ANNEX TO OPENING SUBMISSIONS

Annex 1: Detailed Legal Submissions

1. Copies of the authorities can be supplied if required.

Human Rights

2. Consideration of human rights issues, principally with respect to Article 1 of the First Protocol, adds little, if anything, to the approach required by the Secretary of State in the CPO Guidance and by the UK courts. In all cases, the making of a compulsory purchase order to acquire private interests in land must be shown to be justified in the public interest.

3. The balance between the public interest and private rights is not only a requirement of the Secretary of State (in the CPO Guidance) and English law (see below) but reflects the position under the Human Rights Act 1998 ("HRA 1998") and the European Convention on Human Rights ("ECHR").

4. The pre-HRA approach is set out in ***R v. Secretary of State for Transport ex parte de Rothschild*** [1989] 1 All E.R. 933 and ***Chesterfield Properties PLC v. Secretary of State*** (1997) 76 P. & C.R. 117.

5. As Laws J held in ***Chesterfield***:

> "To some ears it may sound a little eccentric to describe, for example, Kwik Save's ownership of their shop in Stockton as a human right; but it is enough that ownership of land is recognised as a constitutional right, as Lord Denning said it was. The identification of any right as 'constitutional', however, means nothing in the absence of a written constitution unless it is defined by reference to some particular protection which the law affords it. The common law affords such protection by adopting, within *Wednesbury*, a variable standard of review. There is no question of the court exceeding the principle of reasonableness. It means only that reasonableness itself requires in such cases that in ordering the priorities which will drive his decision, the decision-maker must give a high place to the right in question. He cannot treat it merely as something to be taken into account, akin to any other relevant consideration; he must recognise it as a value to be kept, unless in his judgment there is a greater value that justifies its loss. In many arenas of public discretion, the force to be given to all and any factors which the decision-maker must confront is neutral in the eye of the law; he may make of each what he will, and the law will not interfere because the weight he attributes to any of them is for him and not the court. But where a constitutional right is involved, the law presumes it to carry substantial force. Only another interest, a public interest, of greater force may override it. The decision-maker is, of course, the first judge of the question whether in the particular case there exists such an interest which should prevail."

6. Under the ECHR, Article 1 of the First Protocol provides:

> "**Article 1 Protection of property**
>
> Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law. The

preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties."

7. An interference with private property rights must be justified in the public interest. In Strasbourg terms what is described as a "fair balance" must be struck between the public reason for acquisition and private property rights. The "fair balance" is one of the forms of "proportionality" i.e. the requirement that the decision to expropriate must be justified on the facts of the case. In ***James v. UK*** (1986) 8 EHRR 123 at [50]:

> "Not only must a measure depriving a person of his property pursue, on the facts as well as in principle, a legitimate aim "in the public interest", but there must also be a reasonable relationship of proportionality between the means employed and the aim sought to be realised ... This latter requirement was expressed in other terms in the *Sporrong and Lönnroth* judgment by the notion of the "fair balance" that must be struck between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights (… para. 69)."

8. As can be seen, this closely corresponds with the requirements of English law and policy. The CPO Guidance, in particular provides at paras. 12 and 13:

> "12. How does an acquiring authority justify a compulsory purchase order?
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> It is the acquiring authority that must decide how best to justify its proposal to compulsorily acquire land under a particular act. The acquiring authority will need to be ready to defend the proposal at any inquiry or through written representations and, if necessary, in the courts.
>
> There are certain fundamental principles that a confirming minister should consider when deciding whether or not to confirm a compulsory purchase order (see How will the Confirming minister consider the acquiring authority's justification for a compulsory purchase order?).
>
> Acquiring authorities may find it useful to take account of these in preparing their justification. A compulsory purchase order should only be made where there is a compelling case in the public interest.
>
> <u>An acquiring authority should be sure that the purposes for which the compulsory purchase order is made justify interfering with the human rights of those with an interest in the land affected. Particular consideration should be given to the provisions of Article 1 of the First Protocol to the European Convention on Human Rights and, in the case of a dwelling, Article 8 of the Convention</u>.
>
> 13. How will the confirming minister consider the acquiring authority's justification for a compulsory purchase order?
>
> <u>The minister confirming the order has to be able to take a balanced view between the intentions of the acquiring authority and the concerns of those with an interest in the land that it is proposing to acquire compulsorily and the wider public interest. The more comprehensive the justification which the acquiring authority can present, the stronger its case is likely to be</u>.
>
> However, the confirming minister will consider each case on its own merits and this guidance is not intended to imply that the confirming minister will require any particular degree of justification for any specific order. It is not essential to show that land is required immediately to secure the purpose for which it is to be acquired, but a confirming minister

will need to understand, and the acquiring authority must be able to demonstrate, that there are sufficiently compelling reasons for the powers to be sought at this time.

