**Network Rail (Old Oak Common Great Western Mainline Track Access) Order 202[x] - Unilateral Undertaking**

**Network Rail's response to Bellaview's comments on the unilateral undertaking provided on 8 February 2024**

**Definitions**

**BPL** means Bellaview Properties Limited

**Deed** means the Unilateral Deed of Undertaking executed by Network Rail

| **Number** | **Paragraph of Undertaking** | **Inspector/BPL Comment** | **Network Rail Response** |
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| **Response to Inspector's comments** | | | |
| 1 | General | The Inspector described the circumstances in which the Order is made before Starck's lease of the warehouse has been surrendered and Network Rail exercise compulsory land powers under the Order:  - if BPL do not serve a notice bringing site sharing arrangements into play, then Starck would not have rights of access to the warehouse until the relevant notice is served; or  - if BPL no not serve a notice at all, Stark will not have rights of access between the date of exercise of powers by Network Rail and the end of their lease. | The Deed has been amended to provide that Site Sharing Scenario One applies in any event without there being a need for BPL to serve notice on Network Rail for it to apply. |
| 2 | Schedule 1, paragraph 1(iii). | If BPL do not serve a notice bringing Site Sharing Scenario One into effect immediately following the grant of powers, there will be no obligation on Network Rail to provide 10 Working Days' notice of surface reprofiling works. | The Deed has been amended to provide that Site Sharing Scenario One applies in any event without a notice from BPL being required. |
| 3 | Schedule 1, paragraph 1(c)(i) and (ii) | (i) does not state to whom access will not be prevented whereas (ii) refers to access being prevented to BPL. | The Deed has been amended, in respect of (i) so that the paragraph applies to BPL and its tenants, contractors and customers and, in respect of (ii) to provide that it applies to Bellaview and its employees, customers and legitimate visitors. |
| 4 | Schedule 1, paragraphs 2 and 6 | The Inspector expressed his concern that Network Rail's ability to suspend the site sharing arrangements on ground of "the safety and/or operation of the railway and/or operations of Network Rail in their capacity as the railway infrastructure manager" gives Network Rail the ability to suspend the site sharing arrangements in too broad a set of circumstances. | The paragraphs have been amended to provide that the power is intended to be used only in cases of emergency. |
| **Response to Belleview's comments** | | | |
| **1** | **Recitals** | | |
| 1.1 | Recital B | The “Purposes” of the Order (as defined) do not match the purposes set out in the Order. The recital refers to securing permanent “rights in land”; the Order has been updated by NR to refer to a single right, namely the permanent right of way across Plot 3. | If our understanding is correct, this comment refers to the presence of an "s" on the end of the word "right". The "s" will be deleted. |
| 1.2 | Recital B | Refers to “temporary” “rights to use” land. The Order grants no temporary rights, it only gives powers of temporary possession. Possession and rights are different powers. | The recital has been amended. |
| 1.3 | Recital B | Refers to the RRAPs being required for the “delivery the Old Oak Common Station, as well as further maintenance of the railway”. That is not what the Order provides, it provides that the RRAPs are needed for the delivery of the “associated development”. See definition of “associated development”, “development”, and Article 3. | Recitals are not an operative part of the Deed and do not affect powers under the Order. In any event, it is an accurate summary of the powers sought. |
| **2** | **Interpretation** | | |
| 2.1 | Definition of "New Warehouse Opening and Delivery Hours" | The “New Warehouse Opening and Delivery Hours” are not yet determined. Condition 42 of the Planning Permission provides that a “Site and Operations Management Plan” is to be submitted to and approved by the LPA prior to commencement of occupation. This Plan is to include “hours of use”, as well as “times and frequency of activities, deliveries and collections, vehicle movements incl. forklift”. It cannot therefore be said that the opening and delivery hours will be those set out in the definition. The Undertaking includes no flexibility for the hours to be changed to match those approved by the LPA, thereby creating a possible disconnect. | BPL did not lead evidence at the Inquiry (either through Mr Aaronson or otherwise) about wishing to change the hours of operation from those currently adopted by Stark. Further, it is unlikely that the local planning authority will approve hours of use which are significantly different from those that apply to the existing warehouse. Any amendment to the definition of the New Warehouse Opening and Delivery Hours would be considered by Network Rail when BPL provides specific alternative hours. |
