TWA/21/APP/O1/OBJ/8
TWA/23/APP/02

Transport and Works Act 1992

The Network Rail (Old Oak Common Great Western Mainline Track Access) Order

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SUBMISSIONS FOR BELLAVIEW PROPERTIES LIMITED

Introduction

1. Bellaview Properties Limited ("BPL") is the freehold owner of the land at Horn Lane, Acton which would be the subject of the powers sought by Network Rail "NR" through its application, were those powers to be granted. BPL is the party that will principally be affected, and adversely affected, by the exercise of those powers.
2. It is, we suggest, instructive to reflect on how NR's application and the case it has made in support of that application has changed. At the start of the public inquiry on 14 November 2023 and at all times before, NR's case was that there was a compelling case in the public interest for it to be given temporary possession of the whole of the land held by BPL at Horn Lane, including a power to take temporary possession of the warehouse building, necessitating the closure of that building as an operational builders' merchant and, potentially at least, its removal. That position was maintained by NR until it opened its case on day one of this public inquiry. NR also sought a permanent right of access over a route, identified as parcel 3 on the Draft Order Plan, to land to the west of BPL's land, namely the Triangle Land owned by the Crown Estate *bona vacantia*. NR's application for permanent rights over parcel 3 remains unchanged albeit the alignment has been revised. However, through its opening statement on day one of the public inquiry NR changed its case and its application for rights of temporary possession in a fundamental way by (a) substantially reducing the area of BPL's land over which it claims to require temporary possession by 70% of the area originally sought, including by seeking an amendment to its Order Plan to remove the warehouse itself and an area external to the warehouse from the scope of the

Order, (b) conceding that it does not require exclusive possession of the majority of the remaining area over which it continues to claim a need to take temporarily and (c) by confirming that removal of the warehouse is not required. Although this change in position was perhaps unsurprising - NR's case, as disclosed through its written evidence, for seeking the extensive rights it sought through the application, as submitted, was very far from compelling - it is remarkable that it took until day one of the inquiry and NR's opening statement for the substantial changes to its application and its case to be confirmed. NR's behaviour in this respect forms the basis of an application for a partial award of costs, which will be addressed separately. However, and notwithstanding, the powers, in the form of both a permanent right to cross BPL's land and the powers of temporary possession which are sought by NR, these remain the subject of objection from BPL. BPL's case is that no compelling case in the public interest has been demonstrated by NR for the taking of the powers, both temporary and permanent, that it seeks over BPL's land both as a matter of principle and in terms of extent.

3. In these submissions we will address each of the matters set out in the Secretary of State for Transport ("SoST")'s revised Statement of Matters. However, before doing so we will set out BPL's case concerning:
    a. the involvement of the SoST;
    b. the powers sought by NR and their impact on BPL;
    c. whether there is a compelling case in the public interest for the right of temporary possession which is sought;
    d. whether there is a compelling case in the public interest for the permanent right sought;
    e. the deemed application for planning permission;
    f. the current draft Order and the unilateral undertaking.
4. In making these submissions, we will not rehearse or recite the totality of the written and oral evidence that the Inspector has before him; to do so is unnecessary. The Inspector and the SoST will, no doubt, consider all of the evidence when reaching their respective conclusions on the application and the objections to it. Needless to say, however, BPL relies on the totality of its evidence in support of the objection it makes.

The Involvement of the SoST.

5. The SoST is of course the decision maker in respect of NR's application; the Inspector's role is to report to the SoST with a recommendation as to whether the application should be granted, with or without modifications, or refused.
6. As such, the SoST is required, by law, to determine the application fairly, transparently and with an open mind. That the application seeks by compulsion the expropriation from BPL of its land and its possession of it, both permanently and temporarily (albeit for many years), provides particular focus (to the extent it is necessary to do so) to the requirement for the proper and fair discharge by the SoST of his function as decision maker.
7. The inquiry has been shown evidence that the SoST either of himself or acting through his officers, was engaged with NR before the application was made and as part of the process (such as its was) which resulted in a decision being made by NR to seek powers over BPL's land. The SoST and/or his officers appear, from the evidence, to have been involved in the decision which was apparently taken before the application was submitted not to utilise land at the North Pole Depot ("NPD") for a temporary road rail vehicle access point ("RRAP") and/or permanent RRAP for the purposes of the Great Western Main Line ("GWML") Systems Project and/or for a permanent RRAP to give access onto the GWML. In particular, in terms of the SoST's involvement, the Inspector has been shown:
    a. the Old Oak Common Lineside Logistics Compound Strategy (Appendix ARR1i to Adam Rhead's Rebuttal Evidence, OBJ-8.6.6) ("the Compound Strategy") which, on page 10, includes the following statement:
    "*The DfT and depot operators Agility/Hitachi will not entertain a lineside logistics compound at the North Pole Depot as they consider this will be disruptive to depot operations and performance KPIs under the Agility/Hitcahi contract*";
    b. an email from James Slater, Principal Surveyor, Property – Corporate Finance Directorate, Department for Transport ("DfT"), to Jonathan Sinclair of NR, sent on 25 January 2021 at 15:11 (INQ-04). In that email, Mr. Slater states, when referring to the NPD, that "*the area is occupied by Agility who have a long-term lease. Therefore we cannot consent without involving Agility*"[1]. The "we" as used in Mr. Slater's email can only be taken to be the DfT as a whole, of which Mr. Slater was an officer.

[1] This is of course not correct; the SoST has powers to consent to compulsory acquisition of the leasehold interest held by Agility/Hitachi. See section 25 Transport and Works Act 1992. There is no evidence that the SoST was asked to provide his consent.

8. The Inspector also has been told, through Mr. Sinclair's evidence (in examination in chief and in response to questions put by the Inspector), that he had meetings with "various" officers of the DfT in February, March and in April 2021, including with Mr. Slater, whom Mr. Sinclair described as his "proxy contact" at the DfT. Although the substance of these meetings has not been disclosed in spite of requests and the obvious need to do so, Mr. Sinclair confirmed that the objection to use of NPD which had been expressed by Mr. Slater was the "general view of the wider DfT" and the "general consensus" (see Mr. Sinclair cross-examination) within the DfT, and not just Mr. Slater's own view.
9. Even when taken at face value (which they should not). this evidence reveals clear the and substantive involvement and the exercise of influence on the part of the SoST or at least his officers at the DfT in advance of and in the decision apparently taken by NR not to use NPD to the deliver the access to the operational railway which it now seeks powers to do by using BPL's land. It is of course BPL's case that NPD should be used for those purposes. It is of course the case that the SoST is the freeholder owner of the NPD; is the landlord of Agility Trains, its lessee at NPD, and is subject to landlord covenants in that lease. The SoST is responsible for granting the rail service contracts to train operating companies including to Agility / Hitachi which in turn include "*performance KPIs*" against which Agility / Hitachi will be assessed by the SoST. The SoST is also the sponsoring department for HS2 which is the project that ultimately the temporary powers in the Order are sought to facilitate. At the very least, this context gives the SoST an interest in the Order being made or at the very least a perception of the SoST having such an interest. Thus, even when taken at face value, the involvement of the SoST himself or acting through his officers in NR's decision is such that the SoST cannot, we submit, now fairly determine this application or adjudicate upon BPL's objection to it. At the very least, this gives rise on the part of the SoST to the appearance of bias, for the purposes of the test in *Porter v Magill* [2002] 2 AC 357 (at para.103), that is "whether a fair-minded observer, having considered all the facts, would conclude that there was a real possibility of bias".
10. However, the point goes further. It is simply not credible to accept that the involvement of the SoST through his officers was limited to what is recorded in the

