	Question to:	Question
	Stop The WMI Group 3,1,1 (i)The applicant's evidence is that there is a need for an element of warehousing to be constructed and occupied in advance of the completion of the RT, both to help fund the rail infrastructure and to ensure occupier demand for the rail services once they are available. Having regard to that evidence, do the parties consider that there are reasonable grounds for allowing up to 186,000 sq. m. of the proposed warehousing to be built and occupied prior to the opening of the RT?	**Group's Response**: **The Group does take issue with the concept of permitting the erection and occupation of any warehousing in advance of a rail connection. <u>For this development to be allowed the applicant must be able to demonstrate a significant demand for this development which cannot be accommodated anywhere else.</u> It appears from the applicant's evidence that they remain unsure about both demand and the financial means of funding the proposed development. If the RT is truly in the right location then the applicant should have no problem ensuring occupier demand. Yet the applicant states there are no potential pre-lettings and that this is a speculative development.** **The applicant's position on viability is unclear. Initially there was no reliance on the same. At a late stage the subject has been raised but without sufficient information for a proper viability assessment to be made and with a suggestion that the same is not really relied on. This is coupled with a reference to the East Midlands RT case where the Secretary of State rejected the conclusions of the Examining Authority and permitted an RT with the erection of some warehousing in advance of the rail connection..** **The Group's position is that that decision was not sound on the issue of allowing warehousing to be built in advance of the rail connection and that the only lawful way in which that could be allowed is if it were justified properly on viability grounds supported by the quality of evidence normally required for enabling development. Moreover, any case advanced on that basis would need to secure the fruits of the enabling development so that they were available for the investment in the rail connection. In this case we do not have a proper viability assessment and the attempts made by the Group to propose a basis for securing the fruits of the warehouse development by means of a Trust Deed**

		have been rejected out of hand. For the record as submitted in our July post Hearing representations it is considered that the Trust Deed is policy compliant. The concept of allowing 25% of total warehousing without any rail connection in place is totally unjustified. The suggestion that some of this would be built in a location not immediately adjacent to the rail track is concerning and again this seems to arise as part of "the viability case" which emphasises the validity of the points on viability made above. The assertion at the last Hearing that there is "no premium for the rail connection" in rental values etc reduces the incentive to complete what is an expensive rail connection and reinforces the need for strong legal measures to ensure that the rail connection is built if the RT is permitted. Moreover there is now an additional problem highlighted by Highways England's Deadline 6 Response to the effect that they are not satisfied that the highway modelling is adequate for the "no rail connection" scenario. This is despite the fact that the applicant was given a further opportunity to provide additional data on the point.
	(ii) Without the flexibility sought by the applicant, a simplified form of Rail Requirement 4 would possibly read as follows: "The undertaker must complete the rail terminal works prior to the earliest of— (a) the occupation of more than 186,000 sq.m of warehousing; or (b) the sixth anniversary of the first occupation of more than 47,000 sq. m. of warehousing". If there are reasonable grounds for allowing some warehousing to be occupied prior to the completion of the RT, would this simplified Requirement 4 provide the necessary certainty as to the delivery of the rail infrastructure?	**Group's Response** **No – because the applicant could receive and spend the proceeds of sale or rents from lettings of the warehouses and not be in a financial position to complete the rail connection (cost said to be £40M). The sanctions remaining via the criminal law are of zero value against an insolvent company and the sanctions against directors (if still around at the time) do not remedy the planning harm which would have been caused. This is why normally when enabling development is permitted mechanisms are put in place to secure the fruits of the enabling development in the way referred to under the reply to (i) above.**

	(iii) Do the parties agree, as a matter of principle, that the Rail Requirements should provide for a subsequent change to the timescale for completion of the RT to be approved either by the LPA or by any other statutory body/authority?	**Group's Response** **Yes**
	(iv) As currently drafted in REP6-003, do the Rail Requirements provide for an appropriate level of certainty as to the delivery of the RT given the Green Belt location of the proposed development?	**Group's Response** **No**
	(v) The current wording of Rail Requirements 4 and 6 make the LPA the decision making authority for approving any subsequent changes to the approved RT delivery requirement. The Applicant expresses confidence that the RT will be delivered in the timescales specified. However, in a 'worst case scenario' the draft Requirements could potentially lead to the LPA being asked to give approval to WMI being completed and/or operated as a large warehousing development with no rail connection, as feared by many IPs in their evidence to the examination. Such an outcome would, arguably, mean that the completed development does not constitute a SRFI NSIP as defined in s26 of the Planning Act 2008. Does the delegation of this decision making authority to the LPA give rise to any legitimate concern that what would be approved under the DCO as drafted may not be developed in a form which would constitute an NSIP?	**Group's Response** **Yes**
	(vi) If there are legitimate concerns of the type set out in Question 5, it seems to the ExA that one way of addressing such concerns would be to reserve to the Secretary of State the power to determine any subsequent application to change the timescale requirement for delivery of the RT rather than delegating this to the LPA. Under such a scenario the current drafting of Rail Requirement 4 might possibly be amended as follows: • Replace the references to "the	**Group's Response** **That is a logical way of addressing that particular point.**