| 2.2 | Definition of "Possession" | The definition of “Possession” refers to “the duration” “determined by Network Rail”. Network Rail could therefore determine any day / duration as a “possession” even if there was no actual rail possession that day / time. This opens the door for the possibility of BPL being told there is always a “possession” and no ability at all to operate the existing warehouse, construct the development or to occupy it. | Condition 8 of the draft deemed planning permission restricts the number of nights on which activities involving road rail vehicles may be carried out to 300 and activities not involving road rail vehicles to 175.  Railway possessions are planned a long time in advance and agreed between Network Rail and the train and freight operating companies. Accordingly, there is no prospect that Network Rail could or would be able to designate a period as a Possession Period if there is in fact no railway possession. That would be a breach of the Deed. However, we will amend the drafting to clarify that this is the case. |
| 2.3 | Definition of "Possession Period" | “Possession Period” refers to a period which includes 4 hrs before the start of a possession and 1 hr 15 mins after the end of that possession. No evidence has been led by Network Rail on this precise timing requirement, which could disrupt the normal closing and opening times of the warehouses or disrupt construction start/end times. | Network Rail must have some time before a possession comes into effect to secure the site and ensure all health and safety rules have been complied with. Similarly, after a possession has ended, some time is needed to remove health and safety equipment and reinstate the boundary with the railway to ensure the health and safety of all people entering onto the Property. The periods described are the minimum periods that are reasonably necessary to enable Network Rail to comply with its health and safety obligations and to ensure the safety of members of the public. |
| 2.4 | Definition of "Warehouse Opening and Delivery Hours" | “Warehouse Opening and Delivery Hours” reflect the opening hours of the Stark warehouse, (6.30am – 5 pm) however Builder Depot operate different opening hours at some of their stores e.g. New Southgate operates 6am to 5pm. There are no restrictions on the opening hours of the current warehouse. The definition may prevent Builder Depot from operating its preferred opening hours, and there is no flexibility for the hours to be changed to those Builder Depot may wish to operate. | Network Rail has discussed the opening hours with BPL on a number of occasions and also amended the opening hours in the light of BPL's comments. Network Rail's proposed programme of activities mean that the opening and delivery hours must stay as drafted. It is noted that BPL's comment does not refer to a material difference between the opening and delivery hours as defined in the Deed and those of BPL's New Southgate store; the difference is 15 minutes at the start of the day and the hours stated in the Deed are in fact 15 minutes later at the end of the day; namely 5.15pm rather than 5pm. However, we have amended the definition to provide for alternative hours to be agreed but Network Rail must have absolute discretion whether or not to agree alternative hours so that any alternative hours do not conflict with Network Rail's programme of works. |
| 2.5 | Clause 1.3 | At clause 1.3, NR have attempted to address BPL’s comment that the redline on all plans crosses into the boundary of the warehouse (existing and proposed) and 227-237 Horn Lane by stating:  *“Where a plan attached to this Deed shows the boundary of an area edged in red and the red line is drawn over the top of a black line it is the black line which shows the boundary of the relevant area”*  Whilst this might work for the plans attached to the Undertaking, it doesn’t work for the Order Land Plan or the Redline Plan (for the deemed planning permission). This is effectively a concession by NR that their plans are incorrect and they are taking more land than required (the walls of the buildings). It is understood that NR are seeking to amend the plans to remove the overlap. | The land plan has been updated. The plan has to be read in conjunction with the book of reference and that document has been updated to reflect the revised extent of the Order Land. There is no suggestion that Network Rail is seeking to acquire a part of the warehouse. |
| **3** | **Covenants** | | |
