

Deadline 7 Written Submission on behalf of Tarmac Cement and Lime Ltd

Your Reference: TR010032

Our Reference: 140703.00001

Date: 17th November 2023

Gateley **HAMER**

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1. Introduction

- 1.1. The Examination Authority (ExA) may recall that there are four issues in relation to the Tarmac Cement and Lime Ltd (Tarmac) Site. These are:
- The Permanent Rights included in the DCO to enable the Applicant to undertake works to existing utility apparatus.
 - Temporary Rights of Access included in the DCO to enable works to the utility apparatus.
 - The impact of both temporary and permanent acquisitions of land on planning conditions for the landfill area.
 - The impact of both temporary and permanent acquisitions of land on an Environment Agency (EA) permit for the use and remediation of the landfill site and the future surrender of the EA permit.
- 1.2. In this document we will seek to update the ExA on the progress of negotiations, respond to further concerns that are raised by the Applicant's response at Deadline 6 (D6) and provide a conclusion on each of the four areas.

2. Negotiation Update

- 2.1. In general negotiations are progressing with a view to resolving the outstanding issues. However, Tarmac and their advisors, are aware of circumstances whereby the National Highways has agreed heads of terms during an examination period for a DCO only to delay legal completion, await the confirmation of the DCO, and then back out of the agreement in order to use the powers in the DCO. Tarmac therefore consider that the ExA should not take any comfort from the progress of negotiations until an agreement has been signed and documented (the agreement of heads of terms is not sufficient).

Permanent Rights

- 2.2. The Applicant has stated that Permanent Rights are required in order to undertake works (OH4 and OH5) to Pylons PAB18, PAB19 and ZJ016.
- 2.3. It is our view that the Applicant has not justified the requirement for Permanent Rights (see paras 3.2 to 3.14 below). However, Tarmac does accept that if the Applicant is intending to carry out the works themselves then Temporary Rights will be required. Tarmac have therefore offered a licence to the Applicant to enter upon the land and undertake the required works to Pylons PAB18, PAB19 and ZJ016.
- 2.4. It is Tarmac's belief that the Applicant will not undertake the works themselves but would pass this responsibility to the existing utility owners National Grid Electricity Distribution (NG) and UK Power Networks (UKPN) both of whom have existing agreements. Tarmac's legal advice is that if NG and UKPN were to undertake the works they would be able to do so under the existing agreements. The Applicant is not confident of this as set out in the D6 response at paragraph 3.13.4 and reiterated at paragraph 3.13.11, as the words 'replace' and 'alter' are not included. To assist, Tarmac has offered terms to the Applicant to vary the existing agreements in order to include these wordings.

- 2.5. The terms offered by Tarmac would avoid the requirement to implement powers of compulsory acquisition.
- 2.6. To date the Applicant has not responded to the offer.

Temporary Rights of Access

- 2.7. Tarmac and the Applicant have continued to engage on this matter. On 2nd November 2023 Tarmac responded to the travelling draft terms and currently awaits a response.
- 2.8. Tarmac is willing to continue to seek an agreement that limits the impact of vehicle movements across their site but still enables the Applicant to proceed with the scheme, but paragraph 3.13.9 of the Applicant's response at D6 causes concern. In paragraph 3.13.9 the Applicant states:

*IT reiterated that an access agreement was under discussion between the Applicant and Tarmac and so hoped the issue would be narrowed, if not resolved. **However, IT explained that, even if an agreement was entered into, it would be the Applicant's position that the powers to take the land under the dDCO would be retained in the event of any breach or dispute to ensure that the works can be constructed and thereafter maintained, so as not to put the Project at risk. (Emphasis added)***

- 2.9. If it is the stated intention of the Applicant to still use its powers of compulsory acquisition to override any agreement then this would bring into question any weight any agreement may have.
- 2.10. Tarmac awaits the Applicant's response on the terms being negotiated, which must provide sufficient safeguards to ensure Compulsory Acquisition powers cannot be used to undermine any agreement.

Planning

- 2.11. Good progress has been made on this issue with the respective parties' legal advisors having had detailed discussions.
- 2.12. Additional wording has been provided to give greater comfort, but a number of outstanding points still need resolving.
- 2.13. For the avoidance of doubt any agreements reached by Tarmac on this issue will be specific to the circumstances in relation to this site and not reflective of other sites.

Permits

- 2.14. Good progress has also been made on this issue with the respective parties' legal advisors having had detailed discussions.
- 2.15. Two concerns do however remain:
- The DCO wording is reliant on an EA agreement.
 - The mechanics of how permits will be altered needs a review mechanism.
- 2.16. For the avoidance of doubt any agreements reached by Tarmac on this issue will be specific to the circumstances in relation to this site and not reflective of other sites.

