Planning Act 2008

The Infrastructure Planning (Examination Procedure) Rules 2010

Application by Cory[1] for an Order granting development consent for the Riverside Energy Park

Written Summary of Oral Submissions made at

Compulsory Acquisition Hearing on 6 and 7 June 2019

on behalf of

Western Riverside Waste Authority
18 June 2019

[1] WRWA has contracted with a number of "Cory" associated operating companies over the years, but they are all referred to as "Cory" in this Written Summary other than Riverside Resource Recovery Limited and Riverside Energy Park Limited.

Introduction

1. This document is a written summary of the oral submissions made by and on behalf of the Western Riverside Waste Authority ('**WRWA**') at the Compulsory Acquisition Hearing on 6 and 7 June 2019.

2. The hearing was attended by the following (on behalf of WRWA):

    a. Melissa Murphy, Counsel, Francis Taylor Building (instructed by Shakespeare Martineau LLP);

    b. Mark Broxup, General Manager, WRWA;

    c. John Chandler, Solicitor and Consultant, Shakespeare Martineau LLP;

    d. Steve Blackburn, Associate Director – Waste Management, Wood Plc.

3. WRWA also submitted three written documents at the hearing, as follows:

    a. Legal Submissions prepared by Melissa Murphy and dated 5 June 2019;

    b. Preliminary submissions on Protective Provisions dated 6 June 2019 with a further technical note produced by Wood included as an Annex;

    c. Letter from Mark Broxup of WRWA to Ben Butler of Cory dated 4 June 2019.

4. This Written Summary should be read in conjunction with those documents, and with WRWA's Written Representation dated 20 May 2019 ('**the WR'**).

Overview

5. At the compulsory acquisition hearing, on 6th and 7th June 2019 Western Riverside Waste Authority ("WRWA") made the following overarching points:
    a. That it is a statutory undertaker and is entitled to the protection afforded under section 127 of the Planning Act 2008.
    b. That serious detriment would be caused by the compulsory acquisition of its interests.
    c. Quite apart from those matters, there is not a compelling case in the public interest for the confirmation of compulsory acquisition powers. The following factors weigh heavily against confirmation:
        i. In the particular circumstances of this case, the failure of the applicant to conduct meaningful negotiations to acquire the land by agreement is a serious breach of the relevant national guidance.
        ii. The proposed acquisition imperils the security of WRWA's disposal route via the existing energy from waste facility at Belvedere. Compensation is incapable of addressing that issue.
        iii. The proposed acquisition would radically alter the balance of risk in the contractual arrangements between WRWA and Cory, wholly in Cory's favour. It is unclear how compensation could provide equivalence to WRWA.
        iv. At present there is an existing energy from waste facility with its own infrastructure (jetty, roadways etc). In certain circumstances provided for in the contractual arrangements between WRWA and Cory (see below), WRWA would take ownership of that facility. The introduction of a new energy from waste facility immediately beside the existing facility, sharing its facilities, would create compromises and, in consequence, risks to efficient operation. Those risks may be capable of management, but it is nonetheless disadvantageous to WRWA. Compensation is not WRWA's focus, instead, it prioritises the security of its ability to dispose of waste, pursuant to its statutory purpose. In any event, it is unclear how compensation could address this issue satisfactorily.
        v. The construction process itself creates risks to the operation of the existing facility.

WRWA status as a statutory undertaker

6. Dealing with WRWA's status as a statutory undertaker, reference was made to the "Legal Submissions" document which set out and then addressed the relevant statutory provisions: section 127 of the Planning Act 2008 and section 8 of the Acquisition of Land Act 1981. As per p.5 of the Written Representation ("WR"), WRWA claims the protection of the 2008 Act in respect of the leasehold interest it holds in land proposed to be acquired.

7. Its key points are these:
    a. Article 21 of the draft DCO would authorise the compulsory acquisition of WRWA's leasehold interest in various plots listed in its WR at p.13 para. 39.
    b. The leasehold interest was acquired by WRWA pursuant to the Waste Management Services Agreement (WR annex 9) for the purpose of its undertaking and is held by WRWA as such.
    c. WRWA is authorised by statute to carry on its undertaking, and does so directing constituent authorities to deposit waste to its docks; and arranging for Cory to transfer waste, under contract and on its behalf via water transport on the River Thames.

8. Bearing each of these points in mind, it is clear that WRWA is a statutory undertaker within the meaning of section 127, by section 127(8) which applies section 8 of the Acquisition of Land Act 1981 ("ALA 1981").

9. This is a matter which is in dispute. At the hearing, it was apparent that the issue is one of statutory construction, a matter of law. The dispute amounts to this: how do you construe section 8 of the ALA 1981? Is it to be construed broadly, and in a common sense way (as WRWA contends), or is it to be construed narrowly (the Applicant's position).

