

APPLICATION BY HIGHWAYS ENGLAND FOR AN ORDER GRANTING DEVELOPMENT CONSENT FOR A428 BLACK CAT TO CAXTON GIBBET IMPROVEMENTS

RESPONSES OF DAVISON & COMPANY (GREAT BARFORD) LIMITED TO THE EXAMINING AUTHORITY'S WRITTEN QUESTIONS AND REQUESTS FOR INFORMATION (WQ2)

Issued on 4th November 2021

Q2.5.3.1) Different types of agreements

Examining Authority's Written Question:

ExA sought clarification at the CAH1 [EV-024] to [EV-031] on the difference between several terms that had been used in the various representations: such as options agreement, voluntary agreement, lease agreement and heads of terms. Provide the explanation in writing, the sequence in which these agreements might be reached during the DCO process and their status in the DCO process, clearly identifying which would be considerations in the Examination, and which would be negotiated outside the scope of the Examination. Or signpost where this explanation can be found [REP3-021].

Davison Ltd's response:

As established by the ExA in CA1, in order to satisfy the requirements of Section 122 of the Planning Act 2008 and the Department for Levelling Up, Housing and Communities "Planning Act 2008 Guidance related to procedures for compulsory acquisition of land" ('CPO Guidance'), the Applicant is required to demonstrate that there is a compelling case in the public interest for the proposed compulsory acquisition and temporary possession of land for the purposes of the scheme. This includes seeking all reasonable alternatives to the proposed powers of compulsory acquisition sought in the DCO, including seeking to acquire land by negotiation wherever practicable and only seeking authority to acquire land compulsorily if attempts to acquire by agreement have failed (see 'R(oao FCC Environment (UK) Ltd) v Secretary of State for Energy & Climate Change [2015] EWCA Civ 55 and paragraph 25 of the CPO Guidance').

Accordingly, whether the Applicant has evidenced reasonable attempts to enter into voluntary agreements with Davison Ltd to acquire the land or rights over the land by negotiation is highly material to the question whether the Applicant's request for DCO powers over Davison Ltd's land is a tool of last resort and, overall, whether the Applicant has demonstrated a compelling case in the public interest for the proposed powers of compulsion sought in the DCO powers over Davison Ltd's land.

Heads of Terms are a document which sets out the keys terms of a commercial transaction, used to set out the parties' agreement in principle on the key commercial issues at an early stage of a transaction and provides the baseline and framework around which the detailed legal agreement(s) are then drawn up and negotiated. The typical, and most effective approach to entering into voluntary agreements is to first agree Heads of Terms between agents / surveyors.

Once agreed, these form the basis for the preparation of detailed contractual agreements between the parties' solicitors. In this case, subject to agreeing Heads of Terms with the Applicant (in respect of which Davison Ltd are seeking urgent and detailed engagement with the Applicant given the expedited examination timescales), it is proposed that a lease for the land needed on a temporary basis (e.g. the borrow pit), and an option for the land required permanently (e.g. the route of the main carriageway, etc.); giving the Applicant the option on defined triggers and in specified circumstances of purchasing the relevant land from Davison Limited within a fixed time frame, would be entered into. As stated at CAH1, Davison Ltd remain concerned at the level of engagement by the Applicant with these proposed voluntary agreements.

Q2.5.3.7) Farmland at Caxton Gibbet

Examining Authority's Written Question:

- a) Applicant, is it reasonably possible to return the land to its original condition after the purpose for which it is being acquired has been completed?
- b) If the landowners agree to the land being returned in a materially changed condition, can the Applicant consider TP rather than CA? What conditions would need to be imposed in this case and how would those conditions be secured?
- c) Davison and Co (Great Barford) Ltd, respond to the above questions as relevant, and to the Applicant's case [REP3-018, Point 6].
- d) Provide an update on the negotiations relating to the Voluntary Agreement.

Davison Ltd's response:

- a) n/a
- b) Contrary to what the Applicant is suggesting, materially changing the condition of the borrow pits land is not an impediment to using Temporary Possession (TP) rather than Compulsory Acquisition (CA).

