

**POSITION STATEMENT**

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**TRANSPORT AND WORKS ACT 1992: APPLICATION FOR THE PROPOSED NETWORK  
RAIL (EAST WEST RAIL BICESTER TO BEDFORD IMPROVEMENTS) ORDER**

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**FRESH DIRECT (UK) LIMITED  
OBJ/152**

**18 APRIL 2019**

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## 1. INTRODUCTION

- 1.1 This position statement is submitted on behalf of Fresh Direct (UK) Limited (**FDL**) and is supplemental to FDL's objection letter of 11 September 2018 (the **Objection**).
- 1.2 Network Rail Infrastructure Limited (the **Promoter**) has submitted an application (the Application) for the proposed Network Rail (East West Rail Bicester to Bedford Improvements Order) (the Draft Order)
- 1.3 FDL is the leasehold owner of premises known as Unit D Bainton Close, Bicester Distribution Centre, Bicester, Oxfordshire, OX26 4SW (**Unit D**). FDL's land, including the land that is subject to the proposed powers of compulsory acquisition pursuant to the Draft Order, is identified in section 4.
- 1.4 FDL's interest in the land is pursuant to a lease dated 2 September 2016 and made between: (1) Aviva Insurance Limited (**Aviva**); and (2) FDL (the **Lease**). The term of the Lease runs until 2 September 2031.
- 1.5 Aviva submitted a statement of case to the Inquiry on 19 October 2018. FDL endorse the objections articulated by Aviva in their statement of case, and consider that Aviva's objections have not been addressed.
- 1.6 FDL requests that the Inspector considers this position statement in accordance with Rule 18(11) of The Transport and Works (Inquiries Procedure) Rules 2004 (the **Rules**).
- 1.7 FDL is a statutory objector for the purpose of the Rules.

## 2. BACKGROUND

- 2.1 FDL submitted the Objection due to the implications of the Application and the Project.
- 2.2 FDL has not submitted a statement of case or a proof of evidence to date because it has had positive discussions with the Promoter over the impact of the Project and its impact on FDL's business. All discussions proceeded on the basis of the temporary use of FDL's land only and a appropriate timeline is identified below.
- 2.3 Attached is a plan dated 6 February 2019 issued by the Promoter to FDL which clearly identifies its proposed land take requirement as temporary (TWAO Temporary Land Take Boundary): please see Appendix 1. This plan was used to inform the voluntary discussions in respect of temporary land take, and identified no permanent land take.
- 2.4 A summary timeline of key steps is identified for context:
  - 2.4.1 **June 2017 to February 2019**: negotiations between FDL, the Promoter and Aviva in respect of a voluntary agreement to allow temporary use of part of FDL's land until 31 December 2021;
  - 2.4.2 **8 February 2019**: heads of terms agreed for the temporary use of FDL's land by the Promoter with such land to be returned to FDL by 31 December 2021;
  - 2.4.3 **21 February 2019**: the Promoter first mentions the need to permanently acquire part of FDL's land during a site meeting with all parties present;
  - 2.4.4 **28 March 2019**: following numerous requests by FDL following the revelation on 21 February 2019 that land was to be permanently acquired, the Promoter provides a plan