10. At the hearing, the Applicant's case appeared to have two aspects:

a. Specific statutory purpose.
b. Operation of docks/barges.

Specific statutory purpose

11. The Applicant pointed out that there is no reference in section 8 of the ALA 1981 to "waste". That is correct. The protection claimed by WRWA under section 8 is referable to a "water transport" undertaking and/or "dock undertaking", both of which functions WRWA are authorised under statute to undertake (see the Legal Submissions note[2]) in the performance of its duties as a waste disposal authority. The ExA will have noted the Applicant's acceptance (on 7.6.2019) that WRWA is a "statutory body". It is therefore common ground that WRWA's undertaking is authorised by statute. The issue is whether that includes or excludes the specific means by which WRWA fulfils its statutory purpose. It is WRWA's case that it cannot have been Parliament's intention that WRWA would be given responsibility for waste disposal, together with riparian waste transfer stations, if it was not empowered to employ those transfer stations to effect the disposal of waste: using the docks and transporting waste by river to the existing energy from waste plant.

Operation of docks/barges

12. The Applicant claimed at the hearing that if it is not the WRWA's employee who operate the cranes at WRWA's docks, or it is not the WRWA's barges transporting waste along the Thames, then the WRWA is not an undertaker carrying on its undertaking within the meaning of section 8. This is not correct. As WRWA explained at the hearing, WRWA has nominated its riparian waste transfer stations as the locations to which its constituent authorities must bring their waste. WRWA was provided the freehold of the docks, which are part of the waste transfer stations, pursuant to its inherited functions; and under contract to WRWA, Cory operates the waste transfer stations, including the docks; and transports waste by water. Those activities are carried out by Cory under contract for WRWA and on

[2] The WRWA was established under SI 1985/1884 (with functions as per Schedule 2); it is a "waste disposal authority" under section 31 of the Environmental Protection Act 1990 (carrying out functions under section 51 of that Act); it inherited its riparian transfer stations (including docks) from the GLC under the Local Government Act 1985, see, for example, the Local Government Reorganisation (Property etc.) (No. 2) Order 1986 SI 1986/413 para.1.

WRWA's behalf, pursuant to WRWA's role as a London riverside waste disposal authority. As such, WRWA is entitled to the protection of section 127.

Arguments said to illustrate why WRWA is wrong about its status as a statutory undertaker

13. Two points were said by the Applicant to illustrate that WRWA had erred in its claim.

14. First, it was said that "in effect precisely the same statutory basis and statutory provisions which gave rise to [WRWA's] existence render them a statutory undertaker but do not render the East London Waste Authority a statutory undertaker". This argument fails to recognise that WRWA inherited specific property, the riparian waste transfer stations, for use in fulfilling its statutory purpose. It is the protection given to docks and transportation by water that brings WRWA within section 8. If the East London Waste Authority's operation is not reliant upon those scarce and important facilities, then it is little wonder they do not enjoy the same statutory protection.

15. Secondly, it was said to be wrong in principle if a body, such as the East London Waste Authority did commence transportation of waste by water and did acquire docks and utilised them then it would become a statutory undertaker and, if another organisation ceased to have and utilise such facilities/undertake such operations, then it would cease to be a statutory undertaker. The Applicant said that that being able to "flip in" and "flip out" of protection was not provided for by statute. WRWA disputes this. The purpose of the protective provisions within the 2008 Act reflects the importance and rarity of docks and the ability to transport by water, offering undertakings which rely on them special provision in relation to DCOs. If undertakings no longer carry on their statutory functions by those means, the particular purpose served in their protection ceases. There is no difficulty in principle here.

16. WRWA's undertaking comes within section 127 of the 2008 Act. It follows that it is necessary to consider whether serious detriment to its undertaking arises from the

proposed compulsory acquisition. At the hearing, WRWA explained that it would suffer such detriment.

Serious detriment

17. WRWA explained that the proposed acquisition of its lease would cause serious detriment to its undertaking. It relies on those matters in support of its argument in the alternative, that there is no compelling case in the public interest for the confirmation of compulsory acquisition powers. Those matters are set out in overview above and were explained in detail in the hearing (see below).

Important background

WRWA: the organisation

18. At the hearing, Mr Broxup provided an explanation of the WRWA organisation, its priorities and its land ownership. He then described the contractual history with Cory and, in summary, the current contractual position.

19. WR Annex 1 (WRWA's annual report) was referred to by Mr Broxup to illustrate his points about WRWA. Mr Broxup referred to the map of Greater London on p.2, identifying the various statutory joint waste disposal authorities (including the East London Waste Authority).

20. With reference to Annex 1 p.8 second paragraph, Mr Broxup indicated that the Authority takes a progressive and innovative approach to waste management; and that its waste minimisation is recycling-led, whilst utilising the River Thames for bulk transportation. He noted the stated aim to minimise environmental impact by transporting the waste by river. He emphasised that this is a very important part of the Authority's operation.

