



The Planning Inspectorate
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Your Ref:

Our Ref: EN010015

Date: 18 September 2014

Dear Sir/Madam

**Application by Channel Energy Ltd for an Order Granting Development
Consent for the Atlantic Array Offshore Wind Farm**

**Application for an award of costs by [REDACTED] as agent on behalf of twenty-
two affected persons¹**

We are the Examining Authority appointed by the Secretary of State for the examination of the development consent order submitted on 14 June 2013 by Channel Energy Limited (CEL). The application for development consent was withdrawn on 26 November 2013. We are empowered to make an award of costs against any one or more parties in respect of the examination of a Nationally Significant Infrastructure Project (NSIP) application for which we were the Examining Authority appointed to exercise the powers under s88 and s89 of the Planning Act (2008 as amended)². This letter deals with your application for costs against CEL in respect of an application for a Development Consent Order (DCO) (ref: EN010015) which included powers for the compulsory acquisition (CA) of land and/or rights.

The application for costs in respect of persons affected by the proposed compulsory acquisition was made in your letter dated 9 December 2013. Details of the affected persons were clarified in your letter of 22 January 2014 and your email of 9 June 2014. CEL replied in a letter dated 2 May 2014 and a letter dated 15 July 2014 in response to our invitation to comment on your costs application. As these representations have been made available to the parties, it is not proposed to summarise them in detail. They have all been carefully considered.

¹ Names of the individual affected persons are as shown in Annex A

² Section 95(4) of the Planning Act 2008 (as amended) (PA 2008) and Local Government Act 1972 Section 250(5)

Summary of Decision

The reasons for the decision are set out in paragraphs 5 - 21. The application succeeds and the award is granted in full.

Basis of the award of costs

1. The power to award costs is set out in section 95(4) of the Planning Act 2008 (as amended by the Localism Act 2011) (PA2008) which applies Section 250(5) of the Local Government Act 1972 (1972 Act) to the Examining Authority's examination of an NSIP application in the same manner as it applies to an inquiry under the 1972 Act which includes the powers to determine the award of costs.
2. The relevant costs guidance that applies to NSIPs is the Department for Communities and Local Government (DCLG) guidance '*Awards of costs: examinations of applications for development consent orders*' (July 2013) (the costs guidance). Part A is the introduction and covers the extent of the costs guidance and the expectation on parties. Part B covers general principles and Part C examples of events and behaviours.
3. Part D covers how costs are dealt with involving compulsory acquisition. All of the persons on whose behalf the application for costs have been made are identified as per section 57 of the PA2008 within Categories 1, 2 or 3. Only the processes and costs arising in relation to the proposed compulsory acquisition have been considered.
4. The processes for the examination of an NSIP which are expected to be followed are set out in the PA2008 and in the Infrastructure Planning (Examination Procedure) Rules 2010 and the DCLG guidance '*Planning Act 2008: examination of applications for development consent*' (April 2013) (the examination guidance). All matters have also been considered against the framework of the Human Rights Act (1998) (HRA).

Reasons for the decision

5. As set out in Part B of the costs guidance, in the process for the examination of NSIP applications the parties are normally expected to meet their own expenses irrespective of the outcome. The position is somewhat different in respect of CA however where special considerations apply where an applicant seeks development consent order provisions authorising the compulsory acquisition of land³.
6. Part D of the costs guidance gives examples of the conditions which would normally have to be met for an award of costs involving CA. Provision is made for the recovery of costs associated with CA if the CA is confirmed as part of the valuation process or via an application for the recovery of the costs if the CA is not confirmed (in whole or in part) or is withdrawn by the DCO applicant.

