


4 November 2021

The Planning Inspectorate
Menaka Sahai
Lead Member of the Examining Authority
Temple Quay House
2 The Square
Bristol
BS1 6PN

Direct phone: +44 161 455 6512


Dear Menaka Sahai,

A428 Black Cat to Caxton Gibbet Road Improvement Scheme – Deadline 4

We write on behalf of the Church Commissioners for England (CCfE) in connection with land it has an interest in, which will be impacted by the A428 improvement scheme. The land is located broadly between the settlements of Cambourne and Eltisley, as previously identified within our Written Representation.

This correspondence relates to ‘**Deadline 4**’. As an Interested Party, there are a number of matters which we wish to cover on behalf of CCfE in advance of Deadline 4 today.

(1) Attendance at Compulsory Acquisition Hearing 2 (CAH2) to take place week commencing 29th November

As progress with National Highways (NH) remains extremely slow, we anticipate having to attend CAH2 to present CCfE’s case (Claire Fallows of Charles Russell Speechlys LLP).

(2) Responses to Examining Authority’s Written Questions 2

CCfE’s response to the Examining Authority’s (ExA) First Written Questions (WQ2) of 15 October 2021 is set out below. Where relevant, CCfE’s responses also respond to matters raised in further documents submitted by NH at Deadline 3.

Q2.5.3.1 Clarification as to the difference between terms such as options agreement, voluntary agreement, lease agreement and heads of terms. Provision of the sequence in which these agreements might be reached during the DCO and their status, identifying which would be considerations in the Examination and which would be negotiated outside the scope of the Examination.

Q2.5.3.2 The Applicant is asked, in light of the representations that make the case for the lack of engagement from the Applicant outside of the Examination, to convince the ExA that it has sought to acquire land by negotiation wherever practicable, in line with the guidance related to procedures for CA.

NH expressly states in its response to CCfE’s initial written representations [TR010044/EXAM/9.21], that it is willing to “discuss” entering into a private agreement for land required both permanently and temporarily and will “continue to engage”. As noted above, progress with NH on the various documents is extremely slow. CCfE confirms that a private position statement has been provided by NH, but that is of little practical use in progressing negotiations. The current status is as follows.

- The heads of terms for a “framework agreement” were sent to NH by CCfE on 27 August 2021. The heads of terms comprise a high-level summary of what an agreement could include, to seek agreement on principles before detailed drafting commences. This proposed that CCfE would work with NH in respect of its freehold interest in land to facilitate the delivery of the scheme without the use of powers of compulsion in respect of that interest.

- Some 2 months later, although NH has confirmed that the permanent land take can be by agreement and many of the points put forward by CCfE in the heads of terms for a “framework agreement” can be accepted, a detailed response has not been received save in respect of the borrow pit area as described below. It is anticipated that there would be an “option agreement” or other form of conditional agreement, where NH would have the ability to acquire CCfE’s land as and when needed. CCfE are also willing to grant rights over its land on appropriate terms as necessary for the scheme to proceed.
- NH has also confirmed that the land required for a borrow pit can be leased to enable temporary possession by NH for the duration of the works, without any need for permanent acquisition. It provided heads of terms for an agreement for lease on 7 October, which were responded to on behalf of CCfE on 21 October. The agreement for lease would cater for the grant of a lease to NH on appropriate terms.

NH’s proposed timetable for completing these documents is unknown. In contrast, the legal position is clear.

- By law, CCfE’s solicitors, Charles Russell Speechlys LLP, advise the land must be “required” for the development or required to facilitate or be incidental to the development and there must be a compelling case in the public interest. Compulsory powers cannot be used where those tests are not met.

Under the September 2013 ‘Guidance’ (*Guidance related to procedures for the compulsory acquisition of land*), acquisition must be for a legitimate purpose and proportionate – the Secretary of State must be satisfied that the land is needed and “is no more than is reasonably required”. Case law has previously established in the context of compulsory purchase in a planning context that whilst “required” did not mean “indispensable”, it does mean “necessary in the circumstances of the case” and it is not enough for it to be “desirable” or “convenient” (*Sharkey & another v Secretary of State for the Environment and South Buckinghamshire District Council* 1991).

