8 February 2024, at paragraph 5.1, that "Mr Aaronson [the owner of BPL] has advised that he'd (*sic*) start using the site as a logistics and delivery hub immediately post Starck vacation (*sic*) of the site (lease will be surrendered 1.10.24, agreement for surrender signed 2.2.24),…"BPL have not confirmed when they will implement and build out the development permitted by the planning permission; if at all. Network Rail have expressed their wish, and need, to exercise the temporary possession powers under the Order, if made, as soon as reasonably possible after the Order is made. It is, therefore, very unlikely that BPL would, on the date when notice pursuant to article 7(2) is served, have commenced development or, even if they have commenced, made significant progress with their construction programme. BPL will also be fully aware of Network Rail's proposed works when letting any construction contract. Further, under the Unilateral Undertaking, BPL will be able to trigger the Scenario Two site sharing arrangements by giving Network Rail 10 Working Days' notice.  |
| Article 7(10) | It is noted that NR have not in this Article or elsewhere in the Order sought to create site sharing, namely the areas that are shown hatched on plans 9 and 10. The Order therefore has the effect of NR taking exclusive temporary possession of all the hatched areas. This conflicts with NR's evidence to the inquiry that they are prepared to share the hatched areas, and it is therefore clear that NR via this Order are taking more land exclusively than they need, and there is therefore no compelling case in the public interest for such acquisition. | Site sharing arrangements are dealt with by the Unilateral Undertaking. As is accepted and standard practice with a Transport and Works Act Order, the Order sets out the necessary base case powers to ensure the delivery of the scheme for which the Secretary of State will, in making the Order, have determined that there is a compelling case in the public interest. Parties often agree a specific regime to deal with points of detail between themselves which will usually serve to limit the full exercise of the powers granted but due to the level of detail of those regimes and the need for them to be variable and change through implementation, it is appropriate for them to be specified in an agreement, rather than on the face of the Order. In this case, as BPL has not reasonably come to an agreement, despite having been given an opportunity to do so, Network Rail has offered a unilateral undertaking, which can be varied by agreement between the parties, to replicate the same function.  |
| **Article 8 – Disregard of certain interests and improvements** |
| Article 8(1) | NR have been asked to confirm twice (this is the third time) whether NR are of the view that the proposed BPL development "*was not necessary and was undertaken with a view to obtaining compensation or increased compensation*". NR are asked to please kindly answer the question. BPL need to know whether this is a point that NR will be making when inevitably a compensation claim is made.  | It is unclear whether or not this is a point that relates to the drafting of the Order. In any event, Network Rail notes that compensation issues are properly dealt with by the Upper Tribunal (Lands Chamber).  |
| **Article 9 – Extinction or suspension of private right of way**  |
| Article 9(1) and (2) | NRF have amended these paragraphs to include *"…save for any rights of access to the builders' merchant at 239 Horn Lane London, W3 9ED, and save for any rights associated with a proposed mixed use development of land at 227-237 and 239 Horn Lane London W3 9ED…"*This Article as drafted secures rights beyond what NR have stated in evidence that they require and there is therefore no compelling case for the rights here to be granted. As drafted this Article has the potential to extinguish all BPL's rights in plot 3. NR could simply claim use by BPL is "inconsistent" with their right and seek injunctive relief to prevent BPL from developing or operating their development or the existing store. This Artilce is objected to in the strongest terms. It is also contrary to all site sharing discussions. At the point in time that NR are taking this permanent right, either rights will be in existence to use plot 3 to service the existing warehouse, or other rights across plot 3 will have arisen. There is evidence before the inquiry that plot 3 will be used for construction of the new development, as well as use by a variety of uses and by a variety of users all with rights to use it: for residential servicing including refuse collection; for deliveries and collections including loading and unloading of Builder Depot vehicles; for Builder Depot customers to access parking spaces to the rear of the new store; for blue badge holders to access residential parking spaces to the rear of the new store; for emergency egress on foot from the residential floors. If any or all of these rights were “acquired” or extinguished by NR the proposed development could not be beneficially used. It would also mean that NR would effectively have exclusive use of plot 3 and there is no evidence presented to the inquiry and therefore no compelling case in the public interest for NR to have exclusive use. Moreover, it is wholly unclear what of the above rights NR would consider “extinguished”. Given that NR are well aware of the above rights that already exist, or will exist, NR ought to be able to clarify what they will be extinguishing under the Order and update the drafting accordingly. It is only then that BPL will have clarity. It is noted that NR have been able to provide such clarity in relation to Acton House. These