| 3.1 | Clause 3 preamble | NR covenant “on behalf of itself and any person to whom powers under this Order have been transferred”. It is noted that there is no covenant to ensure that NR passes down its obligations in the deed to its contractors or agents as would be usual. It would be usual for there to be a covenant to ensure that its obligations in the deed were mirrored in any construction contracts. It is unlikely that it could be argued that “powers” under the Order had been “transferred” to contactors or agents. This omission leaves BPL without a remedy if NRs contractors fail to follow the terms of the Undertaking as there would be no enforceability of the deed against contractors, and unless NR have included in their contractual arrangements with contractors that they comply with the terms of the Undertaking, then NR may well be unable to enforce compliance. | The obligation to comply with the obligations will be on Network Rail and, where works are carried out by contractors, Network Rail will be responsible for ensuring that compliance is passed down to the contractors. No additional drafting is proposed. |
| 3.2 | Clause 3 (a) | The reference should be “article 6 (power to acquire new right)”. | The "s" on the end of "right" has been deleted. |
| 3.2 | Clause 3 (d) | 10 Working Days’ notice of a change in the possession programme is insufficient, it needs to be 20 Working Days for BPL’s contractors who plan a construction programme months in advance. | The Deed has been amended to provide for 20 Working Days' notice to be provided. |
| 3.3 | Clause 3 (e) | Difficult to see how NR can “work in a cooperative and collaborative manner with Bellaview to achieve collaborative solutions” in an Undertaking. | If BPL prefer for this clause not to be included, it can be deleted but we would have expected BPL to welcome its inclusion. |
| 3.4 | Clause 3 (e) | Only refers to the operation of the old and new warehouse, and construction of BPL’s scheme, no consideration whatever is given to residents who may take residence during NR’s period of possession. | This is part of the clause relating to collaboration which BPL have stated should not be included in a unilateral undertaking. The only further observation which Network Rail would make is that, as noted at the Round Table Discussion, there can be no question of public access (for example by residents of any completed development) to the operational compound areas during the period of Network Rail’s possession. |
| **4** | **Compensation and mitigation** | | |
| 4.1 | Clause 4.1 | The compensation provisions don’t go far enough. For example, NR have removed references to their acknowledgement that temporary possession has the potential to cause permanent loss (e.g. the before and after costs of building the new scheme with NR and without NR). Compensation claims are notoriously difficult to negotiate opposite NR. BPL do not need the time and expense of negotiating a highly contested compulsory purchase claim opposite NR when some basic principles can be agreed now that will save time and expense at a later stage. BPL would like Mr Aaronson’s uncontested evidence to be reflected in the Undertaking that:  4.1.1.1 Any builders' merchants operating from the old/new warehouse may be a compromised operation due to the reduction in customer parking, and external yard space;  4.1.1.2 Any additional restrictions on the operation of the old/new warehouse such as reduced opening days / hours may compromise the operation further;  4.1.1.3 Evidenced business disturbance to the operation of a builders' merchant from the old/new warehouse as a consequence of NR's use of and works to the Property is compensatable under the Compensation Code.  BPL would also like the following points of principle to be reflecting in the undertaking:  4.1.1.4 Temporary possession can give rise to a permanent loss (e.g. the before and after costs of building the new scheme with NR and without NR);  4.1.1.5 The costs of delay in constructing the development e.g., an extended build period as a consequence of NR's temporary possession; or a delayed start date as a consequence of NR's temporary possession may give rise to an increase in costs (e.g. the cost of finance or build costs), or delays during construction due to early finish / late starts as a result of NR's works / possessions. | Compensation matters are for the Lands Chamber of the Upper Tribunal and not for this Inquiry. |
| 4.2 | Clause 4.2 | Difficult to see how NR can “give this Undertaking by Deed in order to achieve a collaborative solution” in an Undertaking. | If BPL prefer for this clause not to be included, it can be deleted but we would have expected BPL to welcome its inclusion. We have kept it in the new executed deed. |
| **5** | **Scenario 1 (existing warehouse)** | | |