It is common-place for DCOs to authorise TP powers which also authorise land to be materially changed (e.g. article 29 of the M4 Motorway (Junctions 3 to 12) (Smart Motorway) Development Consent Order 2016). Indeed, we note that the Applicant's Draft DCO (dDCO) itself provides for land subject to TP to be materially changed at article 40 'a' to 'f':

(4) Before giving up possession of land of which temporary possession has been taken under this article, the undertaker must remove all temporary works and restore the land to the reasonable satisfaction of the owners of the land; but the undertaker is not required to—

- (a) replace a building removed under this article;*
- (b) restore the land on which any permanent works have been constructed under paragraph (1)(d);*
- (c) remove any ground strengthening works which have been placed on the land to facilitate construction of the authorised development;*
- (d) remove any measures installed over or around statutory undertakers' apparatus to protect that apparatus from the authorised development;*
- (e) restore the land on which any soil reprofiling work has occurred; or*
- (f) remove any temporary works where this has been agreed with the owners of the land*

That the borrow pits land may be materially changed is no justification for the proposed compulsory of such land which the Applicant themselves concede is required for a temporary period only for the purposes of the construction phase of the DCO scheme and not the operational stage. As such, it is neither necessary nor justified for such land to be taken by the Applicant permanently. Suitable reinstatement provisions to the reasonable satisfaction of Davison Ltd can be included in the voluntary agreements or in default of agreement is provided for in article 40 of the dDCO.

- c) We note The Applicant's response to issues arising from Compulsory Acquisition Hearing 1. At Table 1 – 1 the Applicant states:

"The Applicant however maintains the position that all land within Plot 14/16a, including the borrow pit land should remain in the Order as Permanent Acquisition, due to the nature of the works proposed on the land and the extent to which it will be materially altered. To impose material changes on a landowner through temporary possession powers and expect the land

to be returned to the landowner in a materially changed condition would not be acceptable, therefore permanent acquisition is required”

As explained above in our response to Q2.5.3.7 b), the Applicant’s response provides no answer or justification for the proposed compulsory acquisition of Plot 14/16A for the purposes of the borrow pit land in circumstances when:

(a) Davison Ltd are agreeable in principle to the proposed material change of such land and are willing to agree suitable reinstatement provisions to be included in the voluntary agreement;

(b) DCOs routinely authorise TP powers in circumstances when it is proposed that the TP land will be materially changed

(c) In default of agreement with Davison Ltd, the dDCO itself, at article 40, envisages and seeks authority for land subject to TP to be materially changed and

(d) the Applicant themselves admit that such land is not required permanently and, to that end, have proposed that a temporary lease is entered into for such land.

d) By way of update on negotiations for a Voluntary Agreement:

- The Landowner sent Heads of Terms to the Applicant in June 2021. In summary, these proposed terms for:

- i. Temporary possession of borrow pit land.
- ii. Sale of land needed for the highway.
- iii. Temporary possession of compound land.
- iv. Dealing with safeguards for the Landowner’s retained land.

The Applicant has recently responded with draft heads of terms for a lease of the borrow pit land, but to date has not responded at all on the other elements of the Heads of Terms (other than to provide a generic off-the-shelf template option agreement with no proposed bespoke or scheme specific drafting included in it) which Davison Ltd consider to be highly unsatisfactory and insufficient evidence that the Applicant is using the required reasonable endeavours to enter into the voluntary agreements with it.

As stated at CAH 1, Davison Ltd requests urgent and detailed engagement with the Applicant/ Applicant’s team to promptly agree all elements of the Heads of Terms (which need to be negotiated and agreed as a package of measures) and thereafter to draw up and negotiate the proposed voluntary agreements which would both (a) enable the Applicant to acquire the land/ rights over the land it seeks for the purposes of the DCO scheme and (b) safeguard delivery of Davison Ltd’s land which is being actively promoted as a part of a strategically important employment development for allocation in the emerging Greater Cambridge Local Plan, thereby securing relevant synergies.