From: [redacted]
To: A428 Black Cat
Cc: [redacted]
Subject: A428 Black Cat to Caxton Gibbet Road Improvement Development Consent Order
Date: 05 July 2022 21:16:43
Attachments: image001.png

Dear Sirs,

We act for Davison & Company (Great Barford) Limited ('DCGBL'), an interested party and a person affected by the above proposed DCO as its DCO lawyers. Carter Jonas (cc'd into this email) act for DCGBL as its CPO surveyors.

We write with reference to the letter from the Department for Transport ('DfT') dated 22 June 2022, among other things, which , at point 1, invites comments from DCGBL on the Applicant's response dated 14 June 2022 to the Secretary of State for Transport's ('SSfT') consultation letter of 31 May 2022 on the issue as to the status of negotiations with affected persons.

Summary of DCGBLs position

Before turning to comment on the adequacy of the Applicant's engagement, we thought it would assist the SSfT if we summarised below DCGBLs primary concerns in this matter and the current position in relation to resolving these concerns with the Applicant.

DCGBLs primary concerns are, in summary:

a. The significant risk that the proposed compulsory acquisition of parts of its landholding for the purposes of the DCO scheme poses to the delivery of the strategically important proposed employment park development promoted for allocation in the emerging Greater Cambridge Local Plan which would substantial public benefits to be ('Proposed Development'); and
b. The adequacy and timeliness of engagement by the Applicant to reach a negotiated solution on the key outstanding issues rather than rely on DCO powers.

Two significant issues remain unresolved with the Applicant. These are, in summary:

i. The urgent need to complete the agreement for lease ('AfL') and lease agreements for the borrow-pit land (Plot 14/16a) and for the proposed construction compound (Plots 15/6a and 15/6b);
ii. Agreeing reasonable land rights (whether reserved or granted) to mitigate the significant risk that the proposed compulsory purchase of DCGBLs land abutting the existing adopted highway will at worst preclude and at best adversely affect the ability for DCGBL to deliver the Proposed Development with its significant economic, social, and environmental benefits.

Borrow Pits AfL and Lease

As to point (i) above, the two outstanding points of principle to agree with the Applicant are, in summary, DCGBLs request, firstly, for a suitable assurance to be provided by the Applicant in the AfL not to exercise DCO powers over the borrow pits land provided that DCGBL are not in material breach of the terms of the AfL and lease and, secondly, that it is appropriate and indeed standard for a suitably indemnity clause in favour of DCGBL to be included in the lease to be

granted to the Applicant. As to the first point above, there is currently no legal protection whatsoever in the AfL and/or lease around the circumstances in which the Applicant may exercise its DCO powers over the borrow pits land in the event that the DCO is made by the SSfT. Accordingly, DCGBL are very concerned that notwithstanding any voluntary agreement(s) entered into that the Applicant may simply decide to go ahead and exercise DCO powers over the borrow pits land in the event that the DCO is made rather than exercise the option to enter into the lease which would directly cut across the voluntary agreements. The author negotiated a similar voluntary agreement on behalf of a landowner with the Applicant in relation to the A303 Stonehenge DCO scheme. In brief, in that case, the Applicant were seeking compulsory acquisition, temporary possession, and new rights powers over part of the landowner's land for the purposes of the DCO scheme. The voluntary agreement entered into with the Applicant provided for the Applicant to be granted during the construction period a licence to carry out specified works on the relevant land for the purposes of the DCO scheme. Following completion of the specified works, the landowner agreed to dedicate part of its land as public highway. Importantly, for the purposes of the present case, the Applicant agreed in the A303 DCO agreement to provide reciprocal undertakings stating- in terms- that subject to compliance with their respective obligations in the voluntary agreement that the Applicant would undertake not to exercise any DCO powers over the relevant land and the landowner undertook to promptly withdraw its DCO objection in relation to the relevant DCO land in a specified timeframe. DCGBL are seeking to agree similar provisions in this voluntary agreement which is being met by resistance on the part of the Applicant.