| 5.1 | Schedule 1, paragraph 1 | Doesn't work.  Mr Aaronson has advised that he’d start using the site as a logistics and delivery hub immediately post Stark vacation of the site (lease will be surrendered 1.10.24, agreement for surrender signed 2.2.24), this use would not necessarily fall within the terms of the deed, which provides BPL with protections if they “operate a builders’ merchant business from the Warehouse”. Moreover, the protections only kick in if NR are given 10 Working Days’ prior notice which suggests that if BPL move in and use the warehouse, but don’t give notice then they would never be entitled to the protections. It is unacceptable for NR to be off the hook in terms of compliance with the deed if they are not served with notice. If BPL’s operation of a builders’ merchants from the warehouse comes to NR’s attention then we’d expect them to be required to comply with the Undertaking. This also protects against a scenario where BPL serve the required notice and NR claim not to have received it, therefore claiming that 10 Working Days’ prior notice wasn’t given, and therefore they are not required to comply with the terms of the Undertaking. | Network Rail has no interest in controlling how the warehouse is used and it is noted that any new use that constitutes a material change of use would need to have planning permission. The Deed has been amended so that Scenario One applies as the default position and there is no requirement on BPL to serve a notice bringing Scenario One into effect. The Deed is otherwise silent on how the Warehouse is used. |
| 5.2 | Schedule 1, paragraph 1(a)(ii) and paragraph 1(b)(iv)(ii) | Refer to NR having a right to “operate a gate at all times”, the suggestion is that they will operate it at all times, even when there is no railway possession, and NR are not using the site. It is understood from the meeting with Mr Ford on 30.1.24 that the gate will not be operated by NR when there is no railway possession (so allowing access for BPL freely), but that is not what the Undertaking says. It also states that BPL will be given access through the gate during Warehouse Opening and Delivery Hours, and there will be no access for BPL during a railway possession. However, the Undertaking is silent as to whether it allows access for BPL outside of Warehouse Opening and Delivery Hours when there is no possession. Since NR have reserved a right to operate a gate “at all times”, such a restriction on BPL is a reasonable inference. BPL’s access is therefore unreasonably restricted. BPL may require access outside of Warehouse Opening and Delivery Hours for maintenance, cleansing or repair, surveys or inspections for example. It is difficult to understand how NR can be justified in restricting BPL’s access when NR are not using the site. This is unreasonable. | We have amended the Deed for access through the gate outside of Warehouse Opening and Delivery Hours, and when there is no Possession, to be agreed by Network Rail. Such agreement is needed to guarantee the safety of all persons passing through the gate. |
| 5.3 | N/A | The draft conditions (condition 8) require 6 months’ notice of dates when movement of people, materials, machinery or vehicles is anticipated to take place to “occupants of nearby properties” although BPL might be expected to be included in this, they are not specifically referred to. It would have been helpful if the Undertaking could have made it clear that they are included. | This is a comment on the conditions rather than the Deed. |
| 5.4 | Schedule 1, paragraph 1(a)(iii) | 20 Working Days’ notice should be given (not 10 Working Days) when the 4 week period commences for the construction of the Ramp which will necessitate the closure of the gate for the entire period, meaning no access to the rear of the existing warehouse for that period. This is what the Undertaking provides for. No consideration is given as to how the builders’ merchant can be serviced in this period (good inwards is via the rear doors). It is unreasonable to close down the builders’ merchant for a month on 10 Working Days’ notice. It is not credible that NR will not know a month before when they plan to start work. | Network Rail requires the ability to commence the works referred to as soon as possible after the Order has been made (if it is made) and, accordingly, the Deed provides for 10 Working Days to be provided in relation to these works. Network Rail will endeavour to provide greater notice if it is reasonably practicable to do so. |
| 5.5 | Schedule 1, paragraph 1(a)(iv)(B) and 1(b)(iv)(i)(B) | Outside of a possession NR can park vehicles and store materials on the green hatched land therefore effectively preventing vehicular access to the rear of the existing warehouse (because delivery lorries will be unable to turn in the hatched green turning area) between 6.15am on a Saturday to 5.15pm on a Monday. Given that warehouse opening hours are given in the Undertaking as 6.15am – 5.15pm Mon - Fri and 6.15am – 12.15pm Sat it is difficult to understand why NR should be able to prevent the warehouse from having vehicular access to the rear all trading hours on Monday and Saturday trading hours, when there is no railway possession. Difficult to see the justification. | The stated hours have been amended so that the Deed provides that Network Rail will not park on the pink hatched land perpendicular to the railway between 6.15am on any Monday and 12.15pm on the following Saturday. In other words, Network Rail will not park on that area during the Warehouse Opening and Delivery Hours. |
