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Dear Tim,

Exceptional Hardship Scheme: HS2 Action Alliance response

Further to my letter of 22 May, and our meeting of 27 May, we are writing to explain our final position for the consultation. For your convenience, this is a consolidated response, incorporating the substance of our interim response (of 22 May) and superseding it.

HS2 Action Alliance conducted an extensive review of the Exceptional Hardship Scheme (EHS) proposals. We undertook detailed research on public and private sector schemes that address property blight. We produced a critique of EHS and have developed an alternative compensation proposal based on private sector best practice.

We enlisted the support of our County and District Councils, other named stakeholder consultees, local MPs and thousands of individuals. There are now some 40 local community groups up and down the line working in alliance for fair and just compensation, who have contributed to this response.

Our responses to your consultation questions are:

Q1: The Department for Transport would welcome views as to whether it should introduce an Exceptional Hardship Scheme ahead of decisions on whether, and if so how, to proceed with a high speed route?

Response: We support the immediate introduction of a scheme, but it should be our alternative proposal not the EHS.

Q2: Do you agree with the proposed principles underpinning the proposed Exceptional Hardship Scheme? If not, what alternative principles would you propose, including specific criteria for determining qualification for the scheme?

Response: We do not support the principles of EHS and propose alternatives that we have developed in detail.

Q3: Do you agree with the proposed system for operating the proposed Exceptional Hardship Scheme? If not, what alternative arrangements would you suggest?

Response: We do not agree with the arrangements proposed for EHS's operation, and have proposed alternatives.

We attach the briefing document that we prepared in April, which details our criticisms of EHS and our proposals together with the research that underpins our recommendations.

In summary we contend:

- EHS is unfair, inadequate and against natural justice (see summary on page 6, more detail on page 9 - 11 and at Annex B)
- EHS gives less remedy than private sector schemes that have been endorsed by Government (see summary on page 6, and more detail at Annex A pages 23 - 24)
- The current statutory protections are grossly inadequate (see Annex A pages 21-22)
- Private individuals are left to bear the cost of property blight caused by HS2 (see summary on page 6 and Annex B)
- The Government should adopt a new principle for compensation (see summary on page 7, and Appendix 1) – being that those who create the loss should bear the cost (ie akin to the 'polluter pays' philosophy)
- The scheme should cover all properties (see Annex B, page 30), all reasons for moving (Annex B, page 30) and compensate the full loss in value (Annex B, page 31) including to those who never move (Appendix 1, page 19/20)
- Government should now announce an undertaking that they will guarantee to protect all property values in full for whatever route is eventually chosen, when it is chosen (see PBPS outline and safeguards summarised on page 7 - 8 and at Appendix 1)
- Such an undertaking would remove the bitterness and dogged resistance to HS2 on any route. It reassures the property market and allays people's fears (see page 7-8 and Appendix 1)
- The 11 March announcement created a particular problem for the preferred route option that requires special remedy (see summary on page 7 and Appendix 1 pages 14, 16 - 17).

Causes of property blight

Property blight from major infrastructure projects has two mechanisms:

- People preferring not to live or work in the proximity of major works and infrastructure (by reason of nuisance, but also because of the impact on local amenities and visual appearance)
- People fearing that the proximity of major works or infrastructure will reduce the value of property, so that they either decline to purchase such property or will do so only at a price sufficiently discounted to eliminate the risk of further loss in value.

The latter is a major mechanism, as demonstrated with CTRL, but also now with HS2. It would cease to be material once the railway is complete and running, but is likely to be a major cause of property blight until then (ie at least for the next 17 years).

Further to our meeting on 27 May, we have conducted research as to the mechanisms and extent of property blight in connection with HS2. This is summarised in the Pilot Property Blight Study report that we have agreed with you to supply next week.

A key finding of our new work is that valuation and finance providers are actively spreading blight in their efforts to avoid exposure to risk. This risk aversion applies not only on the

preferred route option but also on both of the other two identified routes. Some lenders are providing guidelines that relate to properties within 1 mile of any of the identified routes.

Some Councils – notably Bucks County Council (and its district councils) that cover all three routes – are responding to searches such that any one of the three routes is treated as the proposed (HS2) route. This also encourages widespread blight.

