Bellaview Properties Ltd

239 Horn Lane

NRF Comments on the executed Undertaking provided 23.2.24

1. Interpretation

1.1. The "New Warehouse Opening and Delivery Hours" are not yet determined. Condition 42 of BPL's 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 states that NR can agree different hours to those set out in the Undertaking in their "absolute discretion". This creates a very real risk of conflict, if the hours approved by the LPA are different to the hours agreed by NR. It is wholly unacceptable for NR to dictate the opening hours of a business on a permanent basis when the LPA have determined these hours taking into account local neighbouring amenity and highway issues amongst others. This is particularly egregious given that this is an Undertaking and BPL have not agreed its terms.

1.2. "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. The Undertaking states that NR can agree different hours to those set out in the Undertaking in their "absolute discretion". It is wholly unacceptable for NR to dictate the opening hours of a business on a permanent basis. This is particularly egregious given that this is an Undertaking and BPL have not agreed its terms.

2. Covenants

2.1. Clause 3 preamble – NR covenant "*on behalf of itself and any person to whom powers under this Order have been transferred*". NRF previously 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. NR have stated that they will be responsible for ensuring that compliance is passed down to the contractors. No additional drafting has therefore been included. This is cold comfort for BPL. From experience with HS2 if there is no direct recourse against contactors then they will continue to flout the terms of an Undertaking unless forced to comply by the body contacting them. The body contracting them is unlikely to be swift in ensuring compliance as it is not in their interests to do so (after all they want the job completed as quickly and as economically possible by the contractor), leaving the beneficiary of an Undertaking with no option but to enforce the Undertaking against the contracting body, which is costly and time consuming and the beneficiary suffers from the breach of the Undertaking in the meantime. If NR accepts that they should pass compliance down to their contractor, it is difficult to see why NR is not prepared to simply provide for this in the Undertaking. It is noted that HS2 and NR use the same contractors.

2.2. Clause 3(e) – in a previous draft of a bilateral version of this document NR accepted the provisions included by BPL that ensured the parties worked in a collaborative and cooperative manner to achieve successful site sharing. The majority of these provisions have been stripped

out by NR and only clause 3(e) remains, given that is difficult to include such provisions in an Undertaking. Nonetheless, what is clear is that the Undertaking is now much more one-sided giving NR the whip hand unnecessarily and allowing them to dictate site sharing contrary to both the provisions and tone of the bilateral document previously discussed.

2.3. 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. NR's comments have missed the point entirely, the point is not that BPL want their residents to have access to NR's compound during a period of possession, the point is that there are 3 scenarios that need to be considered, and no consideration is given by NR anywhere in the Undertaking (although clause 3(e) is an obvious example as it lists out the scenarios) to this third scenario.

3. Compensation and mitigation

3.1. 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:

3.1.1.1. 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;

3.1.1.2. Any additional restrictions on the operation of the old/new warehouse such as reduced opening days / hours may compromise the operation further;

3.1.1.3. 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 reflected in the Undertaking:

3.1.1.4. 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);

3.1.1.5. 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.

NR's comment that compensation is a matter for the UTLC does not answer the point. BPL do not want a long drawn out compensation battle with NR or to have to submit a reference to the UTLC to get compensation determined. If would be much better for that parties if some basic principles of compensation can be agreed now to avoid these being a battle ground at the later date. BPL seek only for NR to engage on these points. NR have failed to so do either in the Undertaking or outside it. This is disappointing.

3.2. Clause 4.2 – difficult to see how NR can "*give this Undertaking by Deed in order to achieve a collaborative solution*" in an Undertaking.

4. Scenario 1 (existing warehouse)

4.1. Sched 1 para 1(a)(ii) and para 1(b)(iii) – 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. The Undertaking now provides that whether NR allows access for BPL or a Warehouse Tenant outside of Warehouse Opening and Delivery Hours when there is no possession is subject to agreement with NR "in its absolute discretion" (this is also referred to in Schedule 1 para 1(b)(ii)(C)). NR state that this is needed to "guarantee the safety of persons passing through the gate", but if NR are not in a railway possession, and therefore the site is not "unsafe" it is very difficult to see why NR should have this level of control. This makes it very difficult for a business to operate and provides far too much risk and uncertainty with NR being able to dictate how a business operates. 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.