Compound Strategy, in the single email sent by Mr. Slater to Mr. Sinclair in January 2021 or in what Mr. Sinclair said, in the most general terms, about the meetings that took place in earlier 2021. The reference included in the Compound Strategy is plainly derived from some engagement and probably correspondence which preceded it and which the Compound Strategy is seeking to summarise and/or record. The email from Mr. Slater to Mr. Sinclair must be one of a series of emails; it is simply not credible that the correspondence was not more extensive or that there are emails which predate and /or which post-date the exchange that has been provided. This is particularly so in light of the fact that Mr. Slater's last email contains a series of questions addressed to Mr. Sinclair, which it is to be expected would have been answered.

11. What took place during the meetings between Mr. Sinclair and officials of the DfT has not been revealed in any material detail. However, in the face of repeated requests for disclosure, NR has refused to reveal or even to acknowledge that other material existed or exists which relates to engagement between NR and the SoST (and, it seems, Agility/Hitachi) during the pre-application stage.

12. The most egregious expression of this is the singular failure of NR to respond properly or transparently[2] to the letter sent by BPL (via Norton Rose Fulbright, "NRF") on 15 January 2024 (INQ-38 and INQ-39) and of 1 February 2024 (INQ-45 and INQ-46), which was sent after the roundtable session held on 1 February 2024 to consider BPL's application for express disclosure (made pursuant to s. 11(5) of the Transport and Works Act 1992, "TWA 1992"). Copies of these letters have been given to the Inspector. The Inspector too, by a letter of 1 February 2024[3] , asked NR to respond to NRF's letter of 15 January 2024. The response of David Wilson, of NR, sent on 5 February 2024 (INQ-52) is manifestly inadequate. Mr. Wilson states that he has "*undertaken a reasonable search of the electronic folders to which I, personally, have access*" and states that those folders do not contain "*any written communications or meeting notes that relate to the location of a RRAP in connection with the GWML*

[2] Whilst NR did disclose 3 draft documents which Mr Wilson states NR did not even read, these did not respond to the terms of the disclosure request.

[3] It is noted that this document does not appear on the Inquiry website but was submitted by the Inspector to the parties on 1 February 2024 via the Programme Officer.

Systems Project, and which are written communications between Network Rail and Hitachi or Agility Trains or the Department for Transport, or notes of meetings between Network Rail and those bodies, which are not already before the inquiry". That does not answer NRF's requests of either 15 January 2024 or of 1 February 2024. In particular, what was asked for and what NR was requested to disclose were all and any correspondence (internal or external) and notes of meetings between NR, Agility/Hitachi and the SoST and not just that which is included in files to which Mr. Wilson may have had access (see NRF's letter of 1 February 2024 to Addleshaw Goddard (INQ-45 and INQ-46)). We note that Mr. Wilson, in his letter, appears to contradict what Mr Booth KC told the inquiry (on instructions) on 1 February 2024 namely that "*after an exhaustive search*" no such documents existed "*and that Mr Wilson will state that*" in writing. Plainly Mr. Wilson's confirmation is much more limited and no indication whatever is given as to the records that Mr. Wilson has access to, which may be limited.

13. We submit, again, that it cannot be the case that the extent of the record of engagement between NR and the SoST is limited to what has been revealed. NR having plainly declined to disclose or even to investigate further the existence of records, as it was required to do, BPL has sought disclosure from the SoST (see letter of 1 February 2024 and its attachments (INQ-47, INQ-48, INQ-49)). No substantive response has thus far been received. It seems extraordinary that these are no notes of meetings or any other records of meetings that were held between NR and the DfT and Agility and Hitachi. An organisation of the scale and indeed with the range of responsibilities such as NR is to be expected to have processed in place to record such meeting, particularly those with the DfT and in relation to important capital projects.
14. Additionally, Mr. Wilson is wrong in stating, as he does in his letter of 5 February 2024, that NR had not "reviewed" the four draft documents that he did disclose. The fact that NR had NR at first disclosed a two page extract (i.e. pages 27-28) from one of those draft document (App. F to CG's proof (OBJ-8.3.2) can only mean that this draft document at least must have been reviewed and considered by NR before its partial release to BPL, a point that has been raised already by BPL with NR(see email of 5 February 2024 (INQ-57). That Mr. Wilson is, it seems, mistaken in this respect in what he says further undermines the reliability of his contribution as a whole.

15. BPL has requested information from NR via FOIA/EIR requests from October 2022 all the way though until February 2024 seeking to establish what NR's "extensive research" was that meant BPL's site was the "only suitable" site, as well as seeking to establish what correspondence there had been between NR and the DfT/Agility/ Hitachi relating to the NPD, and met with contradictory, and at the time obfuscatory replies. Notably NR stated in a letter dated 4 December 2023 that it was "*still in discussions with our colleagues about the potential prejudice that might stem from releasing the information in question*". NR's position now is that there is apparently no such information, at least of any material or meaningful kind.
16. With regard to the extent of involvement and consensus within the DfT concerning the exclusion of NPD, Mr. Sinclair was clear that this was the "general" view within the organisation (see submissions above). Moreover, from Mr. Sinclair's evidence, it appears that this too was the position of the SoST himself (rather than only his officers) When Mr. Sinclair was asked (in xx) whether the SoST had already decided in principle that it would not allow a RRAP at NPD, Mr. Sinclair gave a quiet "yes" and nodded in agreement.
17. Therefore, BPL submits, on the basis of what is known, that (a) it is clear that the SoST either himself or acting through his officers was, as a matter of fact, engaging with NR before the application was made and (b) it appears, as a matter of fact, the SoST and /or his officers either directed or came close to directing, or at least sought to influence NR in its decision not to consider or pursue further the opportunity to secure access to the GWML for the purpose of the GWML Systems Project and thereafter permanently from NPD. As such, the SoST cannot fairly and in accordance with his public law duties determine the application, not least since the use of NPD as an alternative to the use of BPL's land at Horn Lane is a central part of BPL's objection and is thus central to the determination of the application.
18. This does not, of course, prevent the Inspector discharging his role save that we would invite the Inspector to report to the SoST in full BPL's submission in this respect.
19. For completeness, BPL is also no clearer what the extent of involvement of Agility/Hitachi has, been pre-application, with regard to consideration being given to the use of NPD including its land which comprises the western part thereof; they plainly had some influence on the SoST and involvement with him in advance of NR's

decision to proceed to seek powers over BPL's land. The disclosure by NR in this respect too is inadequate.