The result of these developments is that owners are suffering loss in property values for locations which are unlikely to be materially affected, even should HS2 be built in their vicinity. Blight is now considerably more extensive than we believed was the case when we met with you. A fuller study will be following our Property Blight Pilot.

Addressing blight

Property blight is a well known phenomenon with recognised causes that some private sector companies (Central Railway and BAA) have addressed effectively. The crux of those schemes is an announcement at the outset that full compensation will apply from when the decision to go ahead is made.

Our proposal, to guarantee blight free property values, would both be an effective palliative for individuals suffering from property blight and eliminate the major engine of spreading blight – the fear of losing one's personal assets and the risk aversion of lenders.

The compensation scheme itself would purchase properties at unblighted prices where an owner wants to sell their property but could not do so at an unblighted price. These properties might be sold-on but without an undertaking for further compensation. It would also pay compensation to make up the loss from the unblighted value for property that had not previously been compensated by the scheme but was nevertheless blighted. This would be paid effectively as a top up to any payment due under the Land Compensation Act arrangements when the railway has been running a year.

Two issues are important, to have:

- A market based approach to deal with the reality of how people respond to the risk of an uncompensated loss
- Good information to address uncertainty.

The focus on a market-based approach is essential if the market is to be reassured. It does not matter if the fear of uncompensated losses is based on real physical effects or not. A groundless concern can blight properties as effectively as a well grounded one.

Tight proximity restrictions and various exclusions might accurately reflect what will be the market's eventual assessment of the impact of HS2 on property values when it has been built (more than 16 years hence in the case of HS2). But the risk that physical criteria fail to reflect market preferences represents risk for potential purchasers: to accept risk purchasers require a discount. Of course, the physical criteria used in Government discretionary and statutory arrangements (besides those concerning compulsory purchase) make no pretence of representing the preferences of the market, as they, for example, ignore view and tranquillity.

The provision of good information will contain costs by limiting fear and speculation. Our proposals give HS2 Ltd an interest in putting full information into the public domain and reassuring the property market as to the limited local impacts that the project will have (assuming this is the case!). For example, full information on the effects of tunnelling under properties without foundations, and the noise impacts of HS2 will allow prospective purchasers to take an informed view. If the impacts are in fact negligible, then if the market knows this, blight should not occur.

The less fear and speculation, the fewer the interventions that HS2 Ltd would need to make in the property market (to buy blighted properties).

Current position

Both the actual position on routes and the extent of property blight have already evolved and are likely to evolve further:

- There is evidence of substantial reduction in value of properties near the preferred route option
- Financial and valuation providers are promoting property blight through discounting the value of properties for which there is any possibility of HS2 affecting
- Property blight is already no longer confined to the preferred route option
- Attention to different routes during the consultation process will spread blight further
- Any delay or postponement of HS2 (for example if it were to be an outcome of the spending review, or a result of commissioning further studies on route options) will leave existing blight unaddressed.

There is certainly property blight on more than the A413 corridor route. The tight Government focus on the preferred option route has relaxed with a change in Government, so that the likely route seems a less closed question. The risk aversion of lenders has extended blight.

We have collected some information in our Pilot Property Blight Study which shows that there are cases of specific properties that are blighted on other routes and that institutional practices are re-enforcing blight on all the routes. Our full study will be more comprehensive. We have also had feedback on our proposals suggesting other routes should be treated the same way as the A413 corridor route.

If the decision on HS2 were to be postponed or delayed a remedy would still be needed to remove the blight that has been created by the 11 March announcement. Our proposal for Government to announce an undertaking (that they would compensate in full from when any route is chosen) would meet this concern. If HS2 were not to happen, as was the situation with Central Railway and is probably the case for BAA at Heathrow, then the remedy we propose would both eliminate blight and have no cost (as it has for these other projects).

The strong emphasis on fairness, which is a Coalition theme, sits well with the natural justice of HS2 bearing the costs of the reductions in property values that it creates.

The now widespread nature of blight makes a remedy capable of addressing blight on any potential route crucial. The value of an undertaking to protect unblighted values is that it will give lenders, valuers and individuals confidence that they can purchase without risk.