3. Concerns over the Applicants position as set out at Deadline 6

3.1. Tarmac has significant concerns over the position set out at D6 by the Applicant. We have addressed these with reference to the four key areas as set out at paragraph 1.1 above.

Permanent Rights

3.2. Whilst the Applicant has provided justification for the requirement to enter the land and carry out works to the existing utility apparatus these are all in relation to temporary scheme works and no justification is provided in respect of the requirement for the Permanent Rights sought because, as set out in the Applicant's D6 response (paragraph 3.13.6), ongoing maintenance is to be undertaken by UKPN and NG as that is a matter for those statutory undertakers.

3.3. At paragraph G.2.2 of its D6 response the Applicant clarifies the works required. We have extracted the wording highlighted in bold in paragraph G.2.2 to summarise the works:

- *(e) to facilitate the above: the installation of conductors, insulators and fittings between pylons ZJ008, ZJ009, ZJ013, ZJ015, ZJ016, ZJ017 and ZJ018 (approximately 3,580 metres).*
- *(c) earthing works on existing pylons PAB11, PAB18 and PAB19; and*
- *(d) to facilitate the above: the installation of conductors, insulators and fittings between pylons PAB12, PAB17 and PAB18 (approximately 1,650 metres).*

3.4. None of the works required for the scheme require the Permanent Rights sought through the DCO. In order to undertake the works only Temporary Rights are required as reflected by the temporary nature of the rights sought by the Applicant in the DCO across the Tarmac site to access the Pylons to undertake the works.

3.5. The only justification we can ascertain from the D6 submissions and previous negotiations as to the requirements for Permanent Rights are:

- UKPN and NGET have asked for them, so the Applicant feels they have to provide them (Paragraph G.4.1 of the Applicant's D6 response)

A request from UKPN and/or NG is not a justification for their inclusion.

- To show the works have been authorised and assessed as part of the DCO process (Para G.4.2 of the Applicant's D6 response)

This could have been done via the inclusion of Temporary Rights to undertake the works.

- A lack of confidence the existing agreements can be utilised (Paragraph G.4.4 of the Applicant's D6 response)

Legal advice received by Tarmac is that the existing agreements would allow the works and future maintenance to take place. However, to assist in this point, Tarmac is willing to provide Temporary Rights to the Applicant and/or alter the existing agreement to provide certainty

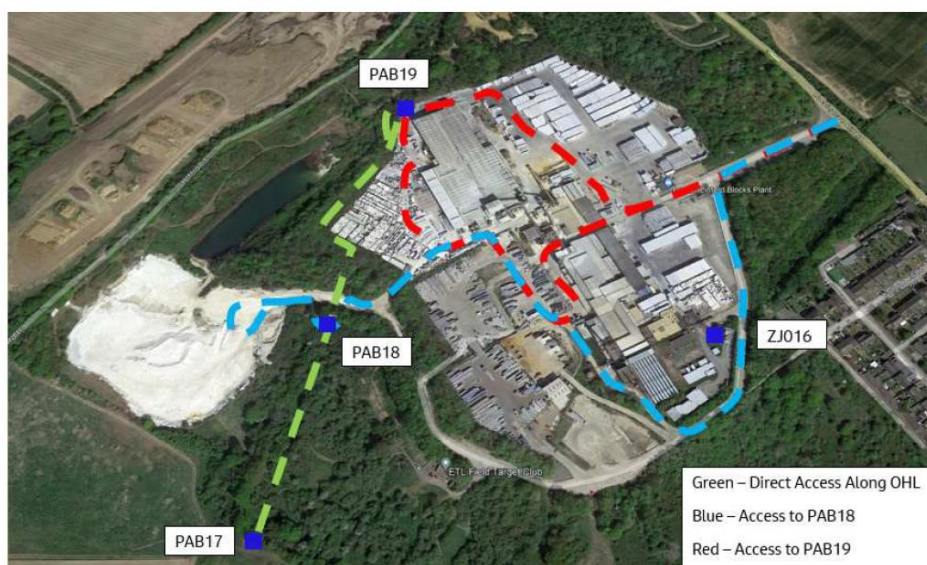
works can be undertaken under those agreements with the inclusion of the words 'replace' and 'alter' which should therefore satisfy the Applicant.