- to FDL for the first time demonstrating the extent of land that it intends to permanently acquire;
- 2.4.5 **1 April 2019:** site meeting convened following the revelations of 28 March 2019 to undertake site testing to demonstrate that the permanent acquisition would render Unit D permanently inoperable;
  - 2.4.6 **10 April 2019:** FDL wrote to the Inquiry, noting its intention to submit a further written statement to address its objections;
  - 2.4.7 **11 April 2019:** the Promoter confirmed that it would not need to permanently acquire any land to the West of the Existing Fence; and
  - 2.4.8 **18 April 2019:** still no formal offer, meaningful attempt or any genuine effort made to permanently acquire any land from FDL.
- 2.5 In spite of discussions over a period between June 2017 and March 2019 where the Promoter and FDL had discussed the temporary use of FDL's land, the Promoter only identified on 21 February 2019 that it would need to permanently acquire some of FDL's land. Until that date, the Promoter had not identified the need for permanent acquisition of FDL's land and all discussions had been based on a temporary arrangement to facilitate construction.
- 2.6 FDL has incurred significant costs to date in putting in place a potential alternative business solution as a result of the Promoter's position that temporary use of its land was required, in order to accommodate the Promoter's plans and in recognition of the agreed impact that the Promoter's plans would have on the operability of FDL's use of Unit 4.
- 2.7 FDL has not had an opportunity to adequately consider whether it is possible to put in place alternative business solutions as a result of the permanent acquisition of its land by the Promoter.
- 2.8 Following this revelation by the Promoter, the Promoter prepared a plan demonstrating the extent of its land take requirements (the **FDL Plan**): please see Appendix 2. The FDL Plan identifies:
- 2.8.1 land coloured green, over which the Promoter, notwithstanding the Book of Reference and deposited plans, only requires temporary rights;
  - 2.8.2 land coloured black, over which the Promoter now asserts, notwithstanding the evidence identified in this position statement and its negotiations with FDL between June 2017 and March 2019, it must permanently acquire;
  - 2.8.3 land coloured pink, over which the Promoter, notwithstanding the Book of Reference and deposited plans, requires temporary rights; and
  - 2.8.4 the existing fence as shown by a red line (the **Existing Fence**) which marks the current boundary within which FDL operates its business.
- 2.9 It is important to note that the land identified in pink on the FDL Plan is not within the order limits and is not subject to, or included within, the Application. The Promoter has not sought compulsory rights over this area of land, and the Draft Order, if made, cannot include the compulsory acquisition of any of this land.
- 2.10 The Promoter subsequently confirmed on 11 April 2019 that it will not need to permanently acquire any land to the West of the Existing Fence.

### **3. FDL'S LAND**

- 3.1 FDL is the leasehold owner of the following land that is subject to the proposed powers of compulsory acquisition pursuant to the Application:
- 3.1.1 Plot 17a as identified in the Book of Reference and shown on Sheet No.2 Revision A02 (Drawing Number 133735\_2A-EWR-OXD-TWAO-DR-T-000002 (**Plot 17a**);
  - 3.1.2 Plot 25 as identified in the Book of Reference and shown on Sheet No.2 Revision A02 (Drawing Number 133735\_2A-EWR-OXD-TWAO-DR-T-000002 (**Plot 25**); and
  - 3.1.3 Plot 45 as identified in the Book of Reference and shown on Sheet No.2 Revision A02 (Drawing Number 133735\_2A-EWR-OXD-TWAO-DR-T-000002 (**Plot 45**).
- 3.2 Plot 17a is identified as being required temporarily. However, Plot 25 and Plot 45 are subject to permanent acquisition.
- 3.3 This position statement is focussed on the impacts of the Application on Plot 45. Plot 45 forms part of the service yard for FDL's operational business which it runs from Unit D.
- 3.4 All of the green land, black land and pink land identified on the FDL Plan is within Plot 45.

### **4. EXECUTIVE SUMMARY**

- 4.1 This position statement will demonstrate that the:
- 4.1.1 temporary acquisition of land within Plot 45 would cause FDL's business to be temporarily inoperable from Unit D during the period of temporary possession;
  - 4.1.2 permanent acquisition of land within Plot 45 would cause FDL's business to be permanently inoperable from Unit D;
  - 4.1.3 Promoter does not require, and has failed to demonstrate a case in the public interest for, the extent of permanent land acquisition that it is seeking powers of compulsory acquisition in respect of Plot 45;
  - 4.1.4 following on from this failure the Promoter has not adequately identified, and has failed to demonstrate a case in the public interest for, the extent of temporary rights that it should actually be seeking powers of compulsory acquisition in respect of Plot 45; and
  - 4.1.5 Promoter has not made meaningful attempts at negotiation and has not genuinely attempted to negotiate the permanent acquisition of FDL's Land and that the powers of compulsory acquisition sought are not the last resort.

### **5. OPERATIONAL IMPACT**

- 5.1 The acquisition of land to the East of the Existing Fence would not cause FDL's business to be inoperable from Unit D, although it may impact future operations of Unit D.
- 5.2 The temporary acquisition of land to the West of the Existing Fence within Plot 45 would cause FDL's business to be temporarily inoperable from Unit D during the period of temporary possession. This is agreed between FDL, Aviva and the Promoter and an alternative business solution was being put in place, at significant cost to FDL, to address this operational impact.

