

**Bristol office**

Narrow Quay House, Narrow Quay, Bristol BS1 4QA  
T: 0117 925 2020 | F: 0117 925 2025  
DX: 7831 Bristol

F.A.O. Paul Clarke  
Head of Property  
Midland Metro Alliance  
4th Floor  
Alpha Tower  
Sussex Street  
Queensway  
Birmingham B1 1TT

**Our ref:** dh/mgm/103967/0001**Your ref:****DDI:** 0117 314 5455**Doc no:** 16464435v2**Also by e-mail:** [p.clarke@metrolalliance.co.uk](mailto:p.clarke@metrolalliance.co.uk)

7 February 2019

Dear Sirs

**The Midland Metro (Wednesbury to Brierley Hill Land Acquisition) Order ("the Proposed Order")  
Objection Number 22 - TJX UK**

We are solicitors acting for and on behalf of TJX UK in this matter.

We are aware that the Secretary of State for Transport intends to hold an inquiry under the Transport and Works (Inquiries Procedure) Rules 2004.

**1. Background**

- 1.1. West Midlands Combined Authority ("WMCA") seeks powers to acquire rights over plot 336 and to acquire rights and extinguish rights in respect of plot 337.
- 1.2. Plots 336 and 337 comprise private roads known as the Embankment and Central Way, which form an essential part of the pedestrian and vehicular access for customers, staff, deliveries and services to the retail units located at the Merry Hill Shopping Centre ("the Shopping Centre").
- 1.3. TJX UK has rights of way over the Embankment and Central Way, which will be interfered with and which may be extinguished entirely. Works affecting these important routes will restrict and disrupt access to and from the Shopping Centre. WMCA has not provided basic details of the proposed works (including, for example, when the works will begin; how long the works will disrupt the use of Plots 336 and 337; the nature of the disruption over this period; or what traffic management steps will be adopted).
- 1.4. We anticipate, based on MWCA's own estimates, that the works affecting the use of the Embankment and/or Central Way may last for over 18 months. This is likely to have a considerable adverse impact upon trade to all retailers at the Shopping Centre, including TJX UK.
- 1.5. Given our client's concerns, its agent, Montagu Evans, submitted a letter of objection dated 29 January 2018 (enclosed for ease of reference).

**Lawyers & Parliamentary Agents**

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1.6. The letter of objection raises a number of concerns, many of which remain unresolved, notwithstanding the provision of the Unilateral Undertaking of WMCA dated 6 December 2018 ("the Unilateral Undertaking"). The objection letter further explains that TJX UK does not object in principal to the scheme which the Proposed Order is intended to facilitate.

## **2. Plot 337 - Lack of clarity in the event of TJX UK's right of way is extinguished**

2.1. As set out in our client's letter of 29 January 2018, Plots 336 and 337 comprise sections of a very important network of private roads, over which our client has access rights, essential for the running of its store at the Shopping Centre. Staff, customers, delivery drivers and maintenance engineers/service contractors use this and the other private roads around the shopping centre to access the TK Maxx unit.

2.2. WMCA has sought to extinguish rights in respect of plot 337 (the Embankment). These rights are integral to our client's use and enjoyment of its retail unit. Please confirm, in the event that TJX UK's rights of way are extinguished over plot 337, what alternative rights will be granted to our client to use this essential access in due course.

## **3. Limited assurances provided by WMCA**

### Unilateral Undertaking dated 6 December 2018

3.1. As the name of the document suggests, the Unilateral Undertaking was prepared by WMCA without any input from TJX UK. TJX UK does not agree to the terms of the Unilateral Undertaking and considers that they are inappropriate. We set out further detail on our client's position below.

3.2. The Unilateral Undertaking provides narrow and limited covenants regarding the implementation of the Proposed Order in respect of plots 336 and 337.