The powers sought and the effect on BPL

20. BPL is the owner of the Order land. The Order land is presently the subject of a lease to Stark Building Materials UK Limited, who occupy the land and use it is as builders' depot. Stark have contracted with BPL to surrender their lease on 1 October 2024. Thereafter, BPL expects to itself take up occupation of the warehouse and associated land and to operate it initially as a logistics and delivery hub immediately post-Stark's vacation and as a builders' depot, either as a replacement for its current facility at West Hampstead, which is threatened with compulsory acquisition or as a new facility in its own right. BPL has also secured planning permission (225069FUL) for a redevelopment of the Horn Lane site to provide a replacement builders' depot and new homes. That planning permission was granted on 29 December 2023 (INQ-71). The Inspector was sent a copy of the planning permission on 5 March 2024 . BPL intends to carry out that development in due course.
21. The extent of the powers originally sought by NR, until day one of the public inquiry, would have precluded BPL or indeed anyone else operating the site as a builders' depot or allowing BPL to carry out its redevelopment. NR's position has moved on, and with its concession made on day one of public inquiry, in that it has reduced the extent of BPL's land over which it seeks powers and has accepted, in principle, that it can share the site with BPL to enable the operation of a builders' depot and/ or the construction of BPL's scheme.
22. We return later in these submissions to whether the powers set out in the draft Order are consistent with what NR seeks and whether those powers do in truth secure site sharing. However, the powers NR still seeks, reduced as these are form those sought when the application was first made, will have a substantial and adverse effect on BPL and its use of its land at Horn Lane.
23. The inquiry has heard from Mr. Aaronson; he is the only witness to the inquiry who has been involved in operating a builders' depot and who can give evidence about, what is operationally required, his evidence on these matters was not contested. In terms of the use of BPL's site as a builders' depot, Mr. Aaronson explained that

external space is critical; this is where external building products are stored and displayed for sale. He explained that it is in the nature of a builders' depot that much of its stock requires external storage. The effect of the rights of temporary possession which are sought, in particular the areas not identified for shared use, will not be available for the storage and display of products and this will have a substantial effect on the attractiveness and the performance of the operation. Mr. Aaronson stated that customers come to a builders' merchants for the external materials, and then shop further for internal materials stored inside the warehouse the external building materials drive the trade. If the area for external materials is reduced, the range cannot be carried and trade across all product ranges will be affected. Moreover, Mr. Aaronson stated that parking is critical, customers seeking to purchase bulky goods will pass by if they cannot park. The temporary possession of parking spaces will therefore also have a significant impact on trade. Mr. Aaronson stated "*external space and car parking drive turnover*". Mr. Aaronson's case was that the builders' depot business could operate but it would be severely compromised. Moreover, it is also clear that through the unilateral undertaking, NR will be gatekeepers to the area over which temporary possession is sought and BPL will require NR's consent to open the gate outside operational and delivery hours. This too will substantially reduce flexibility for BPL and its operation.

24. Although NR suggests that the powers which it seeks will not preclude BPL from carrying out and completing the redevelopment of the site for which it has planning permission, the reality is rather different. If site sharing is in place, Mr. Aaronson's uncontested evidence was that it would be more expensive to build the development and would take longer due to the constraints placed on the contractor via the site sharing arrangements. Mr. Aaronson also stated that it may limit the pool of contractors willing to bid for the project and that they would charge a premium. He also stated that the feasibility (viability) of the development was a fine one. It is possible that if a development is marginally viable then an increase in build costs could affect viability and therefore whether a development would be built. Mr. Aaronson also stated that it is unlikely that new homes will be attractive to purchasers or occupiers where, immediately outside many of those homes is a compound to be used by NR in particular during night-time hours when residents can be expected to be

asleep. 200 families in the new development could be affected by these works as well as existing residents. The value of the new homes may be suppressed as a consequence of NR's exercise of temporary and permanent powers, a reduction in value combined with an increase in development costs can also affect viability and whether a development will be built. Mr. Aaronson referred to the fact that Ealing Council "*want desperately more homes*" and that the planning application was promoted under their guidance. If the new homes were not built it could therefore affect local residents in need of housing, and in particular affordable housing (the development includes 35% affordable housing). The restrictions on the use of the shared area and on the route of the permanent right of way which is sought will be a significant burden on the physical delivery of the permitted scheme and on its quality and attractiveness.

25. In addition, it is plainly the case that the powers sought by NR are in direct conflict with BPL's redevelopment for the reasons set out in BPL's additional objection of 30 January 2024 (INQ-43, see in particular paragraph 14(d)). Area numbered "4" in Site Sharing Scenario 2 – Land Plan 10 (appended to the latest version of the unilateral undertaking) is land which falls within BPL's redevelopment, specifically within parts which have been allocated for example for showroom space as well as entrance into concierge post / post delivery office and entrance to residential cycle store. This would make it very difficult to operate either the builders' depot or the residential development with no showroom, no cycle store, and no post room / concierge for incoming deliveries. It is understood that NR need this area only for parking 3 minibuses/LGV's, and that their usual parking requirement will be one evening fortnightly. It is questioned whether it is proportionate to deprive the development of these facilities for several years to accommodate such an intermittent parking demand. Mr. Fleming gave evidence that the minibus drivers will come from Barlby Gardens where workers will have "signed on" with the "SAC" and will need to go back there too at the end of their shift. It is unclear why the minibus drivers cannot return to Barlby Gardens (a 10 minute journey) and must park at the site for the duration of the possession.
26. It remains the case that the powers now sought will have a serious effect on BPL and its use of and operation form its land. Plainly, the effect will be less than would have

been the case had NR persisted with the powers it was seeking until day one of the inquiry. However, the effects are serious, nonetheless. It is in the context of these impacts on BPL that NR's case that there is a compelling case in the public interest must be considered. Any such compelling case must be sufficient to outweigh those impacts as well as the interference in principle with BPL's legal rights as a landowner (including its Convention rights) not to have the enjoyment of its property taken away or materially reduced.

A compelling case in the public interest – power of temporary possession

27. As matter of principle, for there to be a compelling case in the public interest to take by compulsion powers over private land, it must be shown that there is no alternative means by which the purposes of the Order can be met, and which avoid the need to take those powers. This of course includes demonstrating that alternative sites have been considered and why these have been discounted (see matter 2 in the SoST's revised statement of matters).
28. BPL's position is straightforward. It considers that there exist other means by which access to the GWML can be obtained for the purposes of delivery of the GWML Systems Project and in particular there are other locations, including publicly owned land, from which such access can be taken, and which would avoid the acquisition and interference with BPL's interest at Horn Lane. The focus, during the evidence and now, is on the land at NPD.
29. Before turning to specific matters concerning NPD and its suitability and its availability as an alternative to BPL's land at Horn Lane for temporary access to the railway, there is the matter of the extent of consideration of sites by NR before the application was made. Before a decision is taken to proceed with a proposal which involves substantial interference with, and acquisition by compulsion of, private land, an acquiring authority is to be expected to have carried out a thorough and comprehensive process of examining what alternatives are available, including land in public ownership, to secure the outcome sought to be achieved. This generally will comprise alternative site assessment and selection process.