- 5.3 The Promoter’s permanent acquisition of land to the West of the Existing Fence within Plot 45 would cause FDL’s business to be permanently inoperable from Unit D. This was agreed between FDL, Aviva and the Promoter on 1 April 2019.
- 5.4 The Promoter states in evidence that “*it is possible to maintain the operation of the loading bays at the rear of the units both in the temporary and permanent case*”<sup>1</sup>. This is not correct, and we note that this statement is not supported by any evidence. In any event, this statement preceded the site tests undertaken in the presence of the Promoter on 1 April 2019 which are discussed in more detail below.
- 5.5 In recent months, FDL has worked with the Promoter to undertake trial exercises based on both the temporary and, since 21 February 2019 (when FDL became aware of the proposed permanent land take and 28 March 2019 (when FDL became aware of the actual extent of the proposed permanent land take), the permanent case.
- 5.6 In particular, at a site meeting on FDL’s land on 1 April 2019 (which was held following the Promoter’s disclosure that it required permanent land on 28 March 2019) at which the Promoter, FDL and Aviva were present, FDL ran a test to demonstrate the impacts of the Promoter’s permanent acquisition of Plot 45. It was agreed between the parties that this test demonstrated that this permanent acquisition would have a detrimental effect on the operation of Unit D.
- 5.7 This test involved the placement of cones in the locations shown on the photographs at Appendix 3; this location was agreed between the parties as representing an area within the proposed boundary in the event that the Promoter did permanently acquire Plot 45 (i.e. an area that was actually less severe than the proposed level of permanent acquisition). This clearly shows that the access could not be used in a safe manner.
- 5.8 Also enclosed at Appendix 4 is a written statement of Patrick Bissell, General Manager at FDL. This identifies that the temporary and permanent cases will render the business unable to operate as follows:
- 5.8.1 Inability to exit Bay 1 without significantly compromising “workplace transport safety”; and
  - 5.8.2 Requiring a 24/7 marshal to manage two way traffic flows, with significant negative effects on production and efficiency.
- It is generally noted by Mr Bissell that “*at specific periods during the trial we actually had to move the cones to get the operation working again so we can confidently say that any loss of land on a permanent or temporary basis would have a significant, negative impact on our current day to day operation.*”
- 5.9 Therefore, the:
- 5.9.1 temporary acquisition of land to the West of the Existing Fence within Plot 45 would cause FDL’s business to be temporarily inoperable from Unit D during the period of temporary possession; and
  - 5.9.2 permanent acquisition of land to the West of the Existing Fence within Plot 45 to the West of the Existing Fence line would cause FDL’s business to be permanently inoperable from Unit D.

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<sup>1</sup> Paragraph 7.13.10 of the Proof of Evidence of Evidence of Simon Croft (NR51)

- 5.10 This is based on the extent of the land that the Promoter has now asserted is required. The extent of the land that is actually required by the Promoter is discussed in more detail below, but FDL disputes the extent of land that the Promoter has asserted is required.
- 5.11 If the Draft Order were made in a manner that authorised the permanent acquisition of Plot 45, then FDL would expect the Draft Order to be amended in a manner that would make it explicit that, if the Promoter permanently acquired all or part of any of the land to the West of the Existing Fence within Plot 45, then FDL could require it to acquire the entirety of Unit D pursuant to the material detriment procedures under the Compulsory Purchase Act 1965. This would reflect the fact that the permanent acquisition of such land would render the use of Unit D inoperable.

## 6. EXTENT OF LAND REQUIRED

- 6.1 The Promoter does not need to permanently acquire all of the land identified within Plot 45 to deliver the Project. However, the Promoter has sought to permanently acquire all of Plot 45 without adequate justification and contrary to the need for such land that it has itself identified in the evidence that it has submitted to the Inquiry.
- 6.2 The following issues demonstrate the excessive powers of compulsory acquisition which the Promoter has sought, and the inconsistency within its own evidence which demonstrate that such excessive powers are not necessary.
- 6.2.1 Work No.7 is a temporary work, and so permanent acquisition of any land which is only required for such temporary works cannot be justified;
- 6.2.2 Paragraph 4.3.68 and Insert 9 of the Proof of Evidence of Phil Holland (NR50) confirm that not all of Plot 45 should be subject to permanent acquisition, and goes on to identify a large swathe of Plot 45 which is only required temporarily.
- 6.2.3 In respect of this Proof of Evidence, and that of Jonathan Smith which endorses its analysis of the requirements of the Project:
- (a) Plot 45 is not split in the manner suggested in this Proof. The Book of Reference, and the associated deposited plans, do not distinctly identify any permanent land acquisition and temporary land acquisition in respect of Plot 45: they solely seek permanent acquisition of all of Plot 45; but
  - (b) this Proof demonstrates that a large proportion of Plot 45 should not be permanently acquired. What is clear from the Promoter's evidence is that an extent of Plot 45, identified in green on the FDL Plan and in red at Insert 9 of this Proof, is only required temporarily;
- 6.2.4 Paragraph 7.13.7 of the Proof of Evidence of Simon Croft (NR51) where it is confirmed that the:
- (a) "permanent boundary is then set by the extents of the earthworks and drainage footprint as well as the requirement for Network Rail to be able to access the earthworks and drainage to inspect and maintain them, This in turn drives the location of the new permanent boundary fence and hence the overall permanent land acquisition"; and
  - (b) "temporary land acquisition is then driven by the need to allow adequate space for the safe and efficient construction of the new earthworks, drainage, structure and highway".

