Blaby District Council
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HINCKLEY NATIONAL RAIL FREIGHT INTERCHANGE

Blaby District Council (IP ref. 20040018) Written statement of oral case at ISH5 - Draft DCO and Action Point 113 (ref. TR05007).

Deadline 3 - November 14, 2023

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1.1 This document contains a summary of Blaby District Council's (BDC) oral submissions at Issue Specific Hearing 5 (ISH5) on the draft DCO held on 3 November 2023. It is also a response to Action Point 113.

1.2 BDC was represented at ISH5 by:

(a) Duncan O'Connor, Partner, BDB Pitmans LLP

(b) Edward Stacey, Major Schemes Officer, BDC

1.3 The comments relate to Revision 4 of the draft DCO submitted by the Applicant on 24 October 2023 (Document Reference. 3.1B)

Provision	BDC Comments	Revised drafting proposed by BDC
Art 5 (Authorisation of use)	It is unclear how this article operates in relation to article 42 (Operation and use of railways) and there appears to be a degree of overlap between these provisions. Article 5 authorises the undertaker and any persons authorised by the undertaker to operate and use that part of the authorised development comprised in Works Nos. 1 to 7 inclusive. Works Nos. 1 and 2 include various railway works and the rail freight terminal. Article 42 provides that "The undertaker may operate and use the railway comprised in the authorised development." It is therefore unclear whether 'persons authorised by the undertaker' may operate and use the railway comprised in the authorised development (as suggested by article 5), or whether such use is limited to 'the undertaker' by article 42. As the identity of persons falling within the second limb of the definition of 'the undertaker' in article 2 is not known at this stage, we suggest the more limited scope of article 42 should take priority and article 5 should be amended as shown.	5. Subject to the provisions of this Order and to the requirements, the undertaker ~~and any persons authorised by the undertaker~~ may operate and use that part of the authorised development comprised in Works Nos. 1 to 7 inclusive for the purposes of a rail freight terminal and warehousing, any purposes for which such parts of the authorised development is designed and for any purposes ancillary to those purposes.
Art 7 (Benefit of Order)	For the reasons set out below, article 7(2) should be extended to specify that the benefit conferred by certain other provisions of the order is limited to Tritax Symmetry (Hinckley) Limited.	2) Tritax Symmetry (Hinckley) Limited, has the sole benefit of the provisions of - a) Part 5 (powers of acquisition); b) article 22 (protective works to buildings); and c) article 23 (authority to survey and investigate the land), unless the Secretary of State consents to the transfer of the benefit of those provisions

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Art 9 (Street works)	The activities listed in art 9(1)(e) to (i) go well beyond the model provisions and should be deleted. The Applicant's draft explanatory memorandum states that "*the inclusion of this Article in the draft DCO provides a statutory right to undertake street works within the specified streets and means that the undertaker will not need to obtain a separate licence from the street authority under the New Roads and Street Works Act 1991.*" The drafting of this article represents a misunderstanding of the scope of 'street works' in the 1991 Act. The activities listed in art 9(1)(e) to (i) do not fall within the definition of 'street works' in section 48 of the 1991 and therefore do not require (and would not be capable of being consented by) a street works licence under the 1991 Act. 'Street works' are defined in s. 48 of the 1991 Act as: *"works of any of the following kinds (other than works for road purposes) executed in a street in pursuance of a statutory right or a street works licence—* *(a)placing apparatus, or* *(b)inspecting, maintaining, adjusting, repairing, altering or renewing apparatus, changing the position of apparatus or removing it,* *or works required for or incidental to any such works (including, in particular, breaking up or opening the street, or any sewer, drain or tunnel under it, or tunnelling or boring under the street)."*	9.—(1) The undertaker may for the purposes of the carrying out of the authorised development, enter on so much of any of the streets specified in Schedule 3 (streets subject to street works) as are within the Order limits and may— (a) break up or open the street, or any sewer, drain or tunnel under it; (b) tunnel or bore under the street; (c) place apparatus in the street; (d) maintain apparatus in the street or change its position; and (~~e) construct bridges and tunnels;~~ ~~(f) increase the width of the carriageway of the street by reducing the width of any kerb, footpath, footway, cycle track or verge within the street;~~ ~~(g) alter the level or increase the width of such kerb, footway, cycle track or verge;~~ ~~(h) reduce the width of the carriageway of the street;~~ ~~(i) make and maintain crossovers and passing places; and~~ (e) ~~(j)~~ execute any works required for or incidental to any works referred to in sub-paragraphs (a) to (e)~~(i).~~