30. In this case, so far as the proposals are to secure both temporary rights of access to the GWML for the delivery of the GWML Systems Project and to secure permanent a RRAP, NR can be expected to have, objectively, considered the merits of alternative means of achieving this *before* it decided to compulsory acquire BPL's land. However, in terms of evidence which NR has put before the inquiry, there is no such assessment or at least none that NR has disclosed. For the avoidance of doubt, the three risk assessments (INQ-34, INQ-35 and INQ-36) latterly disclosed by NR do not demonstrate any meaningful an alternative sites assessment; these were in the main generated after NR had decided to proceed with acquisition of interests over BPL's land. In any event, and as set out in BPL's response, of 5 January 2024, to the disclosure of these assessments, these demonstrate that use of NPD has more pros and less cons that use of BPL's land (INQ-33)[4]. Even the pros identified in relation to 239 Horn Lane are now diminished since NR no longer require the warehouse. The "pros" in terms of use of BPL's land seems to be limited to it providing an opportunity for a one-year programme saving if NR secures access by September 2024 and have the temporary RRAP operational by January 2025. As BPL made clear in its response, given that the inquiry into NR's application has continued into March 2024, the prospect of access being achieved by September 2024 is now unrealistic. There will be no one year programme saving. It is also clear from NR's response to BPL's comments on the risk assessments that the one year programme saving is absolute, i.e. it does not diminish to 11 months if NR secure access in October 2024 and has the RRAP operational in February 2025.
31. Beyond that, nothing has been put into evidence which demonstrates any meaningful option assessment process undertaken by NR before the decision was taken to acquire compulsorily interests over BPL's land.
32. What then follows from this? If there was no such objective comparative assessment of alternatives before NR decided to proceed to seek powers over BPL's land then the case for the Order is substantially undermined. It is difficult to see how there can be claimed let along found to be a compelling case to acquire interests and rights over

[4] We note that the current version of INQ-33 on the Inquiry website does not contain NRF's full response on NR's risk assessments. This has been raised with the Programme Officer.

BPL's land unless the decision to do so was properly made, having regard to a meaningful consideration of all alternatives. Anything offered now by NR is plainly after the event and an attempt to address a deficiency in the decision-making process which led to powers within the Order being sought.

33. We make clear at this stage that the approach to consideration of alternative site for development when considering whether planning permission (or similar, such as a DCO) should be given is not applicable to the compulsory purchase field, where the test – a compelling case in the public interest – is very different. It is plain, in the compulsory purchase context, that whether the purpose of acquisition can be met by alternative means is clearly material. The SoST's Statement of Matters in the present case recognises and confirms this. As such, and in anticipation of a submission expected to be made for NR, *Mount Cook, East Suffolk* and *Stonehenge*, which are all planning cases, are not relevant here.
34. The alternative is there was indeed the sort of objective assessment of options before it was decided to acquire interests and rights over BPL's land, but NR has not disclosed this. As we have already submitted, it is clear enough that NR was engaging with the SoST and/or his officials as well as, at the same time, with Agility/Hitachi before it resolved to seek powers over BPL's land. Little of this engagement has been revealed. NR's consultation publication of 10 October 2022 (CG proof App.1, OBJ-8.3.2) refers to "extensive research" having been carried out by NR before it identified BPL's land as "the only suitable area" for the lineside compound. This is all strongly suggestive that at least some form of optioneering exercise was undertaken by NR before it decided on BPL's land but this has not been disclosed. It is of course the case that BPL has asked repeatedly for disclosure of option assessments since October 2022 but on each occasion that has effectively been declined.
35. In particular, the absence of a GRIP 3 report remains wholly unexplained. NR appears to accept that the GRIP process (now replaced by the PACE process) was undertaken; a GRIP 4 "single option development" report has of course been produced (i.e. the Arcadis report at NG App.L, OBJ-8.4.2). It has not been satisfactorily explained by NR where the GRIP 3 report is, which concerns "option selection" when the next stage of the GRIP process was completed.

36. Most recently, on 1 February 2024, after the roundtable hearing to consider BPL's formal application for disclosure, NR was asked again to provide such material or else to confirm that no such material exists. Mr. David Wilson's response of 5 February 2024 does not provide an answer to the matters put to him and we have address this earlier in the submissions. If NR has in fact carried out an options assessment but has declined to disclose the material associated with it, this too undermines its case for the making of the Order sought.
37. We turn then to the evidence before the inquiry concerning alternative sites for NR to secure access to the GWML. At the forefront is NPD. NPD is located in close proximity, to the east, of BPL's land. It comprises a large area of operational railway land to the south of the GWML and just to the east of the site of the new Old Oak Common Station. It is owned by the SoST. It is occupied, at least in part, pursuant to a lease by Agility/Hitachi. The Inspector has visited NPD as part of the accompanied site visit.
38. With regard to NPD and its potential as an alternative location for both the temporary and permanent RRAP proposed at Horn Lane, the starting point is that (a) it is publicly owned land, the landowner being the SoST, (b) it is operational railway land and (c) it is, like BPL's land, located to the south of the GWML but is closer to the Old Oak Common Station works than is BPL's land at Horn Lane. Several opportunities for a temporary RRAP exist, including use of the existing RRAP and compound at Barlby Gardens, to the east within NPD and use of a site in the Agility/Hitachi depot, to west, with two locations to the east and west of that depot being identified (see NG rebuttal para.2.4 (OBJ-8.4.4) and Appendix T (OBJ-8.4.5)). The one to the west being preferred and Mr. Fleming confirmed on the site visit that this was the one he had considered. It is the case that part of the NPD is occupied by Agility/Hitachi pursuant to a lease from the SoST. Nothing has been put before the inquiry by NR concerning any attempt by NR to secure, or even to explore the potential for, the agreement of Agility/Hitachi to site sharing or to give up occupation of part of the area it leases for use as a RRAP for a temporary or permanent period. There is no evidence before the inquiry concerning whether the SoST can re-enter (partially or otherwise) under the lease or require Agility/Hitachi to give up possession of any part of the leased area for other railway operations or to allow the area to used jointly. In any event, and if necessary,

the SoST can give consent for compulsory acquisition of part of Agility/Hitachi's leasehold interest (see s. 25 of the TWA 1992).

39. The inquiry has of course not seen any written evidence or heard from Agility/Hitachi to explain whether and if so to what extent there is any overriding impediment to use of part of the land it occupies as a temporary RRAP. If and in so far as NR is seeking to demonstrate that the use of NPD as a temporary RRAP would interfere unacceptably with the operation of Agility/Hitachi this omission is surprising.
40. Moreover, Arcadis, who prepared the GRIP 4 report recommended that a temporary RRAP at the Agility/Hitachi part of NPD and in doing so recognised none of the impediments now advanced by NR to locating a RRAP there (see NG App.L, OBJ-8.4.2).
41. With regard to locating a RRAP on the west side of NPD, within the Agility/Hitachi depot, NR's objection seems to include three elements:
    a. access from the highway network from the south;
    b. access within NPD, including crossing the rail lines which serve the sidings; and
    c. wider concerns about interference with Agility/Hitachi's operations.
42. With regard to the first of these, the evidence has shown that access Agility/Hitachi currently access NPD from the east, via Mitre Way and from the west, via Old Oak Common Lane. On the site visit the Hitachi representative explained that majority of vehicular traffic comes from the east, but emergency and oversize vehicles come from the west. These access points are used by a range of operational and other vehicles now without any operational or highway safety difficulties. The evidence of CG has confirmed that the expected traffic and range of plant, machinery and vehicles required to access a RRAP at the western side of NPD will be able to use the existing access from Old Oak Common Lane, if required as well as the Mitre Way access. The swept path analysis carried out by CG (proof para.3.30, OBJ-8.3.1) demonstrates how the Old Oak Common Lane access will be available to access a lineside set down area on the western side of the NPD. It is the case that there is a height limitation when approaching the access to NPD from Old Oak Common Lane from the north; CG has demonstrated that this will not in practice be an impediment, as the likely direction of traffic will be from the south (A406 North Circular Road). It has been demonstrated that the works proposed to lower Old Oak Common Lane, at passes beneath the railway to the north of the access will not lead to closure of the access; access will