- 6.2.5 In respect of this Proof of Evidence, and that of Jonathan Smith which endorses its analysis of the requirements of the Project:
- (a) Plot 45 is not split in the manner suggested in this Proof and endorsed in the Proof of Jonathan Smith. The Book of Reference, and the associated deposited plans, do not distinctly identify any permanent land acquisition and temporary land acquisition in respect of Plot 45: they solely seek permanent acquisition of all of Plot 45. What is clear from the Promoter's evidence is that a further extent of Plot 45, not currently shown on any plans, is only required temporarily.
  - (b) the deposited plans demonstrate that the earthworks, structure and highway are all located to the East of the Existing Fence. Therefore, to the extent that any land is required to the West of the Existing Fence, it is clear that such land is only required temporarily to facilitate construction of the earthworks, structure and highway.
  - (c) the Promoter does not need to permanently acquire land in order to "access the earthworks and drainage to inspect and maintain them"; this would be more appropriately secured as a permanent right over land.
- 6.2.6 By email of 11 April 2019, the Promoter confirmed to FDL that it did not need to permanently acquire any part of Plot 45 situated to the West of the Existing Fence.
- 6.3 It is clear from the above that the Promoter has sought greater powers over Plot 45 than is necessary, and that the public interest test is not met. It is also clear from the Proof of Evidence of Jonathan Smith (NR52) that there has been insufficient consideration by the Promoter and its experts of the actual scheme requirements when preparing the Book of Reference and land acquisition. Jonathan Smith concludes that the land is required; in respect of the fact that all of Plot 45 is identified for permanent acquisition, this is not a reasonable or rational conclusion supported by any evidence.
- 6.4 Ultimately, the Promoter has not demonstrated its case for the permanent acquisition of Plot 45 and it has not made a suitable alternative case for the various alternative powers that it may require over the land within Plot 45. With the exception of Insert 9 in the Proof of Evidence of Phil Holland (NR50) (which does not reflect the deposited plans or the Book of Reference), the Promoter does not provide any evidence as to the extent of Plot 45 that should be subject to permanent acquisition and the extent of Plot 45 that should be subject to temporary rights (although it is acknowledged throughout its evidence that there should be a mixture of such rights).
- 6.5 Furthermore, the acquisition of Plot 45 is predicated on a fundamental flaw in the Application and the Draft Order, which is the selection of the option of the Charbridge Lane crossing and the justification for the selection of that option.
- 6.6 As is made clear in the Promoter's evidence, the new bridge in the vicinity of Plot 45 is necessitated by the level of risk at the existing Charbridge Lane level crossing<sup>2</sup>. The new bridge is not required to address any other concerns.

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<sup>2</sup> Paragraph 7.13.2 of the Proof of Evidence of Evidence of Simon Croft (NR51)