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	The drafting of the model provision reflects this and expressly provides a statutory right to carry out works which involve placing apparatus in streets. The Applicant's drafting goes well beyond this and seeks to provide a statutory right to undertake works outside the scope of 'street works' covered by the 1991 Act. This creates uncertainty as to whether article 9 is intended to confer an express authorisation to carry out works such as the construction of bridges and tunnels which may or may not be included with the scope of the authorised development described in Schedule 1 to the dDCO. The fact that equivalent drafting may have been included in previous DCOs is not a reason for perpetuating this misunderstanding. The deletion does not affect the scope of works authorised by the DCO or the powers conferred in relation to alterations to streets. The matters covered by article 9(1)(f) to (i) are expressly authorised by article 10(1) so the deletion does not affect the undertaker's ability to carry out those works.	
Art 10 (Power to alter layout, etc., of streets)	The power in article 10(1) should be subject to the consent of the relevant street authority, rather than the highway authority. The power in art 10(1) applies to 'streets' which are defined by reference to s. 48 of the New Roads and Street Works Act 1991. 'Streets' for the purposes of the 1991 Act may not necessarily be public highways. Accordingly, the appropriate person to consent to the exercise of the power in art 10(1) is the street authority; a	(2) The powers conferred by paragraph (1) must not be exercised without the consent of the ~~relevant highway authority~~ relevant street authority ~~-~~but such consent must not be unreasonably withheld and if the ~~relevant highway authority~~ relevant street authority has received an application for consent to exercise powers under paragraph (1) accompanied by all

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	term which is already defined in the draft DCO – again by reference to the 1991 Act. Where a street is a maintainable highway, the street authority is highway authority. But if a street is not a highway, the street authority is the authority, body or person liable to the public to maintain or repair the street or, if there is none, any authority, body or person having the management or control of the street – see s.49 of the 1991 Act.	relevant information and fails to notify the undertaker of its decision before the end of the period of 42 days beginning with the date on which the application is submitted with all relevant information, it is deemed to have granted consent.
Art 22 (Protective works to buildings and structures)	This power should be amended so that is can only be exercised (a) by Tritax Symmetry Limited; and (b) within the Order limits. As drafted the article provides a power of entry onto any land regardless of whether that land is within the Order limits. The Applicant has provided no justification for this. Furthermore, following commencement of the works on the Main Site, the power could be exercised by any person who has an interest in the relevant part of that site. Accordingly, as drafted, this article provides a power of entry onto unspecified land, but persons who are currently unknown. This is clearly unacceptable. Whilst the article provides that compensation is payable by the undertaker for loss or damage caused by the exercise of this power, this liability is not subject to the guarantee in article 40. The article should be amended as shown.	22(1) - Subject to the provisions of this article, the undertaker may at its own expense carry out the protective works to any building or structure lying within the Order limits which may be affected by the authorised development as the undertaker considers necessary or expedient
Art 23 (Authority to survey and investigate the land)	BDC submits that the powers conferred by this article should be restricted to Tritax Symmetry (Hinckley) Limited. See the suggested amendment to article 7.	See amendments to articles 7 and 40.