³ Paragraph 1, Part D of the costs guidance

7. CEL, in their responses, say that the definition of examination given in Part B paragraph 12 of the costs guidance is the period of time commencing with the ending of the Preliminary Meeting⁴ (PM) and that all references in the cost guidance should be read with that definition in mind. Hence, they conclude that the opportunity to make a claim for costs has not yet arisen as the PM was not held and therefore any claim could not arise due to their withdrawal of the DCO application before the commencement of the PM.
8. [REDACTED], on behalf of the affected persons, asserts that they have participated in the examination by the submission of a relevant representation (RR) and made and maintained their objection up until the point of withdrawal of the DCO application.
9. Paragraph 5 of Part D of the costs guidance is particularly relevant to this application which covers where an applicant decides not to proceed in whole or in part with the proposed CA or withdraws the whole application. In which case:

"If any of those things occur, provided an objector has objected to the compulsory acquisition request and has:

- participated in (or has been represented during) the examination by the submission of a relevant and/or written representation; and*
- maintained their objection until the compulsory acquisition request in respect of their property or the application for development consent was withdrawn*

they will be regarded as a successful objector and be treated as if their success was due to their representations."

10. There are three substantive points to consider therefore: did the objectors make an objection, what is meant by participation in the examination and what is a maintained objection, in the circumstances of the withdrawal of a project at a particular point in the process for the examination of an NSIP.

These need to be considered in the context of the particular circumstances of this case. Some relevant dates are:

- Heads of terms issued to appointed agents by CEL - June 2011⁵
- Submission of the application by CEL - 14 June 2013
- Acceptance of the application for examination by the Planning Inspectorate - 12 July 2013
- Deadline set by CEL for registration for RRs - 16 September 2013
- Invitation and notification issued for the PM by the Examining Authority (ExA) - 8 November 2013
- Withdrawal of the application by CEL - 26 November 2013
- Date set for the PM by the ExA - 10 December 2013
- Draft deadline proposed by the ExA for the registration of persons with an interest in land to register as interested parties (s102A)⁶ - 7 January 2014

⁴ Note that this is incorrect. Paragraph 12 gives the definition of the examination as the beginning of the PM. Another definition of the examination for the statutory timescale, as starting the day after the PM (or the last day of a meeting held under s88), is given in s98 of PA2008.

⁵ Application document 4.1 – Statement of Reasons - paragraph 12.5

- Draft deadline proposed by the ExA for the submission of Written Representations (WRs) - 15 January 2014
11. Hence the withdrawal of the application came after the RR period had closed and the notification of the PM had been received. The withdrawal was ten working days before the scheduled PM and other potentially relevant draft deadlines for participation in the examination process had been notified to the parties in the invitation to the PM. The invitation to the PM also contained specific reference to the guidance on costs and so all the parties would have been aware of the provisions included in Part D.
 12. We have therefore taken account of Paragraph 13 of Part B of the costs guidance, immediately following Paragraph 12, which states that

"Some additional and different considerations apply to compulsory acquisition requests which are dealt with in Part D."
 13. If costs in respect of compulsory acquisition were to be excluded by the reliance on the definition within Paragraph 12 of Part B of the costs guidance, that would place affected persons at a risk of having to decide whether to object to the CA, putting the costs incurred down to their own risk as an applicant choosing to withdraw at any point after the opening of the RR period but before the PM could effectively veto any later application for costs.
 14. In this particular case CEL had registered heads of terms for CA with agents in 2011 and so the objections had been sustained over a considerable period of time including up until the point of the application being withdrawn by CEL. Whilst affected persons may have incurred costs of taking advice during the informal and formal consultation phases that was a matter of their own choice, albeit within the context of the PA2008 encouraging early engagement, but they may or may not have been aware of that guidance.
 15. By contrast, once CEL had submitted the DCO application, it had been accepted for examination and CEL had set the period of time for the registration of RRs, the affected persons not only could engage in the process but were encouraged to do so by the notification sent to them by CEL under section 56 of the PA2008, as a means to evidence their maintained objection. They could not rely on any potential withdrawal of the application to defer the incurring of costs related to professional advice on an application which had now been accepted for examination and for which CEL had set the period for them to register RRs. Whilst it was open to them to register a RR or not, the guidance on examination encourages parties to do so, with only the question of the amount of compensation excluded as a consideration at this stage. There are therefore circumstances here in relation to CA which merit particular consideration.
 16. We have also considered consistency of practice across analogous areas. The National Planning Practice Guidance covers the award of costs in the case of compulsory purchase and analogous orders⁷. This uses analogous wording for the conditions for objectors to sustain objections and also specifically identifies

⁶ For persons noted covered by s57

⁷ <http://planningguidance.planningportal.gov.uk/blog/guidance/appeals/the-award-of-costs-and-compulsory-purchase-and-analogous-orders/>

that the claim can be considered where the order is withdrawn in advance of the inquiry being held into the confirmation of a Compulsory Purchase Order and to which they have made representations⁸.