If an acquiring authority does not:

• have a clear idea of how it intends to use the land which it is proposing to acquire; and

• cannot show that all the necessary resources are likely to be available to achieve that end within a reasonable time-scale." (emphasis added)

9. The ECtHR has always accorded a wide "margin of appreciation" to public authorities exercising compulsory powers. The ECtHR has refused to involve itself in detailed consideration of the merits of policy judgments. In the context of expropriation, the Court said in ***James v. UK*** at [46]:

> "46. … the decision to enact laws expropriating property will commonly involve consideration of political, economic and social issues on which opinions within a democratic society may reasonably differ widely. The court, finding it natural that the margin of appreciation available to the legislature in implementing social and economic policies should be a wide one, will respect the legislature's judgment as to what is 'in the public interest' unless that judgment be manifestly without reasonable foundation."

10. The ECtHR does not require there to be no alternative to a particular scheme in issue in order to justify compulsory purchase. See ***James v. UK***, at [51] which, although expressed in the context of the Leasehold Reform Act 1967 (which forced landlords to sell the freehold or a long lease to certain tenants), the same reasoning applies to CPOs:

> "The availability of alternative solutions does not in itself render the leasehold reform legislation unjustified; it constitutes one factor, along with others, relevant for determining whether the means chosen could be regarded as reasonable and suited to achieving the legitimate aim being pursued, having regard to the need to strike a "fair balance". Provided the legislature remained within these bounds, it is not for the Court to say whether the legislation represented the best solution for dealing with the problem or whether the legislative discretion should have been exercised in another way …"

11. Strasbourg considers the availability of compensation to be a relevant consideration although not an absolute requirement. See ***James v. UK*** at [54][1] (emphasis added):

> "Like the Commission, the Court observes that under the legal systems of the Contracting States, the taking of property in the public interest without payment of compensation is treated as justifiable only in exceptional circumstances not relevant for present purposes. As far as Article 1 is concerned, the protection of the right of property it affords would be largely illusory and ineffective in the absence of any equivalent principle. Clearly, compensation terms are material to the assessment whether the contested legislation respects a fair balance between the various interests at stake and, notably, whether it does not impose a disproportionate burden on the applicants ...
>
> The Court further accepts the Commission's conclusion as to the standard of compensation: the taking of property without payment of an amount reasonably related to its value would normally constitute a disproportionate interference which could not be considered justifiable under Article 1. Article 1 does not, however, guarantee a right to full

[1] See also ***Lithgow v. UK*** (1986) 8 EHRR 329 at paras. 120-122 which follows the same approach and in which an attack on the means of assessing compensation was singularly unsuccessful.

> compensation in all circumstances. Legitimate objectives of "public interest", such as pursued in measures of economic reform or measures designed to achieve greater social justice, may call for less than reimbursement of the full market value. Furthermore, the Court's power of review is limited to ascertaining whether the choice of compensation terms falls outside the State's wide margin of appreciation in this…"

12. Indeed, Strasbourg will only find breach of A1P1 where there is an *extreme disparity* between the compensation awarded and value: see ***Vistins v. Latvia*** (2014) 58 EHRR 4 at [110]-[119].

13. It follows that, depending on the circumstances, the ECHR does not even require that market value (which is secured by the compensation rules under UK legislation for CPOs) be given in order for it to be sufficient. This underlines the fact that compensation is looked at by Strasbourg in broad terms. In the UK legal system the compensation code, generally based on market value and the principle of equivalence, provides compensation for losses which will be suffered by those whose interests are compulsorily acquired: see e.g. the Land Compensation Act 1961.

14. Under the "principle of equivalence" a person whose property is acquired is entitled to recover no less (and no more) than the losses suffered: this includes not only the value of the land acquired but directly related consequential losses (i.e. disturbance). As Lord Nicholls expressed the principle in ***Director of Buildings & Lands v. Shun Fung Ironworks Ltd*** [1995] 2 W.L.R. 404 at 411-412 (emphasis added):

> "The purpose of these provisions… is to provide fair compensation for a claimant whose land has been compulsorily taken from him. This is sometimes described as the principle of equivalence. No allowance is to be made because the resumption or acquisition was compulsory; and land is to be valued at the price it might be expected to realise if sold by a willing seller, not an unwilling seller. But subject to these qualifications, a claimant is entitled to be compensated fairly and fully for his loss. Conversely, and built into the concept of fair compensation, is the corollary that a claimant is not entitled to receive more than fair compensation: a person is entitled to compensation for losses fairly attributable to the taking of his land, but not to any greater amount. It is ultimately by this touchstone, with its two facets, that all claims for compensation succeed or fail."