As to the second point, the current indemnity provision which DCGBL is proposing is in the following terms, which is fairly standard for such leases, namely *"The Tenant must keep the Landlord indemnified against all liabilities, expenses, costs (including, but not limited to, any solicitors' or other professionals' costs and expenses), claims, damages and losses (including, but not limited to, any diminution in the value of the Landlord's interest in the Property and loss of amenity of the Property) suffered or incurred by the Landlord arising out of or in connection with: any breach of any tenant covenants in this lease; any use or occupation of the Property or the carrying out of any works permitted or required to be carried out under this lease".* DCGBL are not wedded to this particular wording and indeed are open to considering alternative wording which the Applicant may propose. However, at present, the Applicant has indicated that it is not its policy to provide indemnities in legal agreements. The author has advised that this is not the position which it agreed with the Applicant on the A303 Stonehenge DCO scheme, in respect of which the Applicant did agree to provide an indemnity in the agreement providing- in terms- that it would undertake and agree to indemnify the landowner in respect of all actions, claims, demands, expenses and proceedings arising out of or in connection with or incidental to the carrying out of, or use of the land for the purposes of the works other than those arising out of or in consequence of any act, neglect, default or liability of the owner. DCGBL are seeking to agree similar indemnity provisions in this voluntary agreement.

DCGBL sincerely hopes that early agreement can be reached with the Applicant on these outstanding points of principle and, thereafter, that the drafting of the borrow pits AfL and lease can be settled as soon as possible and in any event in good time before the 18 August 2022 deadline for the SSfTs decision on the DCO.

Access Rights issue

As to point (ii) above, under the DCO, the Applicant is proposing to compulsorily acquire plots

14/16(b) and 14(6)(c) of the Order Lands which comprises, in broad terms, a strip of land separating DCGBL landholdings from the exisiting adopted highway. The Applicant is seeking powers to compulsorily acquire the land for the purposes of landscaping mitigation for the DCO scheme. Access over this land will be required in the future by DCGBL (subject to the grant of planning permission) to access and run services to the Proposed Development. DCGBL are extremely concerned that if the land is, as proposed, compulsorily acquired by the Applicant and planning permission is granted for the Proposed Development that the granting of such necessary rights to facilitate the Proposed Development may either be declined by the Applicant or proposed on highly disadvantageous commercial terms, resulting in the DCO scheme effectively preventing the Proposed Development coming forward and creating a ransom strip by compulsory purchase in favour of the Applicant which DCGBL consider to be an unconscionable state of affairs and contrary to one of the DCO's core economic objective which is promoting "Economic growth: Enable growth by improving connections between people and jobs and supporting new development projects".

For the avoidance of doubt, DCGBL do not have an in principle objection to the DCO scheme. DCGBLs concerns and objective throughout has been to seek to agree with the Applicant mutually agreeable arrangements which enable both the DCO scheme and the Proposed Development to come forward in a complementary fashion. To that end, and to seek to resolve the access rights issue , DCGBL have proposed three alternative mechanisms to the Applicant, all of which they consider are capable of resolving the access issues in a mutually agreeable fashion.

In summary, these 3 alternative mechanism are as follows:

1. The Applicant to acquire land by agreement, but reserving the necessary rights to DCGBL, subject to planning permission and subject to suitable mitigation/ compensation for any loss of landscaping associated with the DCO scheme. Given such an agreement would be conditional on planning for the Proposed Development and compensatory loss of landscape mitigation being provided, DCGBL do not consider that this option 1 would present any material risk to the delivery of the DCO scheme;
2. The Applicant to reserve the relevant land as adopted highway. As to option 2, this would remove any land ownership issues and enable DCGBL (subject to planning and the relevant highways consents etc for the Proposed Development) to pass and repass over the relevant land and connect into the strategic highway network;
3. The Applicant to enter into an option agreements with DCGBL which provides-in terms-that:
    a. DCGBL will enter into an option agreement for the Applicant to acquire the land conditional on the DCO being granted.
    b. Contained within the option agreement will be terms that provide that if it is exercised by the Applicant , at the same time as completion of the transfer of the land to the Applicant, DCGBL and the Applicant will enter into an option agreement, by which DCGBL can call on the Applicant for the grant of a Deed of Easement for reasonable access rights for the purposes of the Proposed Development
    c. Such reasonable rights would be strictly subject to
        i. Planning permission being obtained for the Proposed Development
        ii. The necessary consents and technical approvals required under Highways Act 1980 being obtained) and
        iii. suitable compensatory landscaping mitigation being provided to be

agreed with the Applicant and its delivery to be secured by a suitably worded condition/obligation on any planning permission and/or as part of any highways agreement entered into with the Applicant for the purposes of the Proposed Development.