remain available from the south, with only limited disruption of access from Old Oak Common due to the proposed works spread across a number of years – as confirmed to NRF by HS2 (see NRF's note of 2 February 2024 and appendices at INQ-50 and INQ-51). Evidence has been provided in relation to undertakings given to Agility to minimise disruption to their operations at NPD including in relation to access. The minimisation of disruption to access is also referred to in HS2's replies to NRF. This access to a RRAP and NPD from the public highway is plainly available. In any event, the Mitre Way access will remain available as an alternative. Mitre Way was confirmed in the Arcadis report as providing acceptable access in the context of the Barlby Road RRAP (p.44, NG Appendix L); the same logically must apply to the suitability of Mitre Way for access to a RRAP to the west, at the Agility/Hitachi depot.

43. With regard to movement within NPD, the Mitre Way bridge has been shown not to be any practical impediment, and as explained on the site visit by the Hitachi representative a 250t crane (used to lift a substation) which could not come under the Mitre Lane Bridge simply came in via the west from Old Oak Common Lane without difficulty. If road/rail plant being transported to a RRAP is of a height that cannot be manoeuvred beneath the bridge, then, as NG has confirmed, this plant is capable of being moved into position using its road mode. As confirmed by the NR operative (who was in charge of the RRV demonstration) on the site visit, the largest RRV vehicles PKR750 and Superbug travel under own steam in any event, and not on a low loader. NR advised (via letter from their solicitors Addleshaw Goddard on 13 November 2023) that in relation to vehicle movements "*on a weekend shift, there will be 5 low loaders arrive on Friday/Saturday to deliver plant to site. These HGVs will leave site after off-loading and then return to either on Sunday or Monday to pick up the plant. Two lorries/flatbeds will also arrive on the weekend in daytime hours to deliver materials. […] It is also estimated that there will be 1 HGV delivery each midweek day to bring materials to site ahead of a shift*." Vehicle movements are not therefore extensive and most possessions only occur one a fortnight. The concern of NR about the interface of RRAP traffic with vehicle movements (and principally employee vehicle movements) on the road within NPD has not been substantiated. NG has confirmed that, within the Agility/Hitachi depot, there are existing level crossing points over the depot lines, which are presently in use and which would be available to use by any vehicles

accessing a RRAP, whether HGVs or RRVs; the eastern level crossing is equipped with flashing lights, half-barriers and road markings; the western crossing with road signals and markings (see NG rebuttal para.2.4(d) and Figs 1 and 2 – OBJ-8.4.4). These were also seen on the site visit. If it is required, the use of those crossings by vehicles accessing the RRAP can be scheduled with the operators of the depot, as NG confirmed, but the necessity for this, given these are existing crossings and operate satisfactorily (the eastern level crossing was seen in operation on the site visit) would seem doubtful. Mr. Fleming also confirmed in evidence that management procedures could be put in place, but he viewed having to cross the level crossing as creating possible delay and risk. The need for RRVs to cross the depot lines can be addressed by that plant being transported over the lines by HGV/transporter and unloaded on the north side. NR's point about the depot lines being electrified from above and that this may affect some RRAP traffic is addressed by the capacity to switch off electrification in that location; in that existing rail traffic into and out of the depot travel under diesel power no disruption is to be expected. A train was seen arriving under diesel power on the site visit and the Hitachi representative confirmed that they stored 300,000 litres of diesel on site. A range of plant and machinery crosses the depot lines now without any evidence of problems arising. There is, as has been shown and seen on the site visit, ample space for any working compound required in association with a RRAP at NPD (the western RRAP being preferred), and as was clear from the site visit. The western RRAP also providing level track access as was confirmed.

44. In terms of an unacceptable interface with Agility/Hitachi's operation as alleged by NR, we do not consider that this has been substantiated by the evidence, nor, of course, has it been supported in any evidence which is before the inquiry from Agility/Hitachi. We have addressed above the point about overhead line equipment and electrification and how this can be addressed. It was demonstrated on the site visit where the vehicle turning area was, and it was confirmed that this was under marshal control. Whilst the internal road within NPD was also used for parking, it was noted that the peak parking demand was at shift changeover which times would not obviously conflict with NR's proposed usual possession times. In any event, Barlby

Gardens (where minibuses start and finish as referred to above) is even closer to NPD than 239 Horn Lane.

45. NR's case, such as it is, that BPL's land is required for a temporary RRAP to meet the programme for the GWML Systems Project proceeds on an assumption possession will be taken of BPL's land by September 2024 with the temporary RRAP operational in January 2025. However, given it is now 8 March 2024 and the public inquiry into NR's application has not thus far closed, the prospect of this being achieved is unlikely. There remain several stages of the process to be completed before a decision is taken on the application. When account is taken of the potential for a legal challenge if the application is allowed, this makes entry onto BPL's land by September 2024 even less likely unless NR proceeded as risk whilst an Order was under legal challenge and before the challenge was disposed of; the Court of course has powers to preclude this. This of course could be restrained by injunction. As such, this driver advanced by BPL for the temporary RRAP to be located on BPL's land should be discounted.
46. As such, in spite of the absence of any evidence of any objective assessment of alternatives before NR decided to seek powers over BPL's land at Horn Lane, the justification for rejecting the most obvious of those alternatives, namely provision of a RRAP at the western side of NPD has not been substantiated. The land is owned by the SoST and is operational railway land. It is located closer to the site of the new Old Oak Common Station, which is the destination of RRVs needing to use the temporary RAPP than is BPL's land. It is a suitable and available alternative and NR has demonstrably failed to show why it should not be considered to be such.
47. NR's concerns about use of NPD for a temporary RRAP largely fall away when considering the permanent RRAP and NR's ad hoc use of the same for maintenance, once HS2's works are complete there will be no restrictions on accessing NPD via Old Oak Common Lane, and use of the level crossings can be managed, with use in accordance with already established procedures or as agreed with Hitachi. No evidence has been given as to how ad hoc use of a permanent RRAP at NPD would interfere with Agility / Hitachi operations either by NR or Agility / Hitachi themselves.
48. For the reasons set out in paragraph 36 alone, it cannot be concluded that there is a compelling case in the public interest to take BPL's land for either a temporary or permanent RRAP given that an alternative location, on publicly owned operational

railway land exists and is both suitable and available to meet the purposes of a new temporary RRAP for the purposes of the GWML Systems Project. It should also be noted (see BPL's comments on the risk assessment, and NR's reply to BPL's comments on the risk assessment) that access has been negotiated in principle between HS2 and Hitachi for access to the 'brownfield site' via NPD in principle post Christmas 2026. Whilst there are no details as to these access arrangements, it is clear that there is no in principle objection to rail access being taken by others access to the GWML from the south via NPD.