15. This approach was confirmed by the House of Lords in ***Waters v. Welsh Development Agency*** [2004] 1 W.L.R. 1304 at para 1 where Lord Nicholls stated:

> "1. Compulsory purchase of property is an essential tool in a modern democratic society... Hand in hand with the power to acquire land without the owner's consent is an obligation to pay full and fair compensation. That is axiomatic: *Director of Buildings and Lands v Shun Fung Ironworks Ltd* [1995] 2 AC 111, 125."

16. The English provisions for compulsory purchase and compensation accordingly plainly satisfy the requirements of the ECHR.

17. It has been expressly recognised by the Courts that English CPO law and procedure complies with the ECHR. In ***Tesco Stores Ltd v. Secretary of State & Wycombe District Council*** (2000) P & CR 427 Sullivan J. held at p. 429:

> "I am not persuaded that either the Convention or the principle of proportionality add any new dimension to the pre-Convention jurisprudence that is applicable to the present case.
>
> In very broad terms, the Convention requires that a fair balance must be struck between the public interest, in the present case in securing much needed redevelopment of the Western Sector of the town, and an individual's right to the peaceful enjoyment of his possessions. Any interference with that right must be necessary and proportionate.
>
> Although the Human Rights Act 1998 does not come into force until October 2, I am satisfied that for present purposes the Secretary of State's policy as set out in Circular 14 of 94 that a Compulsory Purchase Order should not be made unless there is 'a compelling case in the public interest' fairly reflects that necessary element of balance."

18. In ***Bexley LBC v. Secretary of State*** [2001] EWHC Admin 323, following the coming into force of the HRA, Harrison J. followed *Tesco* and held at para. 46 (emphasis added):

> "It was accepted on behalf of the Secretary of State that, by virtue of section 22(4) of the Human Rights Act 1998, he was required to act in accordance with the European Convention on Human Rights when making his decision on 17 August 2000. It was therefore accepted that Article 1 of the First Protocol to the Convention applied in the same way as it applied to the Secretary of State's decision in the *Tesco Stores* case. The right of an individual to peaceful enjoyment of his possessions under that Article is a qualified, rather than an absolute, right and it involves a balancing exercise between the public interest and the individual's right whereby any interference with the individual's right must be necessary and proportionate. Like Sullivan J in the *Tesco Stores* case, I am not persuaded that there is anything materially different between those principles and the principles applied by the Secretary of State under Circular 14/94 whereby a compulsory purchase order is not to be made unless there is "a compelling case in the public interest". Such an approach necessarily involves weighing the individual's rights against the public interest."

19. The Court of Appeal has agreed with this approach. In ***R. (Hall) v First Secretary of State Potter v. Hillingdon LBC*** [2008] J.P.L. 63 Carnwath LJ held (citing the predecessor to para. 17 of the CPO Circular in the 2003 CPO Circular):

> "The courts have accepted that this principle fairly reflects the necessary balance required by the Convention (see *R(Clays Lane Housing) v Housing Corporation* [2005] 1WLR 2229 , 2236). Where the balance depends on judgments of planning policy, the Secretary of State's decision will not be open to challenge save on conventional judicial review grounds."

20. Further, in ***R. (Clays Lane Housing Cooperative Ltd) v. Housing Corp*** [2005] 1 W.L.R. 2229 Maurice Kay LJ rejected the view that approach in CPO cases was displaced by the ***Samaroo*** approach of the "least intrusive option":

> "20 The centre piece of the Strasbourg jurisprudence on this point is *James v United Kingdom 8 EHRR 123*. The European Court of Human Rights, at para 51, plainly rejected a test of "strict necessity" and emphasised "the need to strike a 'fair balance'" in relation to article 1 of the First Protocol. The speech of Lord Steyn in *Daly's* case [2001] 2 AC 532, para 27, adopts the language of "no more than ... necessary to accomplish the objective". Although *Daly's* case concerned article 8 it was no doubt because it has been authoritatively applied more generally, and specifically to article 1 of the First Protocol (see *International Transport Roth GmbH v Secretary of State for the Home Department* [2003] QB 728, per Simon Brown LJ, at para 51) that Mr Stanley accepted in the course of his submissions that "necessity" is a requirement of proportionality in the present case. His point is that "necessity" is a more flexible concept than the "strict necessity" that was

rejected in *James v United Kingdom*. In particular, he submits, it does not compel and is not to be equated with the least intrusive option. To this extent, he seeks to distinguish *Samaroo's* case [2001] UKHRR 1150, another article 8 case.