d. Moreover, such option agreements would also be strictly subject to the proviso that this would not, in any way, fetter the Applicant's statutory functions, duties, and discretionary powers as a statutory consultee on any subsequent planning application for the Proposed Development under the Town and Country Planning Act 1990 regime and/or in relation to its statutory functions as being responsible for the operation, maintenance and improvement of the strategic road network

DCGBL are open to considering any of the above mechanisms (or indeed any alternative mechanisms which the Applicant may propose to resolve the access rights point). However, frustratingly, despite DCGBLs best endeavours, the Applicant is refusing, to date, to engage with the merits of any of the above options and is maintaining the position that they are unable to agree any such arrangements at this stage as they are not DCO matters and/or would prejudice the delivery of the DCO scheme. DCGBL consider this position to be unreasonable and contrary to the ongoing requirement in paragraphs 8 and 25 of the DCLG 'Planning Act 2008 Guidance related to procedures for the compulsory acquisition of land' for the Applicant to have used reasonable attempts to acquire DCGBLs land by agreement and/or treat compulsory purchase powers as a tool of last resort which are ongoing duties.

The Applicant's engagement with DCGBL

At Compulsory Acquisition Hearing 2 in December 2021, the Examining Authority ('ExA') expressly requested (following concerns with the Applicant's lack of engagement generally with affected persons) that the Applicant was to agree a programme of engagement with DCGBL relative to the Examination timetable. This was agreed and jointly submitted to the ExA:

Timetable	Date	Attendees / Action
Agree Heads of Terms	Week commencing 10th Jan	All
Instruct solicitors	Week commencing 10th Jan	All
Follow up meeting with A428 Team	Week commencing 24th Jan (TBC)	All inc. solicitors
Lease / option completion by D9	15th February 2022	Solicitors

The agreed programme scheduled a meeting between the parties for the week commencing 24 January 2022, and the conclusion of voluntary agreements by 15 February 2022. Since then, as considered above, slow but belated progress has been made on progressing the borrow pit AfL and leases hampered by the very surprising decision of the Applicant to change its appointed

external solicitors handing the voluntary agreements during the promotion of the DCO scheme and the absence of any undertaking for DCGBLs real estate lawyers legal fees associated with the lease being provided until 6th April . While belated progress has recently been made on the borrow pits AfL and lease, it remains the case that these agreements have still not been completed some 5 months after the targeted date agreed by the Applicant and two substantial points of principle as summarised above remain outstanding

In relation to the access rights issue, below is a chronology of Carter Jonas's repeated attempts to engage with the Applicant pre and post the close of the Examination period. References in the chronology below to CJ are to 'Carter Jonas' and references to NH are to National Highways:

- 14/01/22 – CJ email to National Highways (NH) confirming agreement to lease Heads of Terms (HOTs)
- 14/01/22 – CJ email chase NH's agent (DVS) ref. arranging their inspection of the land for option valuation
- 19/01/22 – CJ email chase NH's agent ref. lease HOTs
- 25/01/22 – CJ email chase NH ref. meeting dates
- 09/02/22 - CJ email NH (Anne-Marie Rogers) regards option and proposed reserved access rights
- 02/02/22 – CJ tel chase to NH ref. overdue meetings
- 04/02/22 – CJ email chase NH ref. instructing solicitors
- 04/02/22 – NH email (Anne-Marie Rogers) ref. lands issues
- 08/02/22 - CJ email chase to NH ref. overdue meetings
- 09/02/22 – CJ email to NH (Anne Marie Rogers) ref. lands issue/option
- 11/02/22 - CJ email chase to NH ref. overdue meetings and lease
- 15/02/22 - CJ email chase to NH ref. overdue meetings
- 15/02/22 – NH email (Anne-Marie Rogers) ref. lands issues
- 17/02/22 - CJ email chase to NH ref. overdue meetings
- 24/02/22 - CJ email chase to NH ref. overdue meetings
- 28/02/22 - CJ email chase to NH ref. absent draft of lease
- 29/03/22 - CJ email chase to NH ref. overdue meetings

01/04/22 - CJ email and tel call chase to NH ref. lack of undertaking given to Davison's solicitors