3.3. Amongst other assurances in the Unilateral Undertaking, WMCA covenants to:

3.3.1. maintain vehicle and pedestrian access/egress to the Merry Hill Shopping Centre, in the vicinity of the works, at all times during the works for the scheme if reasonably practicable to do so;

3.3.2. to ensure general access/egress to the Shopping Centre will be maintained at all times via alternative routes;

3.3.3. ensure diversionary routes for vehicular and pedestrian access to the Merry Hill Shopping Centre will be clearly signposted and traffic will be diverted as is required; and

3.3.4. provide regular updates and communication of any works that are considered to reasonably impact the business of TJX UK

3.4. As drafted, the terms contained in the Unilateral Undertaking give little practical assurance to our client. For example:

3.4.1. the assurance to maintain access at all times is subject to a reasonable practicality test. This is inadequate. TJX UK relies upon consistently good access and egress to its store. The assurance as drafted leaves TJX UK and other retailers based at the Shopping Centre (numbering approximately 200) likely to be unfairly prejudiced and fails to prevent the programming of works in which it is not practicable to maintain access (for example, where it is more convenient or cost effective for WMCA to programme works in which it is not practicable to maintain access at all times to the Shopping Centre). The programming of such works is within the control of WMCA

and there is no good reason why WMCA cannot therefore provide a fairer assurance.

- 3.4.2. the covenant to provide an alternative route is of little benefit without additional assurances as to the nature and reasonableness of the alternative route to the store.
- 3.4.3. regular updates and communication of any works are of little benefit to our client if those updates are provided infrequently, in an inappropriate form or in a timetable which does not allow our client sufficient time to make alternative arrangements for service deliveries or staff access. TJX UK will require detailed information of the extent and timing of works and alternative access routes, in good time to inform staff and service providers (including deliveries) to ensure that alternative arrangements can be put in place. For example, short notice provided at 'store' level will be insufficient. As a national retailer, it is essential that detailed information is provided to our client at a national level, with at least 2 weeks' notice of works, so that logistics can be re-arranged and coordinated effectively. Deliveries to the unit at the Shopping Centre often incorporate deliveries to other stores and therefore delays arising from the works will be exacerbated and will cause problems with other stores, without careful planning and proper notice of any adjusted routes.
- 3.5. The qualified assurances contained in the Unilateral Undertaking are insufficient to reasonably mitigate the unfair prejudice to our client which may result from the Proposed Order.
- 3.6. Without further reasonable contractual assurances, our client considers that the Proposed Order should contain further fetters to the powers sought. These are essential to ensuring that unfair prejudice to TJX UK, the other retailers and customers of the Shopping Centre can be avoided.

#### WMCA'S letter dated 18 April 2018

- 3.7. In a letter dated 18 April 2018, WMCA has further suggested that it would satisfy both the Dudley Metropolitan Borough Council's and Intu's (our client's Landlord) concerns regarding traffic management. WMCA suggests that our client should be satisfied with those third party assurances on the basis that they will also satisfy our own client's own needs and requirements.
- 3.8. This position fails to recognise that the individual retailers at the Shopping Centre have very different access requirements and concerns to those of the local Borough Council or the owner of the Shopping Centre.
- 3.9. Neither Dudley Metropolitan Borough Council or Intu has an essential business requirement to maintain uninterrupted and reasonable access to the Shopping Centre for the prolonged duration of the works (estimated to be 18 months).
- 3.10. In any event, despite several requests, the assurances provided to Intu and Dudley Metropolitan Borough Council have still not been provided to our client. Whilst Intu has provided a brief indication of the types of safeguards it is discussing with WMCA, our client has not been provided a copy of the final agreement or even a draft document. We are therefore unable to comment on whether or not the agreement contains sufficient safeguards to appease the concerns raised in this correspondence. Further, we have received no assurance that our client will be able to enforce the terms of any agreement between Intu and WMCA, to which our client is not a party.
- 3.11. A detailed traffic management plan has still not been provided, despite the fact that TJX UK has been requesting this information for almost 12 months.

