Application by National Highways for an Order granting development consent for A428 Black Cat to Caxton Gibbet improvements

Response of Davison & Company (Great Barford) Ltd to the Applicant's submissions received at D5 ('9.65 Applicant's comments on other parties' responses to second round of written questions')

Issued on 13th December 2021

Davison & Company (Great Barford) Ltd ('Davison & Co') responds to the Applicant's comments of 16th November 2021 as follows:

Q2.5.3.1 – Different types of agreement

- Contrary to what the Applicant suggests, the proposed lease and option agreements reasonably required to both (a) deliver the DCO scheme and (b) protect the proposed employment land allocation on Davison & Co's land, are not "standard" and this is not reasonable justification for issuing a template legal agreement with no bespoke drafting in lieu of properly and reasonably engaging with the landowner over its case specific circumstances/ proposed terms.

- The option agreement presented to Davison & Co, was not a 'draft' agreement as is claimed, but a template 'off the shelf' agreement with no bespoke drafting whatsoever. Davison & Co have to date received no confirmation / communications that any solicitors have been instructed by the Applicant to proceed with the voluntary agreements drafting and/or any costs assurances in relation to its costs;

- The Applicant states they "will respond to the Interested Party before the Compulsory Acquisition Hearing, scheduled for 2 December 2021." Nevertheless, as at 2nd December (and contrary to the assertion of the Applicant's representatives at the CA Hearing), the Applicant **had not** made any substantive response to either the:

    - Heads of Terms for an option agreement issued by Davison & Co on 6th July 2021 and/or

    - Heads of Terms for a lease agreement on the borrow pit land returned to the Applicant on 10th November 2021.

- The Applicant has very recently confirmed that it is not prepared to enter into voluntary agreement unless land values are first agreed. This despite the Applicant's valuers to date not having valued Davison & Co's affected property, or sought to inspect. The requirement to agree values in advance means that the valuation date could be up to six years in advance of when possession and ownership of the land is transferred under the option. This puts the claimant in a materially worse position compared to compulsory purchase. In offering terms which are worse than compulsory purchase the Applicant is manifestly failing to use reasonable endeavours to avoid compulsory purchase and to reach voluntary agreement.

- It follows that Davison & Co consider the Applicant, to date, has consistently and throughout the process fallen well below the standard required in national policy to make reasonable endeavours to acquire land by agreement and for compulsory purchase to be a tool of last resort which are both highly relevant and material considerations when assessing whether the Applicant has demonstrated the necessary compelling case in the public interest for the proposed acquisition of the land by compulsion in the DCO.

Q2.5.3.7 – Farmland at Caxton Gibbet

- Contrary to what the Applicant states, the dDCO could be amended to provide for the borrow pits land to be subject to temporary possession ('TP'), whilst still making material changes to the land. It is therefore no answer for the Applicant to say *"The dDCO does not provide for the interests required for the borrow pits to be secured temporarily and so Article 40 does not apply."*

  Specifically, the Applicant has failed to demonstrate why material changes to land used as borrow pits in particular precludes the use of TP, and not in other circumstances envisaged in Article 40 of the dDCO, where permanent works would be authorised on land subject only to TP?

  In essence, what the Applicant is proposing amounts to permanently acquiring the borrow pit land despite no permanent works being needed because the dDCO is purportedly set in stone and cannot be amended. No undertaking has been provided to offer back this land when it becomes surplus to requirements and Davison and Co are very concerned that, absent suitable safeguards and protective provisions, that the Applicant can and will seek to circumvent the offer back obligation in the Crichel Down rules if, as they state, the land will have been materially changed during the construction stage leaving Davison & Co wholly unprotected in these circumstances.

- Davison & Co further note that the Applicant does not refer to the borrow pits (or related activities) at all in their Statement of Reasons, despite this being the primary document setting out the purported compelling case in the public interest justification for the proposed compulsory acquisition of this land for the purposes of the DCO scheme. Davison & Co consider this failing is a significant deficiency in the Applicant's application

  Accordingly, among other things, for the reasons set out above, It follows that the main pre-conditions for the CA of land in S.122 of the Planning Act 2008 have clearly not been met in this case, which are, in summary that:

  1. The Applicant has failed to reasonably demonstrate that compulsory acquisition of the borrow pit land is "required" for the stated purposes (in respect of which the case of Sharkey and Another v SSFe (1992) 63 P. & C.R 332, among other things, is relevant, defining "required" as more than "desirable" or "convenient" but means "necessary in the circumstances of the case); and

  2. There is no compelling case in the public interest for the borrow pit land to be acquired compulsorily as alleged by the Applicant or at all.

- As stated above (and contrary to the assertion of the Applicant's representatives at the Compulsory Acquisition Hearing of 2nd December 2021), the Applicant **had not** by this date made any substantive response to:

  - Heads of Terms for an option agreement issued by Davison & Co on 6th July 2021.
  - Heads of Terms for a lease agreement on the borrow pit land returned to the Applicant on 10th November 2021.

- Unless and until Davison & Co see substantive and a prolonged level and period of engagement by the Applicant with agreeing Heads of Terms and negotiating and finalising the necessary legal agreements, it is hard to conclude that the Applicant is doing anything other than paying lip service to the national policy requirements to use reasonable endeavours to acquire land by agreement and to only seek and use compulsory purchase powers as a tool of last resort.

- Davison & Co are significantly concerned that there is now only 2 months remaining during the examination period and the Applicant by their general inactivity and are running the clock down on the examination period with a token level of engagement to enable them to assert that there has been insufficient time to negotiate the necessary agreements and thereby DCO powers are required to be authorised over its land.

- Among other things, for this reason, to ensure that there is sufficient time for the Applicant to fulfil its policy requirement to demonstrate reasonable attempts to acquire by agreement, and to enable the necessary agreements to be entered into, Davison & Co would request that that the Examining Authority (which they understand is a request made by other landowners in a similar dissatisfactory position) consider a suitable extension to the DCO examination period to enable the necessary level of engagement to take place between the Applicant and Davison & Co.

- Davison & Co would ask that this response be placed before the Examining Authority at its earliest convenience and consideration given to its request. Davison & Co are happy to supplement and add to this response as necessary and as required by the Examining Authority.