rights sought at also contrary to site sharing discussions. Words have been added to paragraphs (1) and (2) to reflect site sharing discussions and NR’s evidence. | The exercise of the permanent right under the Order may only be exercised for the purpose described in column (3) of Schedule 1; namely for access for road rail vehicles onto the Great Western Mainline. Article 9(1) has the effect of cancelling private rights but only insofar as they are inconsistent with the right provided by the Order. The effect of this provision is that Network Rail's ability to exercise its right must be unimpeded but it does not mean that Network Rail could seek injunctive relief or in any other respects seek to prevent Bellaview from exercising its rights over Plot 3 which are not inconsistent with Network Rail's right. We note that article 29 of the Model Clauses provides for the extinction of private rights of way without the qualification included in the draft Order before this Inquiry (that such extinction applies only insofar as private rights are inconsistent with the right provided by the Order). In respect of Network Rail's rights of temporary possession, it is correct that private rights of way must be suspended during the period of the temporary possession; if they were not, Network Rail would not have control of the land, and the ability to exclude others from it, during the relevant period. As such, it would not be able to secure the site and ensure the safety of members of the public. That said, crucially, the temporary possession is restricted by the terms of the Unilateral Undertaking which provides for the sharing of parts of the Order Land. To note, art 9(3) provides for compensation arising out of loss by the extinguishment or suspension of any private right of way. That also serves as a natural brake on the extent to which Network Rail would seek to extinguish private rights.  |
| **Article 10 – Time limit for exercise of powers of acquisition** |
| Article 10(1)  | NRF have amended this paragraph as follows: *After the end of the period of 5 years in respect of powers conferred by article* ***Error! Reference source not found.*** *(power to acquire new rights) and after the end of the period of 1 year in respect of powers conferred by article* ***Error! Reference source not found.*** *(temporary use of land in connection with the development) beginning on the date on which this Order comes into force-*Irrespective if it is a model clause it has to be appropriate for THIS order. It is plain from Art 10(2) that NR is proposing 5 yrs for the exercise of temporary possession powers as well as the permanent easement. If NR does not need 5 yrs to exercise temporary possession powers then this should not be asked for. | Article 10 has been deleted. Articles 4 and 5 have been amended to provide that a notice to treat must be served, or a general vesting declaration served, within 5 years of the relevant date. New paragraphs (11) and (12) have been added to article 7 (temporary use of land in connection with the development) providing a period of 1 year for the exercise of powers of temporary possession and for the period to be extended in the event of a court challenge to powers under the Order. This is consistent with amendments to the vesting periods under section 4A of the Compulsory Purchase Act 1965 and section 5B of the Compulsory Purchase (Vesting Declarations) Act 1981 made by the Housing and Planning Act 2016 and amended by the Levelling-Up and Regeneration Act 2023.  |
| Article 10(2) | NRF have deleted the reference to *'associated development'.* NR need to disaggregate the temporary possession and permanent rights. Only 1 year is required for the exercise of temporary possession (see condition on the deemed planning permission), although 5 years may be reasonable for the exercise of permanent rights. It would create an inconsistency with the deemed permission (and contrary to NR’s evidence to the inquiry) for them to have longer than 1 year for the exercise of Art 7 powers. | Our comment in relation to article 10 applies.  |
| **Article 15 - Arbitration** |
| Article 15 (now article 14) | This Art cannot fetter the discretion of any claimant to refer a compensation claim to the UTLC. NR is asked to confirm that it agrees, BPL do not wish there to be a jurisdiction issue alleged at a later date. | Article 15 (article 14 in the new draft of the Order) states that disputes under any provision of the Order must be referred to and settled by a single arbitrator unless *otherwise provided for.* Article 4 states that Part 1 of the Compulsory Purchase Act 1965 applies to the acquisition of interests in land under the Order as it applies to a compulsory purchase to which the Acquisition of Land Act 1981 applies and as if the Order was a compulsory purchase order under that Act. Article 5 states that the Compulsory Purchase (Vesting Declarations) Act 1981 applies as if the Order was a compulsory purchase order. Section 6 of the 1965 Act provides that the question of disputed compensation must be referred to the Upper Tribunal. Section 7 of the 1981 Act states that on the vesting date the 1965 Act applies as if the declaration was a notice to treat. This ensures that section 6 of the 1965 Act applies to questions of disputed compensation. It is, therefore, beyond doubt that the question of compensation will be determined by the Upper Tribunal and not by an arbitrator under article 15. This wording is standard practice in TWAOs – see for example the Northumberland Line Order 2022, The Crossrail (Plumstead Sidings) Order 2015, the London Underground (Northern Line Extension) Order 2014.  |

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**23 February 2024**