- 3.12. Whilst the assurances provided to Intu and Dudley Metropolitan Borough Council are as yet unknown, it seems likely that such contractual assurances given to Intu or the Borough Council, will not in the event be enforceable by TJX UK or the other retailers located at the Shopping Centre. It would therefore appear that any such assurances are of little benefit to TJX UK.
- 3.13. The limited traffic management information provided to date consists of a few drawings detailing with rudimentary arrows how works to the inside and outer lanes of a roundabout may be managed. This falls very short of the detailed management information required by TJX UK, to show how traffic will be managed (and impact) the wider network used to access the Shopping Centre. WMCA has to date given no assurance of the likely impact of diversions, stopping up and lane closures which will inevitably result from the proposed works. Neither has it shown that it has undertaken a detailed examination of how traffic will be managed to ensure that reasonable access is maintained throughout.
- 3.14. Our client, quite reasonably, requires assurances that reasonable pedestrian and vehicular access (both in terms of customers and large delivery lorries) will be consistently available throughout the period of the works.
- 3.15. Prolonged issues with accessing or exiting the Shopping Centre are a significant deterrent to customers seeking to attend the Shopping Centre. The presence of road works and associated delays will cause a significant drop in sales which are of extreme concern to our client.

#### Summary of the limited assurances provided to date

- 3.16. In summary, the powers sought under the Proposed Order will involve significant interference with TJX UK's leasehold rights over the private roads known as the Embankment and Central Way, comprised within plots 336 and 337.
- 3.17. These routes provide essential access to TJX UK's retail unit for staff, customers and the provision of deliveries and other services essential to the running of the store.
- 3.18. The Unilateral Undertaking does not provide sufficient comfort on the limited issues it does address. For example, it fails to properly deal with basic assurances, including:
  - 3.18.1. that reasonable and sufficient access will be maintained throughout the period of the works and once the scheme has been completed;
  - 3.18.2. little information has been provided regarding when the works will be commenced or how long they will take;
  - 3.18.3. no substantive traffic management strategy and little information on the extent of the construction works to be undertaken at the Embankment/Central Way (or the surrounding access/egress network); and
  - 3.18.4. the covenants dealing with the provision of information are too broad to be practically effective. The Unilateral Undertaking does not provide any commitment as to the quality of information, when or how the updates will be given.
- 3.19. In addition, the Unilateral Undertaking fails to deal at all with issues of concern raised in our client's letter of objection dated 29 January 2018. For example, the Unilateral Undertaking contains no covenants or assurances at all regarding:
  - 3.19.1. access to existing levels of available customer car parking during and after the scheme works;

- 3.19.2. assurances that full services and utilities will be provided to our client's retail unit during and after the scheme works;
  - 3.19.3. how the provision of access for emergency vehicles during the scheme works will be maintained;
  - 3.19.4. whether the costs associated with increased use of the private roads which TJX UK must contribute towards upkeep will be covered by WMCA and how damage caused by construction vehicles will be managed; and
  - 3.19.5. details of boundary treatments, the environmental impacts or the final scheme position.
- 3.20. At this stage it appears that WMCA is seeking to progress the Proposed Order:
- 3.20.1. without having fully investigated the impact of the works on the many retailers at the Shopping Centre;
  - 3.20.2. without having put in place a suitable traffic management strategy to mitigate the impact on pedestrian and vehicular access to the Shopping Centre; and
  - 3.20.3. without providing sufficient assurances to TJX UK or the other retail retailers that reasonable access will be maintained throughout the period of the works and upon completion of the scheme.

#### **4. Failure to reasonably engage in negotiations**

- 4.1. The Unilateral Undertaking was provided by WMCA without giving TJX UK an opportunity to comment on the terms set out in the Unilateral Undertaking.
- 4.2. WMCA has not engaged in a reasonable attempt to negotiate the requirements by private treaty before applying for the Proposed Order.
- 4.3. We request that you now engage urgently in this respect, as we consider that a sensible agreement dealing with our client's concerns can be reached before additional unwarranted costs arise in progressing the objection at public inquiry.