49. If, however, and contrary to the submission above, the Inspector and/or the SoST were to conclude that a temporary RRAP is required on BPL's land, it is submitted that the extent of the workspace and the compound which NR seeks to secure via rights of temporary possession is not necessary. NR is seeking to acquire an adjoining parcel of land – the Triangle land – as a site for a permanent RRAP. The land is vested in the Crown as bona vacantia and as matters stand NR neither owns nor controls that land and the Crown Estate Commissioners have confirmed that they are not prepared to engage with NR until the outcome of this Order is known. The Commissioners have not committed to a transfer of the Triangle land to NR. Nonetheless, NR is, it would seem, confident that it will acquire the Triangle land and ask the Inspector and SoST to allow its application for a permanent right over BPL's land. NR can't have it both ways and, on this basis, of its confidence that the Triangle land will be available to it, there is no evidence at all to demonstrate why the Triangle land could not be used to accommodate at least some of the working compound required in association with the temporary RRAP thereby reducing the need to take land temporarily from BPL. NR's evidence is that there would need to be some vegetation removal and levelling of the Triangle land so that it could be used. This rather suggests that once these works were complete that it could be used for some of the parking or laydown or perhaps welfare cabins that NR seek to use BPL's land for in the temporary situation. As such, on NR's own case, the extent of working compound required to be taken has not been shown to be necessary and is, we submit, excessive. Moreover, in respect of the use of the Triangle land,NR have confirmed that the isolation works that prevent the use (they say) of a RRAP on the Triangle land as a temporary RRAP are works that they need to be done in any event for a permanent RRAP on the Triangle land to be useful,

and are works that would take 100 hours to complete. This also rather undermines NR's position that 239 Horn Lane is only suitable location for a temporary RRAP.

A compelling case in the public interest – the permanent right sought over BPL's land to access a permanent RRAP on the adjoining "Triangle" land.

50. The permanent right that NR seeks is to access a proposed temporary RRAP on the adjoining Triangle land. The permanent right is shown as plot 3 on the draft Order Plan. NR, as we have submitted, does not own nor does it have any right over the Triangle land, nor indeed any agreement in place with the Crown Estate Commissioners (as referred to above). As such, there is a current factual impediment (i.e. NR does not own the Triangle land) and a legal impediment (i.e. they need the Commissioners to sell the Triangle land to it) to be overcome before there is any basis to take the permanent right sought over BPL's land. Given the lack of any commitment on the part of the Commissioners to sell the land to NR (and there is of course another party seeking to acquire that land) there is no compelling case in the public interest for NR to be granted a permanent right over BPL's land. Indeed, were the position to be otherwise, there would be a right granted to NR to access land which it does not own and has no power to acquire; NR cannot of course acquire compulsorily land held by the Crown. There is no compelling case for a permanent right over plot 3 to be given in the current circumstances.
51. We return to the terms of the draft Order below. However, and with regard to the modified form of Art 6(1) of the Order, the proviso that the power given to NR, by Art 6(2), to take a permanent right of access over plot 3, is not to take effect until "*NR has acquired such an interest in plot 1 as necessary to allow the purpose set out in column (3) of Schedule (1) … to be achieved*" is wholly insufficient to answer the point of objection that BPL has made. First, it is not stated what "interest" will be sufficient to satisfy Art 6(1), who is to arbitrate this, and how visibility and transparency will be provided to the public and BPL in particular should such an "interest" be acquired; on its face, a temporary or otherwise time limited right to provide a RRAP on plot 1 for a limited period would be enough to meet the proviso. However, the right sought over plot 3 is a permanent right. As such, that can only be justified if NR takes a permanent interest, that is freehold ownership or the equivalent (e.g. a 999-year lease) over the

Triangle land. Anything less will result in the extent of the permanent right sought over BPL's land being excessive. Moreover, and separate to that, it is unacceptable that NR is given the absolute discretion as to what "interest" is sufficient to meet the Art 6(2) proviso. Therefore, if, notwithstanding what is set out above, the Inspector and/or SoST conclude that a compelling case exists for NR to be given a permanent right over plot 3 notwithstanding that it does not currently have any interest in the land which that right is to serve (and has no means by compulsion to acquire such an interest) it is necessary for the draft Order to be modified to ensure that the rights is only taken if or when NR secures ownership or the equivalent of the Triangle land, plot 1.

52. As referred to above, NR have not presented a compelling case as to why NPD is not an appropriate location for the permanent RRAP and indeed HS2 appear to have agreed access to the 'brownfield site' via NPD post Christmas 2026, in principle, (the risk assessment #1 states that the NPD is only off track location to access the 'brownfield site'). NR confirm this in their response to BPL's commentary on the risk assessments and importantly have not suggested that access to the 'brownfield site' via NPD will not be available;, they simply state that "full details" of the access arrangements between HS2 and Hitachi "have not yet been agreed". NR also state that access to a 'brownfield site' is not comparable to possession based working, but they have not stated why, and have provided no evidence that access to the "brownfield site" will not require men, machinery, laydown of materials, RRVs and all the matters referred to as being required in connection with a permanent RRAP.
53. More generally, NG gave evidence that the existing permanent RAPP within the eastern side of NPD at Barlby Gardens together with a new permanent RAPP on the west side, in one or other of the locations in the Agility/Hitachi depot, which is available for a temporary RAPP, would meet the need for further permanent access to the railway for RRVs. With this provision, no permanent RAPP to the west of Old Oak Common, on the Triangle land or elsewhere is needed. This remained NG's evidence and, we submit, NR has not provided any substantive or satisfactory answer to this. On the further basis, no compelling case in the public interest for access over BPL's land to a new RAPP, on the Triangle land has been shown.

54. The temporary RRAP proposed to be located on BPL's land will include a works compound. That is to be located adjacent to a block of residential properties, namely Acton House. It is inevitable that the use of the temporary RRAP and associated works compound will generate noise and involve the use of artificial light during night-time working, as well as generating emissions from plant and machinery. This impact will be cumulative with the consequences of NR's use of the area on a site sharing basis. However, NR has produced no assessment of these matters, including the noise profile of loading and unloading RRVs as seen on the site visit, nor of their impact on the amenity of residents of Acton House or elsewhere. As such, and contrary to development plan and national planning policy and guidance (see M. Connell proof para.4.2-4.36, OBJ-8.5.1) these impacts cannot be assessed, nor can the Inspector or the SoST be satisfied that the impacts will be acceptable or acceptably controlled (including with reference to the combined impacts arising from NR's operations together with an operational builders' depot, a scenario which was not proposed by NR until day one of the inquiry). The refusal of NR to produce in evidence or indeed it seems to carry out the type of assessment which is required of most other noise-generating development, whether permanent or temporary, is mystifying and no less concerning. It is plainly wrong to suggest that such assessments are not required for temporary works and nothing in planning policy suggests as much; it would be absurd if policy did so.
55. In the absence of any assessment of noise, lighting and air quality impact it is not possible reasonably to conclude that the impact in planning terms of what is proposed is acceptable. Likewise, it is impossible to conclude the extent to which planning policy at all levels which seeks to protect amenity are met.
56. That it is proposed to attach conditions to any deemed planning permission to require the submission of an environmental management plan (draft condition 5) is no answer to the point. To require, as condition 5 does, for example measures to control noise and vibration (having regard to BS 5223-1:2009+A1:2014 Code of practice for noise and vibration control on construction and open sites …" cannot and will not be

