**Bellaview Properties Ltd**

**239 Horn Lane**

**NRF Comments on the executed Undertaking**

1. **Recitals**
   1. Recital B – the “Purposes” of the Order (as defined) do no 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.
   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.
   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.
2. **Interpretation** 
   1. 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.
   2. 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.
   3. “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.
   4. “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.
   5. 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.

1. **Covenants**
   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.
   2. Clause 3 (a) – the reference should be “*article 6 (power to acquire new right~~s~~)*”.
   3. 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.
   4. 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.
   5. 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.
2. **Compensation and mitigation**
   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:
      * 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;
        2. Any additional restrictions on the operation of the old/new warehouse such as reduced opening days / hours may compromise the operation further;
        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 reflected in the undertaking:

* + - 1. 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);
      2. 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.
  1. Clause 4.2 – difficult to see how NR can “*give this Undertaking by Deed in order to achieve a collaborative solution*” in an Undertaking.

1. **Scenario 1 (existing warehouse)**
   1. Sched 1 para 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.
   2. Sched 1 para 1(a)(ii) and para 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.
   3. 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.
   4. Sched 1 para 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.
   5. Schedule 1 para 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.
   6. Schedule 1 para 1(c)(i) – 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).
   7. Schedule 1 para 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.
2. **Scenario 2 (development of the new scheme)**
   1. Sched 1 para 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.
   2. Sched 1 para 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.
   3. Sched 1 para 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.
   4. Sched 1 para 3(a)(iv)(B) and para 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.
   5. 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).
   6. 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.
   7. Sched 1 para 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.
   8. Sched 1 para 6 – see comments above at para 5.7.
   9. NR have deleted obligations that allow BPL to implement Scenario 1 and then Scenario or only one or the other.
   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.

**Norton Rose Fulbright**

**8.2.24**