#### **5. Costs and compensation**

- 5.1. The Unilateral Undertaking provides that our client's rights to statutory compensation are unaffected by the deed.
- 5.2. Given that TJX UK is not an owner or occupier of Plots 336 and 337 (but rather it enjoys rights of way over these plots), it is very concerned that it has very limited recourse to a claim for statutory compensation, under section 10 of the Compulsory Purchase Act 1965.
- 5.3. As a direct result of the Proposed Order, our client's business is very likely to suffer loss, caused by the inevitable disruption to our client's retail unit from works to the access / egress infrastructure serving the Shopping Centre. This will impact directly (as a result of staff, customers, services and deliveries being delayed and disrupted) and indirectly (from customers deterred from attending the Shopping Centre due to prolonged works).
- 5.4. Despite the prospects of the Proposed Order causing significant loss to our client, it does not appear that it will be entitled to recover compensation for losses arising from the inevitable disruption caused by the proposed works over a prolonged period.
- 5.5. In addition, our client is liable to contribute towards the maintenance costs associated with the private roads comprised within Plots 336 and 337. Our client is likely to suffer additional

expense in the form of increased maintenance costs (and increased likelihood of damage from construction vehicles), because the Proposed Order is to include powers for construction vehicles to use these private roads. WMCA has provided no assurances to TJX UK that such costs will be covered.

- 5.6. We appreciate that issues of the value of compensation are not grounds of objection to the Proposed Order per se. However, the likelihood of significant losses to our client's income arising directly from the Proposed Order, which will not be compensated, suggests inherent injustice arising from the implementation of the Proposed Order. Without further contractual assurances that (a) effective traffic management will be utilised throughout the works to ensure good access and egress is maintained to the Shopping Centre and (b) sufficient notice of works is provided, our client and the other Shopping Centre retailers at is at risk of incurring significant, uncompensated, losses. This will result in injustice to the retailers at the Shopping Centre and will be an important factor when balancing the wider objectives of the scheme.

## 6. Conclusion

- 6.1. We must stress that our client's objection is not one of principle or in relation to the merits of the scheme. Our client does however hold very real concerns that the Proposed Order contains few safeguards to protect it (or the other retailers at the Shopping Centre) from implementing the powers in an unfairly prejudicial manner. Our client has sought contractual safeguards to try to mitigate the risks. The Unilateral Undertaking does not adequately address these concerns.
- 6.2. It is clear that the objectives of the proposed scheme could be achieved whilst still mitigating the impact upon TJX UK (and the other 200 plus retailers at the Shopping Centre). However, WMCA has so far failed to provide satisfactory assurances that it will take all reasonable steps to ensure that the significant detriment to our client is adequately managed, or will be compensated.
- 6.3. Our client's preference is to reach an agreement which will allow it the assurances that it requires to continue its business uninterrupted and with suitable compensation agreed.

The current assurances are not sufficient and therefore our client will need to sustain its objection.

Our client has therefore sent a copy of this correspondence to the Secretary of State for Transport c/o Angela Foster, Transport and Works Act Orders Unit, to be submitted to the Planning Inquiry in support of our client's initial objections raised in the attached correspondence dated 29 January 2018. Our client will when writing to the Transport and Works Act Orders Unit reserve its position to make further representations in due course during the inquiry, as necessary.

Our client would like to reach a sensible agreement which deals adequately with its concerns. With that in mind we also enclose an amended Unilateral Undertaking which contains sufficient assurances that, if agreed, will allow our client to remove its objection to the Proposed Order.

We look forward to hearing from you shortly.

Yours faithfully

**Veale Wasbrough Vizards LLP**

*cc FAO of Angela Foster, Transport and Works Act Orders Unit, Department for Transport, Zone 1/14 Great Minster House, 33 Horseferry Road, London SW1P 4DR (ref TWA/17/APP/08/OBJ/22)*

FAO: Melanie Owen-Roberts, Programme Officer, [REDACTED]

by email to: Kalvinder Aratoon, Metro Property & Projects Solicitor, [Kalvinder.Aratoon@wmca.org.uk](mailto:Kalvinder.Aratoon@wmca.org.uk)