Costs and benefits

We are aware that the undertaking we propose would create a contingent liability, but it has the potential to address property blight on all the potential routes. Moreover, an undertaking involves no expenditure unless and until a route is selected, both of which are subject to some uncertainty. The key issues on the costs and benefits are:

- The proposal does not lead to an *overall* increase in cost – just an issue of who should pay (should individuals bear the cost of selling at depressed prices or should the project's promoter?)
- It is practicable to estimate the costs
- The benefits of such an approach have been proven in the private sector
- It is plausible the cost could be modest and be exceeded by the benefits.

Lord Adonis was dismissive of property blight being extensive when the railway is complete. He may well be right. But the interim effect until operations commence under current

arrangements are and would undoubtedly continue to be severe, as potential purchasers are prepared to buy only at prices that remove the risk of financial loss by reason of HS2.

The costs of the scheme to HS2 Ltd would be greatly less than the losses of the current property owners in the absence of this scheme, because the scheme addresses the risk aversion responsible for much of the blight. The risk aversion observed in purchasers – and re-enforced by lenders – obliges current owners to sell at a discount. While the purchasers may see the unblighted value substantially restored some years later, this does nothing to mitigate the hardship and injustice suffered by current owners.

Given the limited information made available by HS2 Ltd (in the Sustainability Report) we have not been able to cost our proposal. However it would be practicable to estimate the cost to HS2 Ltd of the scheme, for example from studying GIS information for any particular route, provided there is good information on its likely physical impacts. We intend to undertake a follow on study to our Property Blight Pilot Study that will deploy such tools.

It would also be possible to look at the property price impacts of HS1. This latter possibility was discussed by an Interdepartmental group in the late 1990s (with a pilot study), but no serious attempt was made as far as we are aware. We believe that their approach was flawed as it did not look at the full sales process, eg to include lenders' rules.

It is plausible that the cost of the scheme to HS2 would be modest because the scheme prevents the fear of losses from magnifying the real impact of a new railway, allowing the property market to continue in large measure as if HS2 were not occurring. A Government backed guarantee would be likely to be even more successful than the previous private sector guarantees.

It is also plausible that the advantages to HS2 Ltd of providing full and fair compensation could exceed the costs of the scheme. Fair compensation would undoubtedly do much to remove the sense of acute injustice and the bitter and dogged resistance that it generates. In turn this would reduce the challenges and delays that extend project timescales and increase costs – which HS2 would otherwise be sure to experience.

Setting a precedent

A number of Councils have expressed concerns to us that a fair compensation scheme would set a precedent for other Government infrastructure projects, including schools, for which they have responsibility for funding. Such local projects can result in property blight, but it is contained both geographically and in degree by the improvement in amenity to local residents that superior facilities afford.

More significantly, such arrangements might set a precedent for other major infrastructure projects, particularly those where there are no off-setting advantages to local communities.

If arrangements are introduced as we propose and they work well, they may set a precedent. Working well would include effectively addressing property blight, but also encompass being administratively simple, reducing local resistance and simplifying implementation. With a discretionary scheme the Government can evaluate its effectiveness and cost in practice, informing the approach that might subsequently be adopted on other large scale projects.

In our April briefing report (attached), we summarised the position on human rights implications for property blight (page 29). We have had more work done in this area and it seems that there is a strong case that property owners are entitled to compensation for loss of property value (without reference to nuisance) under current UK law. An outline of the position is attached as Appendix 1. We would be reluctant to pursue this case because of the extended timescale before its likely resolution. However, if pursued it could create a binding precedent.

Following a precedent

The Interdepartmental Working Group on Property Blight (of 1997) gathered valuable evidence and developed a clear understanding of the causes and remedies of property blight. However, it fell short of recommending the sort of approach that it commended (in the same report) to be best practice ie the Central Railway scheme – which subsequently became the basis for the BAA scheme, again commended by DfT. The reason for this is that the Interdepartmental approach was concerned with following precedent.

Under common law, a balance is struck between the rights of different property owners to freely enjoy their property. The freedom of one owner to enjoy his property may be to the detriment of his neighbour. The prevention of, or compensation for, nuisance is the basis for this reconciliation, which is what the Land Compensation Act 1973 recreates for people adversely affected by developments that are achieved through the exercise of statutory powers.