- 06/04/22 – Davison solicitors undertaking received
- 14/04/22 – CJ email chase proposing potential meeting dates
- 20/04/22 - CJ email chase to NH ref. overdue meetings, including request for NH policy team (decision makers on key issues) to attend**.**
- 20 & 21/04/22 – NH 'holding email' response, requesting meeting agenda
- 25/04/22 - CJ email chase to NH ref. overdue meetings, with proposed meeting agenda (as requested by NH)
- 04/05/22 - CJ email chase to NH ref. overdue meetings (as no response from NH to emails of 20th and 24th April)
- 10/05/22 - CJ email chase to NH ref. overdue meetings
- 11/05/22 – NH 'holding email' response (i.e. no meeting dates)
- 13/06/22 – NH respond proposing potential meeting dates. Various emails then followed between the parties about meeting date.
- 28/06/22 – Meeting with NH ref. outstanding lease issues
- 30/06/22 – Meeting with NH ref. option / land issues (policy team not in attendance)

It will be seen from the above chronology that the Applicant's engagement has been wholly inadequate with Carter Jonas having to repeatedly (without response) chase updates and requests for meetings which have largely fallen on deaf ears save for repeated unsatisfactory holding responses. Indeed, a meeting on the access rights issue was not held until 30th June (some 5 months later than the agreed programme submitted to the ExA) and still at this meeting nobody from the Applicant's policy team (decision makers on key issues) attended the meeting meaning that the Applicant was unable and unwilling to take any decisions and was largely in listening mode.

Conclusion

The repeated lack of engagement on the part of the Applicant pre and post Examination has reinforced DCGBLs view that the Applicant has consistently failed to use reasonable attempts to acquire its land by agreement and/or treat compulsory purchase powers as a tool of last resort which are both highly relevant and material considerations when the SSfT will assess whether the Applicant has demonstrated that the necessary compelling case in the public interest for the compulsory purchase powers sought over DCGBL land holdings has been demonstrated. Such conduct is also directly contrary to paragraphs 8 and 25 of the DCLG 'Planning Act 2008 Guidance related to procedures for the compulsory acquisition of land' .. In this regard, we note that "late compliance with any requests made by the Examining Authority" is given as an

example of 'unreasonable behaviour' in government guidance relating to the award of costs in applications for DCOs.

For these reasons and those set out in their previous representations, DCGBL maintain that the Applicant has not demonstrated a compelling case in the public interest for the proposed compulsory purchase powers over its land holdings contrary to the requirements of S.122(3) of the Planning Act 2008, and, therefore, proposed DCO powers over DCGBLs land interests would be unconscionable and should not, therefore, be authorised by the SSfT. Should, contrary to the above analysis, the SSfT consider that there is a compelling case in the public interest for the DCO powers sought over DCGBLs land holdings then DCGBL would request in the alternative either (a) a suitable extension of time of the post examination process to enable the Applicant to properly engage and meet its commitments to proactively negotiate with DCGBL and other affected persons in a similar position and/or (b) that the DCO specifically requires the Applicant to use its best endeavours to complete the voluntary agreements, and to proactively engage with DCGBL to seek to resolve the access and rights issue as DCGBL are significantly concerned that if the DCO is made on or before 18th August that the Applicant will be even more difficult to engage with (when it has secured its powers for the DCO scheme) then it has been to date. With regards to (b) above, Carter Jonas are familiar with precedent for this approach in the SSfTs DCO decision of 2nd September 2016 relating to the M4 Motorway (Junctions 3 to 12) (Smart Motorway) Development Consent Order concerning the objection made by Bloor Homes Southern and Anita Thomas (represented by Carter Jonas). In his decision letter on that scheme, the SSfT required "the applicant to continue to pursue a mutually satisfactory agreement with these objectors" in order to prevent that DCO adversely impacted a proposed employment development. Ultimately, this led to an agreement after the grant of the DCO which mitigated the risk the M4 (Junctions 3 to 12) scheme would adversely impact on the proposed development.

Overall, and notwithstanding DCGBLs significant unresolved concerns outlined above, they remain willing and able to continue to actively engage with NH to explore a mutually agreeable resolution to the critically access and rights point and to promptly conclude the borrow pits related agreements.

We hope that this letter addresses the points in respect of which the SSfT seeks an update from interested parties and we would be grateful if this email could please be placed before the SSfT at your earliest convenience.

Best wishes,

Paul

Paul Arnett
Senior Associate
Town Legal LLP

[redacted]