| 5.6 | Schedule 1, paragraph 1(c) | Advises that the exercise of rights in para 1(a)(i), (ii) and (iv), and (b) (i) – (iii) will not prevent access from the warehouse’s northern access outside of possession, however this does not deal with the concerns expressed above in relation to 1(a)(iii) and 1(b)(iv)(ii). | We have amended the Deed so that access through the gate outside of Warehouse Opening and Delivery Hours, and when there is no railway possession, is subject to agreement by Network Rail. |
| 5.7 | Schedule 1, paragraph 2 | NR have carte blanche to prevent operation of the warehouse for rail safety / rail operation reasons. NR do have to consider BPL mitigation proposals if made. NR have deleted provisions which provided for a daily rate of compensation to BPL in the event of an engineering works overrun which prevents operation of the warehouse on the day and with no warning. This ought to be a specifically recognised compensation event. | We have amended this paragraph to take on board the Inspector's comment at paragraph 4 under Inspector's comments above.  The reference to compensation relates to a draft Deed of Agreement which was sent to BPL on a without prejudice basis and it not before the Inquiry.  Compensation issues are for the Lands Chamber of the Upper Tribunal and not for this Inquiry. |
| **6** | **Scenario 2 (development of the new scheme)** | | |
| 6.1 | Schedule 1, paragraph 3 | Doesn’t work. The BPL protections only kick in if NR are given 10 Working Days’ prior notice which suggests that if BPL start construction, but don’t give notice then they would never be entitled to the protections, even if NR subsequently become aware of construction occurring. If BPL’s construction comes to NR’s attention then we’d expect them to be required to comply with the Undertaking. This also protects against a scenario where BPL serve the required notice and NR claim not to have received it, therefore claiming that 10 Working Days’ prior notice wasn’t given, and therefore they are not required to comply with the terms of the Undertaking. | Site Sharing Scenario One will represent the default position. Network Rail cannot be expected to become aware when construction has started so that Site Sharing Scenario Two will apply. If a notice is properly served Network Rail could not claim not to have received it. |
| 6.2 | Schedule 1, paragraph 3(a)(ii) | Allows NR to “operate a gate at all times”. Not clear if NR intend to operate the gate at all times even when there is no railway possession. BPL are given access through the gate (and also at 3(b)(iii)) during Construction Hours which are 7am – 6.15pm Mon - Fri and 7.15am – 1.15pm Sat (to reflect the construction hours in BPL’s planning permission). However, the Undertaking by default allows no access through the gate for BPL outside of Construction Hours even when there is no railway possession, at least it is unclear on this point, but given the reference to “at all times” it is a reasonable inference. This would therefore prevent non-construction related activities outside of Construction Hours, such as site inspections, site office activities, or security / surveillance operations. This is unreasonable. | We have amended the Deed to provide that access through the gate outside of Construction Hours to be subject to the agreement by Network Rail. Such agreement is needed to guarantee the safety of all persons passing through the gate. |
| 6.3 | Schedule 1, paragraph 3(a)(iii) | 20 Working Days’ notice should be given (not 10 Working Days) when the 4 week period commences for the construction of the Ramp which will necessitate the closure of the gate for the entire period, meaning no access to the rear of the site for construction purposes for that period. This is what the Undertaking provides for. No consideration is given as to how construction of the development can be facilitated in this period. It is not credible that NR will not know a month before when they plan to start work. | Network Rail requires the ability to commence the works referred to as soon as possible after the Order has been made (if it is made) and, accordingly, the Deed provides for 10 Working Days to be provided in relation to these works. Network Rail will endeavour to provide greater notice if it is reasonably practicable to do so. |
| 6.4 | Schedule 1, paragraph 3(a)(iv)(B) and paragraph 3(b)(ii)(B) | Outside of a possession NR can park vehicles and store materials on the green hatched area (therefore effectively preventing vehicular access to the rear of the site as lorries will be unable to turn) between 7.15am on Saturday and 6.15pm on the following Monday. Given that Construction Hours given in the Undertaking are 7am – 6.15pm Mon - Fri and 7.15am – 1.15pm Sat it is difficult to understand why NR should be able to prevent contractors from having access to the rear (except by foot) between 7.15am on a Saturday to 6.15pm on the Monday (i.e. during all Mon and Sat Construction Hours outside of railway possessions). Difficult to see the justification. | 3(a)(iv)(B) - The stated hours will be amended so that the Deed provides that Network Rail will not park on the pink hatched land perpendicular to the railway between 7am on any Monday and 1.15pm on the following Saturday and, if the New Warehouse is operational, between the hours of 6.15am on any Monday and 12.15pm on the following Saturday. In other words, Network Rail will not park on that area during Construction Hours or New Warehouse Opening and Delivery Hours. |