- 3.6. It is Tarmac's view that none of the above justify the inclusion of the proposed Permanent Rights.
- 3.7. We do not believe it is disputed that UKPN and NG will undertake the maintenance of the powerlines in the future. As confirmed by the Applicant's D6 response at paragraphs 3.13.4 and G.4.7, UKPN and NG already have powers of maintenance, repair, renewal, inspection and removal under the existing agreements.
- 3.8. The Applicant seems to consider that the works for the scheme will not be covered by the existing agreement and whilst Tarmac's legal advice is that this would be covered, they are prepared to clarify this through an addendum to the existing agreements. This would avoid the requirement to acquire Permanent Rights through compulsory acquisition.
- 3.9. Tarmac is also concerned with the approach to be taken by either the Applicant or UKPN to access Pylons PAB17, PAB18 and PAB19 to undertake future maintenance. As set out in paragraph G.3.6, UKPN do not currently have rights to pass over the Tarmac site for the purposes of maintenance, renewal etc and currently access is provided on a voluntary basis by Tarmac:

"...as is typical of attending for annual inspections or the undertaking of minor works, UK Power Networks may indeed approach Tarmac to agree an alternative route if they foresee it as beneficial for the mitigation of harm to the environment."

- 3.10. The access rights sought across Tarmac's site through the draft DCO are temporary in nature. Meanwhile, the Permanent Rights sought mirror the rights in the existing UKPN wayleave which do not include rights of access over the Tarmac site as sought through the DCO on a temporary basis. Therefore, should the draft DCO be confirmed the only permanent route of access to the Pylons PAB17, PAB18 and PAB19 for maintenance or said annual inspections will be along the corridor route of the existing overhead powerline shown by the Applicant as a Green Dashed line at Plate G.2 as below:

Plate G.2 Access routes associated with the PAB Route, within Tarmac's site (Work No OH5)



3.11. The Applicant explains the condition of the land between PAB17 and PAB18 at G.2.3 as follows:

The Applicant wishes to highlight that pylons PAB18 and PAB19 are located within heavily vegetated, naturally regenerated parts of the site, with this vegetation, coupled with undulating ground extending south westerly beneath the overhead powerlines between pylons PAB18 and PAB17, as shown at Plate G.1 below.

Plate G.1 Looking west to Pylon PAB18, from south-east of the pylon



- 3.12. If the powers sought are confirmed the only maintenance route will be over the vegetation covered undulating ground (Green Dashed Line on Plate G2). Whilst difficult this may be possible on foot but if a vehicle is required then this will be extremely challenging and vegetation clearance will clearly need to be carried out.
- 3.13. The obvious need for vegetation clearance which results from the permanent rights being sought under the draft DCO is contradictory to the comments made by the Applicant in its D6 response. At paragraph G.3.10 the Applicant states

*The application includes assessment of the loss of all vegetation within the easement corridor to facilitate the construction of the utility works (for both Work No OH4 and Work No OH5) as they correspond with land owned or adjacent to Tarmac land holdings. Owing to the planting restrictions associated with the overhead powerlines, **it is not anticipated that vegetation loss would be required to facilitate future management during the operation of the networks, (emphasis added)** but maintenance of existing and replanted vegetation may be necessary. This would be completed by the utility networks maintenance contractor through their standard operating procedures. The assessment therefore is considered to be a worse-case scenario. This does not obviate the need for the 'spaghetti' configuration during construction as the impacts would be greater on existing vegetation.*

- 3.14. For the reasons set out above we would disagree with the highlighted response on the basis vegetation clearance will be required within the entirety of the blue corridor for future maintenance to take place. It is not clear from paragraph G.3.10 if this has been fully assessed in the EIA or just the areas where works are to take place.