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	The liability to pay compensation under this article should also be subject to the guarantee is article 40. See suggested amendment to that provision.	
Art 34 (Temporary use of land for carrying out the authorised development)	Article 34(3) is not justified and should be deleted. The new wording requiring the giving of such period of notice "as is reasonably practical in the circumstances" is not sufficient to overcome BDC's objections to this provision. There would need to be very special justification for a power of entry onto land without notice. It is clearly not appropriate for this power to be available simply because the undertaker identifies "a potential risk to the safety of the matters listed in sub-paragraph (3). There is no clarity in the drafting as to what such 'a potential risk to the safety' of these matters might constitute. What is a risk to the safety of the environment? The provision gives the undertaker complete discretion to determine this. The provision is clearly not appropriate and should be deleted.	~~(3) The undertaker is not required to serve notice under paragraph (2) where the undertaker has identified a potential risk to the safety of any of—~~ ~~(a) the authorised development or any of its parts;~~ ~~(b) the public; and/or~~ ~~(c) the surrounding environment,~~ ~~and in such circumstances, the undertaker may enter the land under paragraph (1) subject to giving such period of notice as is reasonably practical in the circumstances.~~
Art 35 (Temporary use of land for maintaining the authorised development)	Article 35(9) should be deleted for the same reasons given above in relation to article 34(3).	~~(9) The undertaker is not required to serve notice under paragraph (3) where the undertaker has identified a potential risk to the safety of any of—~~ ~~(a) the authorised development or any of its parts;~~ ~~(b) the public; and/or~~ ~~(c) the surrounding environment,~~ ~~and in such circumstances, the undertaker may enter the land under paragraph (1) subject to~~

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		~~giving such period of notice as is reasonably practical in the circumstances.~~
Art 40 (Guarantees in respect of payment of compensation)	The guarantee in respect of compensation should be extended to all articles which impose an obligation to pay compensation.	40.—(1) The undertaker must not exercise the powers conferred by the provisions referred to in paragraph (2) in relation to any land unless it has first put in place a guarantee or alternative form of security approved by the relevant planning authority in respect of the liabilities of the undertaker to pay compensation under this Order in respect of the relevant power in relation to that land. (2) The provisions are— (a) article 12 (temporary closure of streets) (b) article 22 (protective works to buildings); (c) article 23 (authority to survey and investigate the land) (d) article 25 (compulsory acquisition of land); (e) article 26 (compulsory acquisition of land - incorporation of the mineral code); (f) article 27 (compulsory acquisition of rights); (g) article 30 (private rights); (h) article 31 (rights under or over streets); (i) article 34 (temporary use of land for carrying out authorised development); (j) article 35 (temporary use of land for maintaining authorised development); and (k) article 36 (statutory undertakers).

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Art 43 (Operational land for the purposes of the 1990 Act)	The scope of this provision was queried by the ExA in its initial comments on the dDCO included in the Rule 6 letter. BDC does not accept the Applicant's response that "it is considered prudent for this provision to relate to all land within the Order limits" and is concerned that this provides an unreasonably wide area over which permitted development rights that could be exercised over the whole site in future. The ability to exercise permitted development rights should only apply to land that can properly be regarded as 'operational land' within the definition in s. 263 of the TCPA 1990 (i.e. land which is used for the purpose of carrying on their undertaking; and land in which an interest is held for that purpose). The Applicant should be asked to reconsider this point.	
Art 45 (Defence to proceedings in respect of statutory nuisance)	There is overlap and duplication between 45(1)(d) and the other sub-paragraphs of article 45(1). The drafting should be clarified as shown.	45.—(1) Where proceedings are brought under section 82(1) of the Environmental Protection Act 1990 (summary proceedings by persons aggrieved by statutory nuisance) in relation to a nuisance falling within section 79(1) of that Act (statutory nuisances and inspections therefore) no order may be made, and no fine may be imposed, under section 82(2) of that Act if - (a) the defendant shows that the nuisance— ~~(a)~~ (i) relates to premises used by the undertaker for the purposes of or in connection with the construction or maintenance of the authorised development and that the nuisance is attributable to the carrying out of the authorised