effective as an environmental control unless it is established before planning permission is given or deemed to be given what the likely noise and vibration effects are and the extent to which these can be controlled by measures anticipated by the condition but yet to be identified. Of course, and as a matter of law, if at the stage that condition 5 is to be discharged, it is revealed that the noise levels generated by the proposals are such that measures of the sort envisaged by condition 5 will not and cannot reduce noise to an acceptable level, it is then too late to remedy this. The LPA cannot refuse to discharge condition 5 or otherwise stop the development if it is shown that no effective or practical mitigation is possible. To effectively kick the can down the road, is not a sufficient or acceptable basis to grant planning permissions. Local residents deserve to know that their amenity will be protected. Ms Kustza gave evidence that her amenity has not been protected and was awoken on Christmas Day by rail-side noise, with NR's complaints team having in her view inadequately dealt with her concerns.

57. There is not, we submit, a sufficient evidence base to grant the deemed application for planning permission in this case.

The Draft Order and the Undertaking

58. NR has accepted that it does not require exclusive occupation of that part of the Order land over which it seeks temporary rights of possession. It accepts that in principle an arrangement whereby NR shared use of at least part of the site over which it seeks temporary possession will be sufficient for to access the GWML to deliver the GWML Systems Project, as proposed. Given the limited occasions on which access is required to the GWML for those purposes, that NR now accepts in principle at least, site sharing is unsurprising. However, the terms of the Order, as now proposed, and the undertaking do not secure this with the result that the powers sought still exceed that which NR needs to secure access to the railway if, contrary to BPL's case, its site is required temporarily or permanently at all.

59. The draft Order and the unilateral undertaking have been through several iterations. NR's current drafts of both were provided on 23 February 2024. BPL, through NRF, has set out its comments on the current draft of both the draft Order and the undertaking.

We do not repeat those comments. We do however repeat one basic but important point:

a. We do not accept that it is necessary or indeed appropriate for site sharing to be provided in an undertaking rather than in the Order itself. There is nothing in principle which precludes provision for site sharing being included in an order made under the TWA 1992; the model clauses are just that and are capable of being adapted. As matters stand, Article 7 of the draft Order, which provides for powers of temporary possession, exceeds that which is necessary for NR's purposes in that it does not provide or even make reference to site sharing. Thus, the powers sought by the Order exceed what is necessary, on NR's own case. We do not accept that an undertaking, enforceable only in private law by BPL is or can be a remedy for the Order taking powers which are excessive.

   In addition:

b. the draft Order does not make it clear that the "associated development" is located outside of the Order limits. This is an important clarification, and an amendment should be made to the definition of "associated development" to make this clear, particularly as Art 3 is entitled "Power to use and execute temporary works on land within the Order limits" (emphasis added), which Article concludes with the words "for the purposes of the construction of the associated development".

c. The rights sought in Art 2(2) are circumscribed by the rights in Art 6. It is therefore important that a cross reference is inserted into Art 2(2) to refer to Art 6. The rights sought in Art 2(2) are nonetheless too wide ranging. These seek powers unsupported by NR's evidence. Therefore, there is no compelling case for the grant of these rights. Rights are sought to "do, or to place and maintain, anything in, on or under land or in the air-space above its surface". No evidence has been given in relation to such rights as are needed to exercise the Art 6 right. NR state that exercise of the Art 2(2) rights would need to be consistent with the exercise of the Art 6 right, whilst this might be accurate it would not prevent NR from lawfully exercising its right to place an unreasonable restriction on BPL's development or business. NR could seek, for

example, to place signage on Plot 3 e.g. advising drivers not to use reversing alarms at night, or to only travel at 5mph. This would be consistent with the right sought, but if that signage was placed so that it obstructed the emergency residential egress, or obstructed the loading bay doors then it would prevent BPL's use of the development and its only recourse would be compensation. Art 2(2) should be modified to refer only to the rights that NR needs, or else deleted.

d. Art 7(1)(c) seeks the construction of temporary works including the provision of a means of access. NR have now clarified that these are references to the works referred to in the draft deemed planning permission and the "means of access" refers to the gate that is also referred to in the draft deemed planning permission. That being the case, Art 7(1)(c) should be deleted or else amended to refer to the rights that NR needs. The Art is otherwise too widely drawn, unclear, and there is no compelling case for it.

e. Arts 9(1) and 9(2) seek to extinguish rights inconsistent with NR's right of access in Art 6, or suspend such rights (so that NR can effectively achieve exclusive use of the site) when it is in temporary possession. Once BPL's new development is constructed a variety of new rights will be created with the right to use plot 3. There is no mechanism for deciding what if any of these rights are considered "inconsistent" with NR's right of access, and NR have stated that their access must be "unimpeded". NR could argue that any manoeuvring or parking of any other vehicle save their own on Plot 3 impedes their access if such parking / manoeuvring occurred when NR wished to take access. This could render the development unoccupiable, unfundable and risks discriminating against blue badge holders with parking spaces accessed off plot 3. It is accepted that during a railway possession and for 4 hours before and 1 hr 15 mins after such possession that NR need to maintain a secure area and that rights should be suspended during that period. This is what the undertaking provides for. Arts 9(1) and 9(2) have therefore been amended to make it clear that BPL's users' rights of access relating to the new development will not be extinguished, and the power to suspend rights is limited to the possession period as defined in the undertaking.

The Revised Statement of Matters

60. In his revised Statement of Matters the particular matters which the SoST wishes to be informed of are set out. BPL's case in respect of several of these matters are addressed in the submissions we have made above. Where this is the case, we will not repeat those submission.

The aims and objectives of, and the need for, the project to provide a temporary and permanent road rail vehicle access point on to the Great Western Main Line railway

61. BPL does not dispute the need for temporary access to the GWML from the south for the purposes of the GWML Systems Project and the trackside works for the delivery of the new Old Oak Common Station, in particular. As such the need for a RRAP to access the main line from the south is not dispute. It is the need for that access to be taken from BPL's land and the need for a new RRAP for those purposes that is however disputed. We address matter 2, and alternatives below.
62. With regard the permanent RRAP, powers necessary to deliver that RRAP are not sought through this Order, save for a permanent right of access over BPL's land to the proposed new RRAP, which NR say they wish to provide on the Triangle land (plot 1). Since, as matters stand, NR does not own and has no power to acquire the Triangle land from the Crown Estate Commissioners, BPL does not accept that there is a need for nor indeed any reasonable basis to take the permanent right sought over BPL's land, whatever the need for a new permanent RRAP on the southside of the GWML may be. The correct procedure would be for NR to acquire the Triangle land first and seek by agreement a right of access with BPL over 239 Horn Lane, or in default of agreement seek compulsory powers.