- The Guidance requires the applicant to demonstrate to the Secretary of State’s satisfaction that “all reasonable alternatives” to compulsory purchase have been explored. Crucially the Guidance requires that “applicants should seek to acquire land by negotiation wherever practicable” and powers to acquire compulsorily “should only be sought ... if attempts to acquire by agreement fail”.
- Applicants are urged to consider offering full access to alternative dispute resolution techniques throughout the whole process.

It is for NH to justify its case for dispossession of or seeking rights over third-party land. The requirement to demonstrate a compelling case in the public interest is a high hurdle, which should not be taken lightly by those purporting to act in the public interest. To date, NH has:

- failed to justify that all compulsory purchase powers are required and are in respect of land that is no more than is reasonably required
- failed to use all reasonable alternatives to compulsory purchase
- failed to acquire land by negotiation despite it being practicable to do so – it is not even close to exhausting attempts to acquire by agreement
- failed to offer access to alternative dispute resolution.

It is abundantly clear that to date NH has not discharged its responsibilities nor met the requirements set by statute and by Guidance as advised by Charles Russell Speechlys LLP.

CCfE await to see NH's response to question 2.5.3.1 and are likely to wish to respond further. NH should without delay explain its proposed timetable for concluding negotiations. At the present rate of progress by NH, it seems extremely unlikely that agreements will be concluded by early December (CAH2 being scheduled for early December).

Only once those negotiations have reached a conclusion and NH's position is fully articulated, will it become possible for landowners to put forward to the ExA a considered position as to whether or not NH's final position complies with statute and Guidance. If further sessions are not programmed, landowners' ability to present a full and proper case to Examination will be prejudiced.

Given the slow rate of progress, it is of no comfort to landowners if NH says that it will continue to use its endeavours to acquire by agreement after the Examination closes (if indeed that is NH's position). That will not make good NH's failure to satisfy the legal tests and requirements of Guidance.

If NH are unable to fulfil their responsibilities within the time set by Examination, the Examination should be paused to enable the necessary negotiations to conclude.

Q2.5.3.8 Affected Persons' site-specific issues – Land near Caxton Gibbet

CCE, identify where in the Statement of Reasons you require further detail [APP-030, Annex A]?

CCfE requests further information on the justification of the extent of permanent acquisition of Plot 14/6e for use as a borrow pit etc as this is a substantial area of land take where land is not actually required for permanent works. Annex A of the Statement of Reasons (page 70) states that the land is required, amongst other things, for a construction area north west of the Caxton Gibbet junction (work no. 106).

No detail is provided in that document as to how NH has calculated the necessary area of land as being required for construction works and as a borrow pit. It is for NH to demonstrate that the land take is "necessary" which, as noted above, does not mean merely "desirable" or "convenient".

Further, this is in the context that: (a) permanent compulsory acquisition is not necessary as the parties have agreed in principle that the area can be leased, and the lack of progress by NH in those negotiations does not and cannot justify compulsory purchase; (b) in any event, permanent land take is not necessary given sufficient rights can be acquired compulsorily; and (c) even if the ExA agreed that permanent land take was appropriate for a borrow pit given the change in land form, that would not justify permanent acquisition of the areas merely required for construction works.

NH therefore needs to demonstrate what area of land is required for borrow pit and what area of land for construction works, should they continue to rely on the argument that compulsory purchase is "necessary". However, that would still only apply if NH properly exhaust their attempts to acquire by agreement.

In its response to CCfE's initial written representations [TR010044/EXAM/9.21], NH state that a larger and shallower borrow pit offers more efficient means of material extraction, simpler management of groundwater and safer maintenance; plus simpler restoration. NH also states that the extent of the plots has been determined by a "buildability contractor who are a competent contractor with experience of schemes of similar scale and an understanding of the minimum land required to construct the works safely and efficiently". CCfE and its consultant team have not seen the justification for this in any examination documentation and have not seen the buildability contractor's report, but would be happy to be directed to the relevant document. Otherwise, stating, without evidence which affected parties can review and comment on, that a competent contractor is content with the position is not adequate justification.

CCE provide further details regarding Plots 13/10c and 13/10d and the landowner not being able to identify which land will be affected or assess the impact on its land

As highlighted in CCfE's Deadline 3 Submissions, permanent rights / temporary possession are being sought over Plots 13/10c and 13/10d for statutory undertaker work. According to NH, the extent of the land subject to the permanent rights is not yet known and will only be narrowed down following detailed design.