Temporary Rights of Access

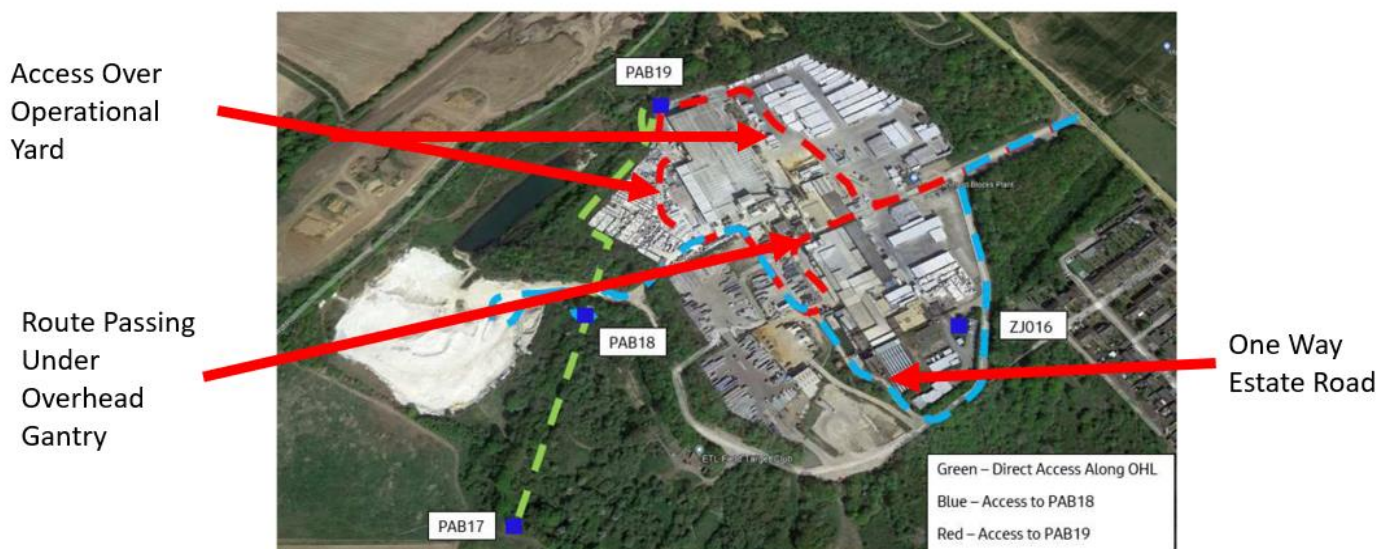
- 3.15. Tarmac accepts the requirement for temporary access rights during works to the Pylons and continues to engage with the Applicant over an agreement that allows such access. Tarmac do however continue to object to the proposed access routes sought by the Applicant.
- 3.16. The Applicant appears to be under the impression that they are seeking to utilise existing routes through the site. At paragraph G.3.4 they state:

The temporary access proposes a series of routes entering and exiting the site from Buckingham Hill Road and then utilising the existing one way circuits that Tarmac's vehicles utilise through the site around the manufacturing plants and storage yards to attend the pylons on the western side of the site.

- 3.17. However, as can be seen from the Applicant's Plate G.2 the proposed route passes, in a number of places through yard space utilised by Tarmac that are not estate roads but operational parts of the site. Furthermore, where the route does pass along estate roads, the route, as set out in G.2, will introduce traffic travelling the wrong way down a one way road. This brings health and safety risks. Finally, despite requests, the Applicant has failed to provide details of the vehicles required to pass along the access routes. Of particular concern is the height of vehicles that may potentially pass underneath overhead gantries.

- 3.18. We have highlighted the areas of concerns on the Applicant's D6 response Plate G2:

Plate G.2 Access routes associated with the PAB Route, within Tarmac's site (Work No OH5)





Photographs Showing One way road

Permits & Planning

- 3.19. Tarmac has concern with the protections being offered in the draft DCO but the parties have been liaising constructively over the wording of DCO Articles 56(3) (planning permission) and 68 (interface with waste operation permits) seeking to adequately address the consenting and permitting issues for Tarmac's Linford landfill arising as a result of Applicant's scheme. The amended Articles 56(3) and 68 recently circulated by the Applicant are not considered ideal by Tarmac from a permit holder perspective and Art 68 is not positively supported, however, if the anticipated amended provisions are submitted by the Applicant and included in the draft DCO, Tarmac would not object to those provisions. Tarmac will need to review the next submitted draft of the DCO to confirm that the anticipated amendments have been included.
- 3.20. However, Tarmac understands that the Environment Agency (EA) still does not agree with Article 68 and contends that under S150 of the Planning Act 2008 that the EA's consent is required for inclusion of Article 68 in the DCO. Tarmac is unclear on what the EA proposes as its alternative and is making contact with the EA requesting details in order that Tarmac can review for comments. It is essential that the EA makes clear as soon as possible its proposals for any amendments to the DCO and how existing environmental permits and licences affected by the Applicant's scheme will be dealt with by the EA as the regulator in order that permit holders, such as Tarmac, have a fair opportunity to consider and comment on those matters as part of the DCO examination. Tarmac will make further comments once the details are known.

4. Conclusion

Permanent Rights

- 4.1. Set out below is the extract from the Government Guidance titled 'Planning Act 2008 Guidance related to procedures for the compulsory acquisition of land':

Section 122 of the Planning Act provides that a Development Consent Order may only authorise compulsory acquisition if the Secretary of State is satisfied that:

- *the land is required for the development to which the consent relates, or is required to facilitate or is incidental to the development, or is replacement land given in exchange under section 131 or 132 (subsection (2) of section 122) and*
- *there is a compelling case in the public interest for the compulsory acquisition (subsection (3))*

Promoters must therefore be prepared to justify their proposals for the compulsory acquisition of any land (or rights over land) to the satisfaction of the Secretary of State and will need to be ready to defend such proposals throughout the examination of the application. The following guidance indicates certain factors to which the Secretary of State will have regard in deciding whether or not to include provision authorising the compulsory acquisition of land in an order granting development consent, and which promoters should therefore take into account when preparing an application.