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		development in accordance with a notice served under section 60 (control of noise on construction site), or a consent given under section 61 (prior consent for work on construction site) of the Control of Pollution Act 1974; or ~~(b)~~ (ii) is a consequence of complying with a requirement or any other provision of this Order and that it cannot reasonably be avoided; or ~~(c)~~ (b) the defendant shows that the nuisance is a consequence of the construction or maintenance of the authorised development and that it cannot reasonably be avoided.~~; or~~ ~~(d) relates to premises used by the undertaker for the purposes of or in connection with the maintenance, operation or use of the authorised development and that the nuisance is attributable to the maintenance, operation or use of the authorised development which is being maintained, operated or used in compliance with a requirement or any other provision of this Order and that it cannot reasonably be avoided.~~ (2) Section 61(9) of the Control of Pollution Act 1974 does not apply where the consent relates to the use of the premises by the undertaker for the purposes of or in connection with the

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		construction or maintenance of the authorised development.
Schedule 2 Part 1 Requirement 8 (travel plan)	The Applicant's revised drafting provides that monitoring of the occupier-specific travel plans will continue for 5 years. It does not provide that the measures set out in those plans have to continue beyond that period. BDC's sees no reason why the implementation of the occupier-specific travel plan should cease after 5 years.	(2) Prior to each and every occupation of an individual warehouse unit an occupier-specific travel plan is to be submitted to, and approved in writing by, the relevant planning authority. Each occupier-specific travel plan must be in accordance with the framework travel plan. Each occupier must comply with their occupier-specific travel plan ~~within~~ from not less than three months of the date on which they first occupy the relevant warehouse unit for the duration of the occupation of the relevant warehouse by that occupier. Each occupier must monitor the operation of the occupier specific ~~environmental management~~ travel plan for a period of five years from the date of first occupation of the relevant warehouse (or until the cessation of occupation of that warehouse if earlier).
Requirement 10 (Rail)	BDC's position remains as set out in the Council's written representation. It is not correct for the Applicant to claim that agreement had been reached with BDC over the wording of this requirement – See Applicant's Comments on Written Representations [Appendix A – Applicant's Response to BDC Written Representation Appendix 6] Document reference: 18.3.1.	(1) The rail freight terminal which is capable of handling a minimum of four 775m trains per day and any associated rail infrastructure must be constructed and available for use prior to the occupation of any of the warehousing. (2) No rail infrastructure may be removed which would impede the ability of the rail freight terminal to handle four intermodal trains per day

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		unless otherwise agreed in writing by the relevant planning authority.
Requirement 11 (Container stack height)	BDC's position remains as set out in the Council's written representation. The reason why the maximum height of the stack of the container returns area should be limited to 14.5 meters is because the proposed mitigation planting would not be effective in mitigating landscape and visual effects in the long-term if a container stack height of up to 20.7 metres was permitted.	(1) The height of any stack of containers within the container storage area approved pursuant to the details submitted in accordance with requirement 2 must: (a) not exceed 8.7 metres from finished floor level prior to the fifth anniversary on the date on which the container storage area first comes into use; and (b) not exceed 14.5 metres from finished floor level at any time thereafter. (2) The height of any stack of containers within the returns area approved pursuant to the details submitted in accordance with requirement 2 must: (a) not exceed 8.7 metres from finished floor level prior to the fifth anniversary of the date on which the returns area first comes into use; and (b) not exceed 14.5 metres from finished floor level at any time thereafter.
Requirement 16 (construction hours)	Construction hours on Saturday should be limited to 07:00 to 13:00. **For Deadline 3, BDC will separately provide an update on the discussions with the Applicant on this requirement in response to Action Point 117.**	16.—(1) Construction works relating to the authorised development must not take place on Sundays, bank holidays nor otherwise outside the hours of 07:00 to 19:00 on week days and 07:00 to ~~15:00~~ 13:00 on Saturdays.

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Requirement 31 (Lighting)	The revised wording included in Revision 4 of the dDCO is agreed.	
Schedule 2 Part 2	BDC's position remains as set out in the BDC's Written Representation.	See BDC's Written Representation.
Throughout the Schedules	In accordance with the guidance on statutory drafting, the paragraph numbering in each Schedule to the dDCO should be continuous, rather than restarting at 1 for each Part.	