17. Finally we have considered the HRA as the inclusion of the powers for CA in a draft DCO represents a potential interference with the right to enjoyment of property and possessions as set out in the HRA Article 1 of the First Protocol. Affected persons can only have their right to the enjoyment of their property and possessions considered through a fair process in which they have the right to be heard. That right goes beyond general engagement in the planning process where participation is a choice and where the parties are normally expected to meet their own costs.
18. Affected persons are encouraged to engage and to maintain their objections, if they wish to object, through the PA2008 process as a whole where formal stages of consultation, notification, registration and objection do take place before the PM and through to the end of the examination, the recommendation and the decision by the relevant Secretary of State, all of which is taken to represent a fair process consistent with HRA.
19. The *process* for the examination of a DCO for an NSIP is therefore wider than the statutory period of the examination starting with the PM. To take too narrow a reading of the guidance on costs would place affected persons at a financial risk with no guarantee of recompense whilst simultaneously encouraging them to engage formally and potentially risk their own costs. That would be inconsistent with other areas of the planning process and incompatible with HRA.
20. Paragraph 6 of Part D of the costs guidance covers the period during which an application for an award of costs must be made. In this case the application for costs was received within 28 days of the withdrawal of the DCO application and that point is not contested.
21. In summary, the application has merit in that the affected persons had made and sustained an objection to the compulsory acquisition of the land and/or rights at all the stages available to them, including through RRs as they are encouraged to do so under the examination guidance. The costs guidance acknowledges the special circumstances applying to CA matters and given that the applicant withdrew after the period at which the affected persons had been given by CEL to formally register their objection and hence engage the costs for which they had applied. To decline an application for costs following the withdrawal of the DCO application at such a stage is incompatible with the encouragement of engagement in the PA2008 for affected persons, being required to evidence their objection during the process of examination of an NSIP, and potentially incompatible with the HRA in terms of their access to a fair process.

⁸ Section 3 Growth and Infrastructure Act 2013

FORMAL DECISION

For these reasons, it is concluded that an award of costs against the applicant for costs arising from the proposed compulsory acquisition of land and/or rights by the affected persons is granted in full.

COSTS ORDER

Accordingly, the Examining Authority, in exercise of powers under section 250(5) of the Local Government Act 1972, section 95(4) of the Planning Act 2008, and all other powers enabling in that behalf, **HEREBY ORDERS** that CEL pay the persons listed in Annex A, their costs incurred in the preparation and submission of RRs in respect of their land and/or rights and in preparation or making of their objections to the proposed compulsory acquisition affecting their rights until the withdrawal of the application on 26 November 2013 and the costs of making this costs application, such costs to be assessed in the Senior Courts Costs Office if not agreed.

You are now invited to submit to CEL details of those costs with a view to reaching agreement on the amount. A copy of this letter has been sent to CEL. In the event that the parties cannot agree on the amount, a copy of the guidance note on how to apply for detailed assessment by the Senior Court Costs Office is enclosed.

Yours faithfully

Pauleen Lane

Dr Pauleen Lane CBE FICE MBA
Lead Member of the Examining Authority

Annex

A List of affected persons covered by this decision

Enclosure

Guidance note on how to apply for detailed assessment by the Senior Court Costs Office

Advice may be given about applying for an order granting development consent or making representations about an application (or a proposed application). This communication does not however constitute legal advice upon which you can rely and you should obtain your own legal advice and professional advice as required.

A record of the advice which is provided will be recorded on the Planning Inspectorate website together with the name of the person or organisation who asked for the advice. The privacy of any other personal information will be protected in accordance with our Information Charter which you should view before sending information to the Planning Inspectorate.