4.2. The draft conditions (condition 7) 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. NR state that this is a comment on the conditions, but it is not. It is a comment on an omission in Undertaking. It is noted that NR have not confirmed that BPL would be included in the list of persons entitled to receive notice pursuant to condition 7. This is very disappointing.

4.3. Sched 1 para 1(a)(iii) – NR state that they cannot give 20 Working Days' notice but will "endeavour to provide greater notice if it is reasonable practicable to do so". It is regrettable that NR have failed to include this wording in the Undertaking to provide comfort that it will do at it says. The Undertaking provides for 10 Working Days' notice to be given. It is not credible that NR will not know a month before when they plan to start work.

4.4. Schedule 1 para 1(a)(iv)(B) and 1(b)(ii)(B) - outside of a possession NR cannot park vehicles and store materials on a part of the Scenario One Property perpendicular to the railway during the period between 6.15am on a Monday to 12.15pm on the following Saturday. NR state that this reflects the Warehouse Opening and Delivery Hours. However use of that defined term is not used here, so there is no ability to agree with NR a change to the times (in their absolute discretion) as provided for in the definition. This is disappointing, and again demonstrates NR seeking an unjustified level of control over the Property.

4.5. Schedule 1 para 1(b)(ii)(B) and para 3(b)(ii)(B) – NR have introduced a reference to "south side of the gate", but no explanation is given as to what this means.

4.6. Schedule 1 para 2 - NR have amended the paragraph to refer to a Rail Emergency, but have not amended the reference to overrunning engineering works (termed a "Possession overrun") and it is not clear if these fall within the definition of "Rail Emergency" which refers to imminent threats to safety and dangers to health and safety. It appears the NR are still seeking to close down the operation of the Warehouse (even via its southern entrance) when there is no real emergency and NR's works are simply overrunning. This is unacceptable, although NR do have to consider BPL mitigation proposals if made this is cold comfort and again demonstrates that NR are seeking too great a level of control over the operation of a business. 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. NR's comment that compensation is a matter for the UTLC does not answer the point. BPL do not want a long drawn out compensation battle with NR or to have to submit a reference to the UTLC to get compensation determined. If would be much better for that parties if some basic principles of compensation can be agreed now to avoid these being a battle ground at the later date. BPL seek only for NR to engage on these points. NR have failed to so do either in the Undertaking or outside it. This is disappointing.

5. Scenario 2 (development of the new scheme)

5.1. 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). The Undertaking now provides that whether NR allows access for BPL outside of Construction Hours when there is no possession is subject to agreement with NR "in its absolute discretion" (this is also referred to in Schedule 1 para 3(b)(ii)(C). NR state that this is needed to "guarantee the safety of persons passing through the gate", but if NR are not in a railway possession, and therefore the site is not "unsafe" it is very difficult to see why NR should have this level of control. This makes it very difficult for a contractor to manage a site, and provides far too much risk and uncertainty with NR being able to dictate construction management. BPL's access is therefore unreasonably restricted. BPL may require access outside of Construction Hours for non-construction related activities, such as site inspections, site office activities, or security / surveillance operations. This is unreasonable.

5.2. Sched 1 para 3(a)(iii) - NR state that they cannot give 20 Working Days' notice but will "endeavour to provide greater notice if it is reasonable practicable to do so". It is regrettable that NR have failed to include this wording in the Undertaking to provide comfort that it will do at it says. The Undertaking provides for 10 Working Days' notice to be given. It is not credible that NR will not know a month before when they plan to start work.