As noted above, Charles Russell Speechlys LLP, advise that the legislation does not allow for compulsion to be used where acquisition is "convenient" or "desirable", it must be "necessary". In acknowledging that it may not require all of Plots 13/10c and 13/10d, NH has failed to establish that the temporary land take and permanent rights are needed for the development and are no more than is reasonably required. NH should explain why it is promoting a DCO where the scheme has not been sufficiently designed to establish land requirements.

A helpful meeting with NH was held on 4 November where it was suggested that NH would use endeavours to keep the location of utilities to the perimeter of plots where appropriate. However, that does not seem to be a formal requirement in the DCO and there is no commitment to continue to engage with landowners on the detailed design.

In the circumstances, CCfE is unable to determine where utilities will run through its land and how those permanent rights might affect its ability to deal with its land in the future. Whilst the land is used for agriculture, taking land for utilities will have obvious impacts. However, this land is also being promoted for future development. Not knowing where utilities will be located within the relevant plots limits CCfE's ability to put forward considered plans.

CCE, which specific accesses affect your land?

Access to CCfE land is currently taken from the accesses shown numbered 1, 2, 3 and 6 on the plan attached to these submissions at Appendix 1. The accesses numbered 4 and 5 on the plan relate to land over which CCfE has an interest in by virtue of an option agreement (shown shaded blue on the plan). Access is critical to those farming the land and the accesses shown on the plan must continue to be maintained at all times.

Parties may choose to report on matters in principle in the Schedule of all agreements, negotiations and objections (Annex A), and provide a more detailed report in the separate Joint Position Statement

Please see above update on the current state of negotiations. NH has not approached CCfE regarding a Joint Position Statement.

Q2.6.2 Borrow pits

(a) LAs, NFU and CCE, comment on the Borrow Pits Excavation and Restoration Report [REP3-011] and provide a list of issues relating to size and location, alternatives such as any working quarries, restorations and aftercare, biodiversity, and land contamination that remain outstanding.

CCfE's comments on the Borrow Pits Excavation and Restoration Report (the **Report**) relate to Site 3 (Plot 14/6e) owned by CCfE, which lacks detail. CCfE would like clarity as to the status of the Report, and how compliance with the Report will be secured.

The Report (or the First Iteration EMP as appropriate) should include the following measures:

- Requirements to consult and engage with affected landowners in relation to soil and agriculture including on establishing baseline conditions, the necessary mitigation measures and the detailed proposals for restoration. For example, paragraph 1.7.6 of the Soil Handling and Management Plan at Annex E to the First Iteration EMP states that the PC must undertake further inspections of the restored agricultural land with the landowner / tenant / NH's soil expert to assess the progress of the restoration but there is no information provided as to how that will be secured;
- Obligations on NH to provide specifications for the reinstatement materials before restoration (which should be materials that would not need to be removed in the case of development of the site) and evidence of the borrow pit extents (e.g. a topographical survey showing works done);

- Obligations on NH to ensure that the relevant site is restored to the same Agricultural Land Classification as it was prior to the borrow pit works being undertaken.

(e) Provide details and an update on the possibility of the plots affected by borrow pits being secured by lease.

Please see above. CCfE is ready, willing and able to enter into an agreement to facilitate the grant of a lease.

Q2.7.3.10 – Article 23 – Authority to survey and investigate the land

CCE, state how specifically your farming practices respectively would be affected by the 14 days' notice period.

The power under Article 23 is extremely broad. It does not just relate to access for surveys and investigations, but also excavations, trial holes, boreholes, discharge of water and placing and leaving of apparatus.

The proposed 14 day notice period would have a negative impact on farming practice because it does not give the tenant sufficient notice to:

- mitigate the undertaking of cultivations, crop planting or any crop husbandry on the affected area. Any loss incurred will be at a full level;
- plan any field operations and to manage those in the context of their wider farm holding;
- mitigate any field operations which may create health and safety concerns to either the farming operator or the construction team if they take place concurrently.

Whilst a 28 day notice period may still cause impacts, having double the notice significantly increases the chance that the tenant may be able to mitigate. In any event, this should only be in the context of ongoing engagement by NH or its ALO (see below) with farmers so that they have advance notice of requirements save in the case of emergency.