The Interdepartmental Group clearly sought solutions that went no further than compensating nuisance, eg they ignored view and tranquillity (that are important particularly in an Area of Outstanding Natural Beauty (AONB)). In failing to protect full property values, their own proposals could not prevent the fear of losing value from spreading blight because the risk of the uncompensated loss would remain.

In our view the position of HS2 Ltd or the Government is not that of a private individual:

- A private individual must work within the planning context of an area, which prevents inappropriate development – and in some cases any development
- The Government can put the previous planning context aside. No one else could possibly put major works across an AONB.

The purpose of HS2 is to do something for the general good, to achieve a net benefit for society. But in doing so it would profoundly compromise nearby individuals' enjoyment of their property: this is a cost of HS2. It is plainly unjust that these individuals should have to personally bear the loss of value to their properties to achieve something for the benefit of others.

The way forward

Had the 11 March been less focused on the A413 corridor route, (named as the 'preferred route option') we would have recommended an entirely 'undertaking' based approach until the route was selected. It is clear now, following the change in government and the evidence of institutional practices (reported in our Pilot Property Blight Study) that there is not a single focus on the A413 corridor route, but we remain worried that more is needed to lift the virulent blight that the 11 March announcement imposed on that route.

In the 21st century it is no longer acceptable for the state to over-ride individuals' enjoyment of their property without full compensation. It may well be that the Human Rights Act has created an entitlement to compensation. In any event, HS2 paying the costs of the damage to property price values it creates, conforms to natural justice.

We appreciate that you will be concerned about the distress that property blight is causing. We hope that we have persuaded you that the proposed EHS will be totally ineffective at remedying this, and that our alternative will both relieve this distress and facilitate a less emotive reaction to HS2.

We are confident that you will find that the fairness and natural justice of the approach match the core values of the government, and commend you to adopt it.

Yours sincerely

Hilary Wharf
HS2 Action Alliance

Appendix 1

HS2 will unlawfully interfere with human rights if it is not accompanied by an adequate compensation scheme for those particularly affected by it.

The current proposal for compensation is inadequate to comply with the UK's obligations under the European Convention on Human Rights, and enforceable under the Human Rights Act (HRA).

Individuals have the right to respect for their homes, and to the peaceful enjoyment of their property (Article 8 and Article 1 of the First Protocol).

Although these rights can be limited where it is necessary and proportionate to do so in the wider public interest, interference with these rights is disproportionate and unlawful if some individuals are required to bear a particular, excessive and unjustifiable burden on behalf of the wider community, without payment of compensation which fairly reflects past and future loss of amenity, past and future loss of use, and loss of capital value.

This is reflected in the case law of both the European Court of Human Rights and the National Courts.

For example the decision of the European Court of Human Rights in *S v France* established that 'compensation may have to be paid to individuals whose rights are infringed by that undertaking in order to achieve a fair balance between the interests of the individual and the community' (para 117).

In *Dennis v MOD* [2003] EWHC793, it was held (at para 47) that as a matter of public policy, selected individuals should not bear the cost of the public benefit, at (para 63) that 'common fairness demands that where the interests of the minority, let alone an individual, are seriously interfered with because of an overriding public interest the minority should be compensated', and (para 83) that damages should reflect past and future loss of amenity, past and future loss of use, and loss of capital value.

Where, as here, a compensation scheme is proposed, it is implicit that it should be fair and rational, and reflect the European Convention principle that compensation should be reasonably related to the reduction in the value of the property and sufficiently flexible to take account of substantially different situations (see by analogy *R(Kelfall) v Secretary of State for Environment, Food and Rural Affairs* 2003 EWHC459(admin)).

These principles mean that if the Government uses its powers to construct a new railway (HS2), those suffering losses must be entitled to compensation under HRA, irrespective of whether this is compensation to which they would be entitled under the Land Compensation Act (1973). The current proposals for compensation are inadequate because:

- They do not propose compensation for all those who suffer loss of value as a result of the Scheme
- They are insufficiently flexible to cover substantially different situations in relation to the loss or damage suffered
- They do not reflect the actual market value of losses, but a figure that has been substantially and unjustifiably discounted