5.3. Sched 1 para 3(a)(iv)(B) and para 3(b)(ii)(B) - outside of a possession and outside Construction Hours NR can park vehicles and store materials (therefore effectively preventing vehicular access to the rear of the site as lorries will be unable to turn) except they cannot so park vehicles or store materials on a part of the Scenario 2 Property perpendicular to the railway between 7.00am on Monday and 1.15pm on the following Saturday, or between 6.15am on Monday and 12.15pm on the following Saturday if the New Warehouse is open. The latter reflects the New Warehouse Opening and Delivery Hours. However, use of that defined term is not used here, so there is no ability to agree with NR a change to the times (in their absolute discretion) as provided for in the definition. This is disappointing, and again demonstrates NR seeking an unjustified level of control over the Property.

5.4. Sched 1 para 3(b)(ii)(C) - states that NR will allow only access to the green hatched area outside possessions, Construction Hours, and New Warehouse Opening and Delivery Hours in its "absolute discretion". This demonstrates NR seeking too great a control over the Property even when there are no NR works and the site is not unsafe.

5.5. 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. NR have misunderstood the point, this is not about a railway possession, but rather the period following which NR have exercised powers of possession over the site. The restrictions would prevent all vehicular use of the access road to the rear of the warehouse outside of railway possessions, Construction Hours and New Warehouse Opening and Delivery Hours unless NR agree. However, contractors and a new tenant of the warehouse may not be the only site occupiers in the period before NR vacate the site, there may be residential occupiers. Blue badge parking is to the rear of the site, perpendicular to the railway and requires access over plot 3. This area is also used for vehicles to undertake manoeuvres relating to: residential servicing, provide emergency vehicle access, and customer parking. It is totally unreasonable to restrict these users unless NR agree in their "absolute discretion". NR have simply had no regard to residential occupiers at all, their needs, and in particular the needs of those with protected characteristics.

5.6. Sched 1 para 3(e) – again this para gives NR too much control and unnecessarily so. It effectively states that NR's works cannot be delayed, but it appears to be wholly acceptable for NR to delay BPL's works, and since NR have deleted the wording relating to the costs of construction delays caused by NR being recoverable by BPL, BPL have no comfort whatsoever.

5.7. 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.

5.8. Sched 1 para 6 – see comments above at para 4.6. It is also worth noting that NR have not considered residents of the development, and how they might be affected by a "Possession overrun". How will blue badge holders be able to access their cars and retain their mobility if their cars are parked behind NR's cordon sanitaire? This raises Equality Act 2010 issues.

5.9. NR propose to exercise temporary possession powers over the land shown in BPL's planning permission as the showroom for the builders' merchant, access to the residential cycle store, the residential concierge and access to it, as well as the hard landscaped area to the front of Horn Lane, and all the external hard surfacing in the shared and exclusive use areas. NR's position is that they have not received "specific proposals for works". This is rather disingenuous. BPL's proposals are set out in the approved plans of their planning permission, these should have been clear to NR. BPL seek to be able to complete their development in these areas. The Undertaking gives them no ability to do this (save on the exclusive use land where NR are to use reasonable endeavours to agree arrangements for the carrying out of such works – which is cold comfort). BPL had sought a similar mechanism to that inserted at para 3(d) to enable these works to be undertaken. NR have ignored this request.

5.10. The precedent undertakings / deeds of agreement prayed in aid by NR as examples of the approach being taken in this case are in truth a far cry from the current position and offer limited precedent value. It is interesting to note how few examples NR have been able to locate.

5.11. The comparatively simple examples of precedents are not reflective of the much more complex Undertaking proposed by NR in BPL's case. The example given at clause 7.1.4 is about HS2 ensuring that an alternative route is available whilst Old Oak Common Lane is closed. This cannot be fairly compared to BPL's scenario, whereby NR is taking exclusive powers over the Order land and then immediately handing back shared possession over the majority of that land in the Undertaking. The fact is that the current situation is unlikely to have precedent and NR have been unable to provide any.

Norton Rose Fulbright

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