There is felt to be a lack of understanding and respect by NH for farming practice and the time and resources of farmers. Compensation (which can be disputed and delayed) is not an adequate remedy, where a little more care and co-operation would lead to less damage in the first place.

CCfE is concerned at NH's response to Action 14 arising from ISH3 regarding the meaning of "adjacent" in Article 23 [TR010044/EXAM/9.33 at Appendix B] which suggests that in some cases "adjacent" land could be up to 250 metres from the Order Limits. In addition to the above, this could affect landowners and tenants in ways which they were not aware of when initially consulted, or who have not been consulted on the proposed development at all.

Q2.6.3.1 Agricultural Liaison Officer (ALO)

Applicant, you state that the Principal Contractor will allocate a named individual within the stakeholder and community engagement team as the ALO; you also state that the ALO would need to commission consultancy support should specialist expertise be required. This does not give any assurance that the ALO would have the specific expertise that the NFU have made a case would be required to deliver the required responsibilities. Applicant and NFU to comment. The ExA remains unconvinced that the specialist expertise that would be required for engagement with landowners with farming businesses, would be available and to hand. Applicant and NFU to comment.

CCfE agree. NH has confirmed in its comments on other parties' responses to WQ1 [TR010044/EXAM/9.20, page 51] that there has been no specific consideration of particular farming calendars in the programming of the works but that farming timings and constraints will be evaluated where possible and practicable in the development of the detailed construction programme.

CCfE submits that it is necessary to have a dedicated ALO with an in depth understanding of farming practices to liaise with agricultural landowners and tenants regarding the proposed scheme and to minimise the impact of the proposed works on farming practices.

Other matters:

Outline Construction Traffic Management Plan (OCTMP)

CCfE notes that NH will be submitting an updated OCTMP at Deadline 4. During ISH2, CCfE raised a query regarding the Customer Plan and Stakeholder Engagement and Communications Plan referred to the OCTMP. NH responded that the plan is an internal document, and that it will respond by Deadline 3 as to its contents and purpose. No such information appears to have been submitted by NH at Deadline 3.

CCfE acknowledges NH's response to Action 7 arising from ISH2 [TR010044/EXAM/9.32, pages 5 and 6] but submits that more detail around landowner consultation and engagement is required and that such details should be secured through the DCO. For example, NH's response refers to the requirements of its standard communications plan but as far as CCfE is aware, this plan is not before the ExA.

If you would like to discuss any aspect, please do not hesitate to contact my colleague, Nolan Tucker (ntucker@deloitte.co.uk).

Yours sincerely

A black rectangular redaction box covering the signature of the sender.

Deloitte LLP

Appendix 1 – Access Plan

Deloitte LLP is a limited liability partnership registered in England and Wales with registered number OC303675 and its registered office at 1 New Street Square, London EC4A 3HQ, United Kingdom.

Deloitte LLP is the United Kingdom affiliate of Deloitte NSE LLP, a member firm of Deloitte Touche Tohmatsu Limited, a UK private company limited by guarantee ("DTTL"). DTTL and each of its member firms are legally separate and independent entities. DTTL and Deloitte NSE LLP do not provide services to clients. Please see www.deloitte.com/about to learn more about our global network of member firms. Real Estate Services regulated by RICS.

© 2019 Deloitte LLP. All rights reserved.

CAMBOURNE EXTENSION LAND
APPENDIX 1 SITE PLAN



NOT TO SCALE

savills

UNEX HOUSE 132-134 HILLS ROAD
CAMBRIDGE
CB2 8PA

Tel: +44 (0) 1223 347000

Produced By The Cartographic & Design Team,
Wessex House, Wimborne, Dorset BH21 1PB. Tel: (01202) 856800

MCL/PDF REFERENCE: Z3401APPENDIX 1 SITE PLAN REV A DATE PRODUCED: 28/07/20

NOTE - Reproduced from the Ordnance Survey Map with the permission of the
Controller of H.M. Stationery Office.

© Crown copyright licence number 100024244 Savills (UK) Ltd.
NOTE - Published for the purposes of identification only and although believed to be
correct, its accuracy is not guaranteed.