21 That Samaroo's case is not of universal application has been accepted by this court in *Lough v First Secretary of State* [2004] 1 WLR 2557, which was concerned with the application of article 8 and article 1 of the First Protocol to a grant of planning permission. Pill LJ said, at para 49:

"The concept of proportionality is inherent in the approach to decision making in planning law. The procedure stated by Dyson LJ in *Samaroo's* case [2001] UKHRR 1150 ... is not wholly appropriate to decision making in the present context in that it does not take account of the right, recognised in the Convention, of a landowner to make use of his land, a right which is, however, to be weighed against the rights of others affected by the use of land and of the community in general. The first stage of the procedure stated by Dyson LJ does not require, nor was it intended to require that, before any development of land is permitted, it must be established that the objectives of the development cannot be achieved in some other way or on some other site. The effect of the proposal on adjoining owners and occupants must, however, be considered in the context of article 8, and a balancing of interests is necessary ... Dyson LJ stated, at para 26: "It is important to emphasise that the striking of a fair balance lies at the heart of proportionality.'"

Keene LJ agreeing, said, at para 55:

> "the process outlined in *Samaroo's* case, while appropriate where there is direct interference with article 8 rights by a public body, cannot be applied without adaptation in a situation where the essential conflict is between two or more groups of private interests. In such a situation, a balancing exercise of the kind conducted in the present case by the inspector is sufficient to meet any requirement of proportionality."

I interpret this as signifying that what is "necessary" is driven by the balancing exercise rather than by a "least intrusive" requirement.

22 There is nothing new about interpreting the word "necessary" in a less than absolute way. In *Handyside v United Kingdom* (1976) 1 EHRR 737, para 48, the European Court of Human Rights observed that, in the context of article 10(2), "the adjective 'necessary ' ... is not synonymous with 'indispensable'". It compared the position with that arising under article 6(1) where the words are "strictly necessary" and article 2(2) ("absolutely necessary"). It seems to me that it was these more rigorous tests that were rejected by the court in *James v United Kingdom* 8 EHRR 123 in the context of article 1 of the First Protocol.

23 As the word adopted by Lord Steyn in *Daly's case* [2001] 2 AC 532 was "necessary" and not "strictly necessary", I conclude that there is no real inconsistency between Daly's case and *James v United Kingdom*. They both allow "necessary", where appropriate, to mean "reasonably", rather than "strictly" or "absolutely" necessary. Everything then depends on the context because, as Lord Steyn reminds us, at para 28: "In law context is everything." In the present context, I do not regard what Lord Hope said in *Shayler's* case [2003] 1 AC 247 as having been intended to go further than Lord Steyn had gone in *Daly's* case.

24 I therefore focus on the context in this case. It is not a case of naked property deprivation. It is common ground that the decision of 24 June 2002 that there should be a transfer by reason of mismanagement of CLHC is unassailable. The context is one wherein a statutory regulator, HC, having unobjectionably decided upon a transfer, then had to choose between two alternatives, Peabody or TFHC. It chose Peabody.

25 In my judgment, the task in which HC was engaged was wholly different from the task of the Secretary of State in *Samaroo's* case [2001] UKHRR 1150. Having lawfully decided

> that there would have to be a transfer, the decision was then one between two proferred alternatives. Although not in every respect the same as a planning decision, it approximated to what Keene LJ was describing in *Lough v First Secretary of State [2004] 1 WLR 2557*, para 55, namely "a situation where the essential conflict is between two or more groups of private interests". I conclude that the appropriate test of proportionality requires a balancing exercise and a decision which is justified on the basis of a compelling case in the public interest *and* as being reasonably necessary but not obligatorily the least intrusive of Convention rights. That accords with Strasbourg and domestic authority. It is also consistent with sensible and practical decision making in the public interest in this context. If "strict necessity" were to compel the "least intrusive" alternative, decisions which were distinctly second best or worse when tested against the performance of a regulator's statutory functions would become mandatory. A decision which was fraught with adverse consequences would have to prevail because it was, perhaps quite marginally, the least intrusive. Whilst one can readily see why that should be so in some Convention contexts, it would be a recipe for poor public administration in the context of cases such as *Lough v First Secretary of State* and the present case."

21. Accordingly, there is no breach of the HRA or ECHR in considering and, if the submissions and evidence put forward in support of the CPO are found to be soundly based, confirming the CPO.