| 6.5 | Schedule 1, paragraph 3(a)(iv)(B) and paragraph 3(b)(ii)(B) | Further, should the new warehouse forming part of the proposed development be constructed and operational whilst NR remain in possession of the site, then outside of a possession NR can park vehicles and store materials on the green hatched area (therefore effectively preventing vehicular access to the rear of the site as lorries will be unable to turn) between 6.15am on Saturday and 5.15pm on the following Monday (i.e. all Monday and Saturday trading hours would have restricted access to the rear of the warehouse, with access by foot only). | 3(b)(ii)(B). We have added a new paragraph 3(b)(ii)(C) that provides that access over the green hatched area outside of a Possession and outside of Construction Hours or New Warehouse Opening and Delivery Hours will be subject to agreement by Network Rail in its absolute discretion. |
| 6.6 | Schedule 1, paragraph 3(a)(iv)(B) and paragraph 3(b)(ii)(B) | Moreover, the Undertaking does not cater for a scenario where any of the residential apartments are occupied whilst NR remains in possession of the site. The restrictions at para 3(iv)(B) would prevent all vehicular use of the access road to the rear of the warehouse between 7.15am on Saturday and 6.15pm on the following Monday. Between those times when there was no railway possession it would be impossible for vehicles to undertake manoeuvres relating to: residential servicing, provide emergency vehicle access, customer parking, and blue badge residential parking. This is unreasonable. | Network Rail will vacate the Property, other than in respect of the permanent easement if Plot 1 has been secured, no later than 31 December 2029. Until that date, Network Rail cannot allow residential occupiers to pass through the gate during a possession; this is for their own safety. |
| 6.7 | Schedule 1, paragraph 5 | It is difficult to see how this obligation will operate as this deed is an Undertaking. If BPL grant alternative parking rights to NR, there is nothing that clearly states that NR have to be bound by those alternative parking rights, and will give up their previous parking rights, save by cross-reference to para 4. The release wording in para 4 should be repeated here. | Paragraph 4 provides for rights to be released whether the alternative land provided by Bellaview for parking is the grey land or other land. |
| 6.8 | Schedule 1, paragraph 6 | See comments above at para 5.7. | We have amended this paragraph to take on board the Inspector's comment at paragraph 4 under Inspector's comments above.  The reference to compensation relates to a draft Deed of the agreement which was sent to BPL on a without prejudice basis and it is not before the Inquiry.  Compensation issues are for the Lands Chamber of the Upper Tribunal and not for this Inquiry. |
| 6.9 |  | NR have deleted obligations that allow BPL to implement Scenario 1 and then Scenario or only one or the other. | This comment relates to a draft Deed of Agreement that was sent to BPL on a without prejudice basis but was not agreed with BPL and the latest draft of which was not responded to by BPL. In any event, the paragraph referred to is unnecessary as Scenario One is the default position and the Deed provides for BPL to bring Scenario Two into play if it wishes. We have added a new paragraph 7 which provides that BPL may bring Site Sharing Scenario One into effect after it has brought Site Sharing Scenario One into effect. |
| 6.10 |  | NR have deleted an obligation that relates to allowing BPL to undertake works approved by the planning permission for the BPL scheme on those parts of the site that fall into with the shared use (hatched) or exclusive use (green) areas. The works in question are principally hard surfacing. It should be possible to have a similar mechanism to that inserted at para 3(d) to enable these works to be undertaken. | This comment relates to a draft Deed of Agreement that was sent to BPL on a without prejudice basis but was not agreed with BPL the latest draft of which was not responded to by BPL.  Network Rail would be willing to consider specific proposals for works that would need to be undertaken pursuant to the planning permission, but no such proposals have been received. The Deed has been amended to provide that use of the green areas will be subject to agreement by Network Rail. |

**Addleshaw Goddard LLP**

**23 February 2024**