The promoter should be able to demonstrate to the satisfaction of the Secretary of State that all reasonable alternatives to compulsory acquisition (including modifications to the scheme) have been explored and that the proposed interference with the rights of those with an interest in the land is for a legitimate purpose and is necessary and proportionate. (emphasis added)

The promoter must have a clear idea of how it intends to use the land which it is proposing to acquire, and should be able to demonstrate that there is a reasonable prospect of the requisite funds becoming available. Otherwise, it will be difficult to show conclusively that the compulsory purchase of land meets the two conditions in section 122 (see below) and is therefore justified in the public interest at that time.

The Secretary of State must ultimately be persuaded that the purposes for which an order authorises the compulsory acquisition of land are legitimate and sufficiently justify interfering with the human rights of those with an interest in the land affected. Regard should be had in particular to the provisions of Article 1 of the First Protocol to the European Convention on Human Rights and, in the case of acquisition of a dwelling, Article 8 of the Convention.

(emphasis added)

- 4.2. Whilst it is understood, although not agreed, why the Applicant is seeking rights to undertake works to the utility apparatus, for the purpose of the scheme, no justification is given for the acquisition of Permanent Rights which will not be utilised by the Applicant (temporary rights would be more appropriate). It is understood that the Permanent Rights are required for the future maintenance of

the utility apparatus but this will be undertaken by the two utility operators NG and UKPN. However, both NG and UKPN have existing agreements that allow for the maintenance of the utility apparatus and this is set out in the respective agreements:

For UKPN (see third schedule) it says: "...includes the placing, user, maintenance, repair, renewal, inspection and removal..."

For NG (see clause 1) it says: "...to retain, use, maintain, repair, renew, inspect and remove..."

(The agreements were included with post CAH3 submissions).

- 4.3. Referring back to the Government Guidance and the tests set for consideration, Tarmac's view is as follows:

the land is required for the development to which the consent relates, or is required to facilitate or is incidental to the development and Promoters must therefore be prepared to justify their proposals for the compulsory acquisition of any land (or rights over land)

- 4.4. Tarmac's view is that the Applicant has provided no evidence to support the requirement for Permanent Rights for the scheme. Temporary Rights to undertake works could be justified but the future maintenance of utility apparatus falls to the utility operators and is not relevant to the delivery of the scheme, particularly when rights of maintenance are already in existence for the utility operators. In such circumstances there can be no justification for the compulsory acquisition of the proposed Permanent Rights.

all reasonable alternatives to compulsory acquisition (including modifications to the scheme) have been explored

- 4.5. The Applicant appears to try and justify the inclusion of Permanent Rights on the basis they are required to undertake the works and for future maintenance. Tarmac's legal advice is that the existing agreements provide such rights although they are happy to provide a deed of variation to the existing agreements to confirm this if the Applicant continues to have concerns. By imposing new Permanent Rights when the rights already exist cannot be seen as meeting the test of compulsory acquisition being the means of last resort. The compulsory acquisition of rights already in existence for the same purpose of those in existence cannot be necessary and proportionate.
- 4.6. It is Tarmac's view that the Applicant has failed to meet the tests in respect of the acquisition of Permanent Rights.
- 4.7. Tarmac is of the view that retaining the status quo, under the existing agreements (subject to a reasonable amendment if necessary), would be the least intrusive way of ensuring the maintenance, repair etc of the utility apparatus and ensure UKPN and/or NG are in no worse position.

Temporary Rights of Access

- 4.8. Tarmac continues to work with the Applicant to agree appropriate arrangements for temporary access and await the Applicant's response to the latest terms. The access routes as set out in the draft DCO

would cause significant harm to Tarmac's operation as the routes pass through operational yard space, the wrong way down a one way system and under an overhead gantry.

Planning and Permits

- 4.9. Discussions with the Applicant regarding the impact on planning and permits for the landfill site are continuing. Tarmac's main concern relates to the fact the Applicant has not agreed the position with the EA. Tarmac are unclear on EA's alternative proposals for addressing consenting and permitting issues arising from the scheme and consequently wishes to reserve the right to make further representations when the EA's position is crystallised.