The main alternative options considered by NR and the reasons for choosing the Scheme. This should include alternatives that did not require compulsory acquisition.

63. We have addressed this matter in some detail earlier in these submissions. It is plain that, on the basis of the evidence produced to this inquiry by NR and the material that it has disclosed, no proper objective assessment of alternatives was carried out by NR

before it decided to locate a temporary RRAP on BPL's land at Horn Lane and a permanent RRAP on an adjoining parcel (albeit it has no power to deliver this). This represents a fundamental failing which goes directly to whether there is a compelling case in the public interest for NR to be given the powers it now seeks. Moreover, on the basis of the evidence before the inquiry, there is an alternative location for the temporary and permanent RAPP which NR seeks to provide, that is on the NPD site. That site is owned by the SoST and is operational railway land. Part is leased to Agility Trains/Hitachi, who have not given evidence to the inquiry to justify whether or if so, why a part of the land that they occupy could not be used to accommodate a RRAP and, on all the evidence before the inquiry, there is no impediment to a temporary or permanent RRAP being located there, in particular to the west of the NPD. The terms of the lease to Agility/Hitachi and the scope for the land that they occupy to be used (jointly or otherwise) for other railway operations has not been confirmed or addressed by NR; there is no evidence of the powers of the SoST to re-enter, partially or otherwise, under the lease. Given that NPD is in public ownership compulsory acquisition are unlikely to be necessary; if it were to be necessary for compulsory purchase powers to be exercised in respect of part of the leasehold interest held by Agility Trains/Hitachi, then SoST has power to consent to this (see s. 25 of the TWA 1992). There are therefore alternative means to deliver access to the railway which does not involve acquisition of rights and powers over BPL's land, and which would therefore avoid the substantial and adverse interference with BPL's operation and future development proposals which NR's proposed powers would generate.

The likely impact of the Scheme on local businesses and residents during construction and operation. Consideration should include but is not limited to:

- *The impact on access arrangements including access to parking at the rear of Acton House*
- *Impact on local amenities and the surrounding environment*
- *Impact on noise, light and air quality*

Impact resulting from an increase in HGV movements including on the local highway network.

64. The impact of the powers sought on BPL and the continued use of its warehouse as a builders' merchant by Stark or BPL has been described in evidence and summarised earlier in these submissions, as has the effect on the implementation of BPL's redevelopment of the site, which has been given planning permission. The builders' depot at Horn Lane is an important local business and resource. Mr Aaronson's evidence is that Builder Depot's main customers are local tradespersons.
65. So far as impact on the environment and impact through noise, light and on air quality these have not been assessed by NR who, notwithstanding what is set out in BPL's statement of case, have not commissioned any assessment of these effects. Given that the proposed RRAP and its associated works compound will be directly adjacent to Acton House, this is a serious omission. As such, the SoST is not in a position to consider or to reach a conclusion on the range of impacts set out in this matter, and in particular the effect on neighbouring residential amenity. And, as a consequence, he is not able to consider the extent to which what is proposed by NR would conform with planning policy which is concerned with protection of amenity and control of environmental impacts.
66. In relation to impacts on access, NR's evidence confirmed that access to BPL's site by low loaders would be under marshal control. For forward manoeuvres, this would require temporary stopping of traffic on one carriageway of Horn Lane, and for reverse manoeuvres, stopping traffic on both carriageways. Horn Lane is a busy TLRN route. We also refer to the note prepared by Mr Gent (INQ-42), where it is stated that although Friary Road can be used for the purposes of the project to access Horn Lane, there is likely night-time, weekend and public holiday noise pollution caused by NR's vehicles on residential roads which is an important consideration for the Inspector / the SoST.

Having regard to the criteria for justifying compulsory purchase powers in paragraphs 12 to 15 of the Department for Levelling Up, Housing and Communities Guidance on the "Compulsory purchase process and the Crichel Down Rules" published July 2019:

a) whether all the land and rights over land which NR has applied for is necessary to implement the Scheme

b) whether there are likely to be any impediments to NR implementing the Scheme, particularly including the availability of funding.

c) whether there is a compelling case in the public interest to justify conferring on NR the powers to compulsorily acquire and use land for the purposes set out in the Order

d) whether the purposes for which the compulsory purchase powers are sought are sufficient to justify interfering with the human rights of those with an interest in the land affected (having due regard to Human Rights Act)

67. We have in substance addressed this matter in earlier submissions.
68. We do not consider that the temporary possession sought of BPL's land is necessary to secure a temporary RRAP as part of the GWML Systems Project. An alternative, which uses operational railway land in public ownership exists and is suitable and deliverable, namely, to locate the temporary RRAP at NPD. The rights of temporary possession sought over BPL's land are not necessary, therefore.
69. The same applies to the permanent right sought to access the Triangle land. NR has no right to deliver a permanent RRAP on the Triangle land. As such, it cannot be the case that it is necessary to secure a right over BPL's land. That NR does not own the Triangle land and the fact that there is no commitment given by the Crown Estates Commissioners to transfer the land to NR, is a clear impediment to the implementation and delivery of a permanent RRAP on the Triangle land and thus to the need and justification for taking a permanent right over BPL's land. That right is, as matters stand, a right of access to nowhere. The contingency included at Art 6(2) of the draft Order does not answer this point and, as a matter of principle, it is not reasonable or proportionate to expose BPL to the contingent exercise of a power to acquire by compulsion a right over its land which the mechanism within Art 6(2) seeks to do.
70. In any event, BPL considers that the existing RAPP at Barlby Gardens together with a new permanent RRAP at NPD in the Agility/Hitachi depot can be delivered (using publicly owned operational railway land). A permanent RRAP on the Triangle land is not necessary and thus a permanent right over BPL's land is not necessary either.
71. As such and for the additional reasons set out in these submissions, and in BPL's evidence to the inquiry, there is no compelling case in the public interest for NR to be given the powers that it seeks.

72. For the same reason, those powers represent an unjustified interference with BPL's Convention Right, its rights under Article 1 of Protocol 1 to the European Convention on Human Rights. To grant the rights and powers sough would be a breach of those rights, disproportionate and thus unlawful.

An update on the current position in relation to Crown Land.

73. The position in respect of the Triangle land, which is Crown Land, remains unchanged. NR does not own it, has no powers over it nor does it have the benefit of any commitment to have that land transfer to it. As such NR cannot deliver the permanent RRAP which the permanent right over plot 3 within BPL's land is required to serve. This represents an impediment to the delivery of the scheme for which the permanent right over BPL's land is claimed by NR to be needed.

The conditions proposed to be attached to the deemed planning permission and their suitability.

74. BPL's submissions on the conditions which it is suggested should be attached to any deemed planning permission are set out in inquiry document INQ-29 and are addressed in the submissions give above.

Whether all statutory procedural requirements have been complied with.

75. NR makes no submissions in respect of this matter.

<u>Overall Conclusion</u>

76. For the reasons given and on the basis of the totality of the evidence, NR has not made out its case to be given the powers it seeks. There is no compelling case in the public interest to acquire powers, neither temporary nor permanent, over BPL's land at Horn Lane. The application should be dismissed.
77. The SoST is requested to do so and the Inspector to recommend the same.

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8 March 2024.