21. P.22 of the same document describes how the integral part of WRWA's contract with Cory is the use of the River Thames and it describes the operation of the Transfer Stations and how WRWA and Cory together move the waste on the river.

22. Mr Broxup told the hearing that WRWA has two docks, Smugglers Way in Wandsworth which is a traditional wharf where the barges come alongside; and Cringle Dock which is next to Battersea Power Station but also in the London Borough of Wandsworth. The latter is quite unusual on the Thames in the fact that it is a recessed dock so the barges actually come into the waste Transfer Station.

23. Mr Broxup described the contractual arrangements in this way. There is a contract with Cory Environmental Limited, to run the Transfer Stations (Cory operates the docks on WRWA's behalf): they receive the waste, and they compact it into the containers and load it onto the barges. Once the containers are in the barges, they then become the responsibility of RRRL, which is a subsidiary of Cory, who operate the energy from waste facility. RRRL operates the transportation services as well as the recovery process.

24. Cory Environmental Limited has leases over the transfer stations, which works with the contract. Upon the expiry or termination of the contract then the leases would fall on the transfer stations. At the termination of the Contract, as WRWA is the freeholder of the transfer stations, they come back under WRWA's control. There are also scenarios (if Cory was not performing) that would allow WRWA to step in, or if there was a termination scenario, that would also allow step-in. There are separate provisions where (again in termination scenarios) WRWA can step into the Energy from Waste facility functions or take them over essentially. In those circumstances WRWA can take over the assets or take over the company. There are therefore circumstances where WRWA could become the operators of those facilities.

WRWA: the history

25. WRWA came into existence in 1986 when the GLC was dissolved. Transferred to WRWA were Transfer Stations at Smugglers Way and Cringle Dock and another

wharf called Institute Wharf which is not used for waste management purposes at the moment.

26. Transferred to WRWA as well were the river licenses for the transfer stations and also there was in existence a contract that Cory had with the GLC and that was transferred to WRWA. Essentially, as Mr Broxup explained the position, where there were contracts in place or where there were strategic waste facilities in existence, their existence underlay the formation of the particular joint statutory bodies in 1985/1986.

27. WRWA has actually been in contract in one form or another with Cory since 1986. Initially WRWA itself ran the transfer stations: managed the transfer stations and loading the containers onto the barges. The initial contract with Cory was extended because WRWA wished to redevelop the Cringle Dock Transfer Station. So that happened and the contract was extended to 2002.

28. In 1994 WRWA privatised the operation of its transfer stations in line with legislation at the time. A separate company called Cleanaway then operated the transfer stations up until 2002. That contract was to come to an end at the same time as the Cory one was to end.

29. In preparation for the expiry of those two contracts, in 1998 WRWA produced a long-term strategy addressing its intentions for waste disposal in the future. The consequence of that was that WRWA went through a detailed procurement process and Cory was successful in winning a long-term contract to treat all of the Authority's waste for 30 years, from 2002 to 2032.

30. The contract was based on a landfill for an interim time but with the intention that ultimately the RRRL facility would be built. There was a public inquiry in 2003, another one in 2005 and then there was a judicial review by the Mayor of London. The consequence of that was there had been longstop dates within the contract, by which time Cory were due to have provided the energy from waste facility and by mutual agreement those dates were extended numerous times which ultimately led to the situation in 2007 that it had cleared all the planning processes.

31. There was then a very detailed negotiation process which ultimately led to the facility reaching financial close in 2008, ie the funding was there to actually build the RRRL facility. Initially in 2002 when the contract had been let, a merchant facility was in prospect, which meant that the Authority could simply direct its waste to Cory and pay for its disposal.

32. When the funders later became involved, there was concern about condition 5 in the Planning Consent for the energy from waste facility. Mr Broxup identified that condition for the ExA. See annex 4 to the representation: there is a decision letter dated 15 June 2006, there are two consents. One under the Energy Act and then the other under the Town & Country Planning Act 1990. The relevant permission is the latter, the condition is no.5.

33. Mr Broxup explained that other than 85,000 tonnes per year specified in condition 41 below (Bexley waste), in practical terms, given the location and characteristics of other riparian transfer stations in London, that meant the facility would be reliant on WRWA's riparian transfer stations, which materially affected the risk profile of the scheme for investors. Mr Broxup explained that funders had required WRWA to become much more closely involved in the financing or the security of the asset. So what that resulted in was aspects of the contractual arrangements resembling private finance initiative deals. One key aspect of that is that WRWA is the funder of last resort in a termination scenario. Of obvious concern is a force majeure termination, where the Authority would actually have to repay the bank debt that is outstanding. But it then acquires the assets that are available.