- 6.7 Importantly, the Project is not a road scheme and is not necessitated by additional highway demand or need. Meeting additional highway capacity, demand or need are not identified as objectives within the Statement of Aims.
- 6.8 However, the Promoter's evidence confirms that:
- 6.8.1 *"wider foundations and bridge abutments for the construction of future dual carriageway"*<sup>3</sup> have been included within the Application and the Draft Order; and
- 6.8.2 The preferred option for the Charbridge Lane crossing was selected to provide: *"more flexibility...for managing traffic levels in the future without additional disruption"*<sup>4</sup>.
- 6.9 This is inappropriate, and the purpose of this Application is not to facilitate unspecified and unassociated highway improvement for which there is no evidence. As such, and given the absolute lack of justification or evidence for any such future proofing, there is no justification for the impact on Plot 45 or on FDL's interests as a result of the Promoter seeking excessive powers that go beyond the scope of the Draft Order.
- 7. LAST RESORT**
- 7.1 Paragraph 2 The Ministry of Housing, Communities & Local Government (**MHCLG**) Guidance on Compulsory purchase process and The Crichel Down Rules dated February 2018 (the **MHCLG Guidance**) confirms that *"compulsory purchase is intended as a last resort"*.
- 7.2 The MHCL Guidance goes on to state at paragraph 17 that *"acquiring authorities are expected to provide evidence that meaningful attempts at negotiation have been pursued or at least genuinely attempted"*. The Promoter has not provided any evidence that meaningful attempts at negotiation for the permanent acquisition of Plot 45 have been made or genuinely attempted. It has made no such meaningful attempts nor genuinely attempted them.
- 7.3 The Promoter has not sought to progress the permanent acquisition of any land or rights with FDL, and the Promoter has made no offer to FDL to permanently acquire Plot 45 (or any part of it). Instead, the Promoter has been engaged in discussion with FDL for a period of around 18 months over the temporary possession of a minor part of Plot 45 (that part marked in green on the FDL Plan).
- 7.4 Notwithstanding the plans submitted with the Application (which the Promoter confirmed to FDL identified more land than was required permanently which is borne out by the Promoter's evidence), during these voluntary negotiations it was not until 21 February 2019 that the Promoter identified to FDL that it intended to permanently acquire any of its land and 28 March 2019 that it identified the extent of such acquisition.
- 7.5 Whilst the Promoter identifies that it has have had discussions with FDL<sup>5</sup>, it has failed to identify that these have only related to temporary acquisition and have not related to permanent acquisition.
- 7.6 The Promoter does not demonstrate that the permanent acquisition of Plot 45 would be a last resort or that it would be in the public interest. The Promoter demonstrates no compelling case in the public interest for the permanent acquisition of Plot 45.

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<sup>3</sup> Paragraph 7.13.11 of the Proof of Evidence of Evidence of Simon Croft (NR51)

<sup>4</sup> Table 3.3, Volume 2i, Chapter 3 of the Environmental Statement (NR16)

<sup>5</sup> Paragraph 9.40.3 of the Proof of Evidence of Jonathan Smit (NR52)

- 7.7 In addition, FDL has already incurred significant costs in putting in place a potential alternative business solution as a result of the Promoter's position that temporary use of its land was required, in order to accommodate the Promoter's plans and in recognition of the agreed impact that the Promoter's plans would have on the operability of FDL's use of Unit 4.
- 7.8 FDL has not had an opportunity to adequately consider whether it is possible to put in place alternative business solutions as a result of the permanent acquisition of its land by the Promoter.
- 7.9 As such, FDL continues to object to the permanent acquisition of Plot 45 in the strongest terms. As identified above, the effect of the permanent acquisition of all of Plot 45 (or any of Plot 45 to the West of the Existing Fence) would be that FDL would not be able to operate its business as it currently does. Any permanent acquisition of any of Plot 45 to the East of the Existing Fence may also harm future operations.

## **8. REQUEST**

- 8.1 FDL requests that, if the Secretary of State is minded to make the Order, the Secretary of State refuses to authorise the permanent acquisition of any of Plot 45 on the basis that the:
- 8.1.1 permanent acquisition of land within Plot 45 would cause FDL's business to be permanently inoperable from Unit D;
  - 8.1.2 Promoter does not require, and has failed to demonstrate a case in the public interest for, the extent of permanent land acquisition that it is seeking powers of compulsory acquisition for in respect of Plot 45;
  - 8.1.3 following on from this failure the Promoter has not adequately identified, and has failed to demonstrate a case in the public interest for, the extent of temporary rights that it should actually be seeking powers of compulsory acquisition in respect of Plot 45; and
  - 8.1.4 Promoter has not made meaningful attempts at negotiation and has not genuinely attempted to negotiate the permanent acquisition of FDL's Land and that the powers of compulsory acquisition sought are not the last resort.
- 8.2 Notwithstanding this position statement, FDL does not object in principle to the Application and, without prejudice to its compensation position, would not object to the:
- 8.2.1 temporary possession of the land shown in green on the FDL Plan provided that it was made clear that this land would be returned to FDL no later than December 2021; and
  - 8.2.2 permanent acquisition of some land within Plot 45, provided that this is limited to the extent of Plot 45 that is located to the East of the Existing Fence as per the Promoter's requirements and provided that it does not permanently interfere with the current or future operation of FDL's business.