	local planning authority" LPA in paragraph (2) with the words "the Secretary of State;" • Require that copies of the report referred to in (2)(a) be sent to the LPA,	
	3.1.2 (i) Rail Requirement 4(2) includes the wording "the undertaker believes". As there could potentially be difficulty as defining what any person or body may "believe" would additional clarity be added by amending this to read "reasonably believes" so to introduces an objective test?	**Group's Response** **The wording as currently drafted is incapable of enforcement for the following reasons:** **(a) The phrase "outside of the control of" is not a subject of any decided cases as far as Ansons Solicitors have been able to ascertain. This phrase as been inputted into a search on Lexis Nexus which includes the All England Law Reports and it does not appear as a search result.** **(b) The argument was developed at the last hearing that there should be appropriate definition based on force majeure with appropriate events defined which do or do not fall within the definition. The applicant's Solicitor responded to Ansons enquiry of 17th July 2019 as to whether she wished to engage re Force majeure clause before the last deadline in these terms in an email of the same date : "Just to be clear though, as indicated at the hearing, we will not be drafting a force majeure clause. Force majeure is most often defined by what is outside the control of a party, rather than the other way around, and is really intended for unforeseeable events. We will be concentrating on your concern re availability of funds." In the result the applicant has added "11 (c) the expression "matters outside the control of the undertaker" shall be given its ordinary meaning save that, for the avoidance of doubt, such expression shall not include the inability of the undertaker to fund or obtain funding for the construction of the rail terminal works." As indicated above there does not appear to be any**

		ordinary meaning in legal precedent to "matters outside the control of". **(c) To assist in the general approach to this issue 2 Notes by Practical Law Commercial are appended as Annexes 1 and 2 to this response.** **(d) Please note in particular the problems highlighted by the case of British Electrical and Associated Industries (Cardiff) Ltd v Patley Pressings Ltd [1953] 1 WLR 280 where there was a reference to "force majeure" only. This points to the fact that the use of an expression "matters outside the control of" may well be held to be insufficient to be an effective legal definition. This point has added weight in this case where the issue may come before a Criminal Court on a Prosecution under the Planning Act 2008 where the Prosecution has to meet the criminal standard of proof.** **In summary it is for the applicant to put forward an effective DCO and it is submitted that this has not been done in this case.**
	(ii) As drafted, Rail Requirement 4(2)(a)(ii) requires a revised timetable with "substitute figures" to those in 4(1)(a) and (b).This presupposes that any revised "timetable" would involve a change to the level of floorspace to be built and occupied prior to the completion of the RT rather than, for example a revised programme and agreed dates for achieving key milestones. Is it appropriate and reasonable that the Requirement be based on such an assumption?	**Group's Response** **Yes**
	(iii) If the purpose of any change is to approve a revised timetable, is there a need to agree a change to the 186,000sq.m or 47,000 sq. m or could that purpose be achieved, for example, by changing the wording in 4(1)(a) from "the occupation" to "the first anniversary of the occupation" of 186,000 sq. m? or the wording in 4(1)(b) to "the seventh	**Group's Response** **Yes**

	anniversary" rather than changing the area or floorspace to be occupied?	
	(iv) There appears to be an inconsistency in that 4(2)(a) and 4(5) refer to "substituted figures" whereas the term "substituted dates" is used in 4(4)(a). Is a further amendment needed to remove that apparent inconsistency?	**Group's Response** **Yes**
	(v) Would the use of "substitute dates" throughout Rail Requirement 4 add clarity whilst still providing a reasonable level of flexibility for the undertaker to seek some change in the programme if delivery of the RT is delayed due to matters outside of its control?	**Group's Response** **Yes**
	(vi) New Rail Requirement 11 seeks to define "matters outside the control of the undertaker." However, that term is not used consistently in all such references in Rail Requirement 4; for example, in 4(b). Should this not be consistent throughout the Requirements?	**Group's Response** **Yes but please also see Response to 3.1.2 (i) above.**
	(vii) In the revised wording in Schedule 2 Part 2 the term "shall" is used in various places whereas this has largely been replaced by "must" in most of the articles and requirements in line with the Office of Parliamentary Drafting Guidelines. Should these references be amended accordingly?	**Group's Response** **Yes**