34. Mr Broxup explained that another matter which concerned funders at the time was what they did not want a termination of the activities on the transfer stations (Authority Site Services) to lead to a termination of the main contract in respect of the energy from waste facility. That led to the separation between the energy from waste facility and the Authority Transfer Stations aspects of the contractual arrangements.

35. The detailed negotiation of the contractual arrangements was conducted in what Mr Broxup described as a “turbulent time” (2008). He said that to fund the RRRL proposals, as with all infrastructure projects, there was a financial model used. Additional costs had to be included and the only thing left to balance those costs was WRWA’s gate fee. There was therefore an increase in cost to WRWA and little Cory could offer in return. What was agreed was that the Authority would be given residual rights, lasting beyond the term of the Waste Management Services Agreement (“WMSA”, see below) and giving WRWA residual rights lasting from 2032 until 2046. The value to WRWA of those residual rights is very significant. WRWA is a single purpose statutory waste disposal authority, with no purpose other than to safely ensure the treatment of the waste generated by the residents of its four constituent boroughs. What these residual rights mean to WRWA is in place a secure home for its waste up until 2046. Mr Broxup emphasised that protecting those residual rights is of paramount importance to WRWA.

36. Mr Broxup explained that in 2008, when it was negotiating the WMSA, WRWA was looking ahead to 2032 (24 years into the future at that date) and beyond. WRWA was concerned that there was potential for changes in law that could arise during the initial period to 2032 and beyond to 2046. In order to reflect the potential for changing circumstances, in addition to residual rights, WRWA was also granted certain protections in circumstances where there was a change in law affecting the way in which WRWA would manage its waste. Under the WMSA, WRWA was granted a leasehold interest in land at Belvedere, which can be used to provide additional waste accessing capability by technologies that are not currently being carried out or protect the operation of the existing facility.

37. In recognition of the potential for changing circumstances, WRWA was granted a lease over the land. RRRL (who are the freeholder) leased the land to WRWA, who in turn lease it back to RRRL. That lease arrangement prevents Cory or RRRL disposing of the land without WRWA’s permission. That gives WRWA the security that in change in law circumstances, there is land available to WRWA to address such changes. Mr Broxup explained that the change in law security is important to WRWA because its four boroughs are in the centre of London: the riparian transfer stations, including docks and the ability to transport waste to Bexley along the

Thames are crucially important for the disposal of waste; and the purpose of the change in law provisions is to provide security within the contract for that disposal.

38. An example to protect the existing facility given by Mr Broxup was emission standards being tightened in the future, leading to a requirement for retro fitting of certain infrastructure to comply with those new requirements. Another example was the possible need for pre-treatment of the waste prior to it going into the energy from waste facility.

39. Mr Broxup sought to address a specific point raised by the Applicant in rebuttal of WRWA's concerns (in its original representation)[3]: p.210, paragraphs 5.3.16 down to 5.3.18 it is said there that the only change in law scenario that is to be considered is a current proposal that food waste will in future be required to be treated separately from the range of the waste stream. It says that is the only current change or scenario that can reasonably be anticipated. In response to that, it is WRWA's position that this might be true now but the contractual arrangements between the parties run to 2046. That specific change in law is one scenario but there are other scenarios which are not addressed by that anaerobic digestion facility. Mr Broxup explained that the fact that other potential changes in law cannot be identified now does not mean changes will not come into being in future, within the period 2019 to 2046 (27 years). The security is provided for the very reason that it is difficult to predict the long term future. Mr Broxup also queried the size of the proposed anaerobic digestion facility – it was unclear to him whether it had been designed with WRWA's potential future requirements in mind.

40. Mr Broxup then explained a further, crucial point about the importance of the security offered by the leasehold interest. In the period 2032 to 2046, as noted in WRWA's WR (page 9, paragraph 22), last three sentences: the Waste Authority also receives residual rights for 14 years beyond expiry of the 2032 contract, when it can choose either to receive a royalty from RRRL or have its waste processed at effectively cost plus 10% or a combination of the two. The amount of waste it can

[3] Applicant responses to Relevant Representations dated May 2019

opt to have processed depends upon aggregate energy from waste throughput. See the restated Residual Value Agreement ("RVA") (WR annex 6 p.4 definition of EfW Residual Value Capacity). The lease over RRRL land which runs to 2058 provides security to WRWA that will receive its residual rights, see the lease and sublease (WR annex 5).

41. Mr Broxup explained that WRWA's access to waste capacity is based on a percentage of the capacity at the time. The percentage is an historic percentage, how much WRWA has used of the capacity historically, then multiplying that by the capacity that at the time. So in that scenario if the existing facility is dealing with 750,000 tonnes, WRWA will get a percentage of that. If it's dealing with one tonne, WRWA will get a percentage of that. So having a competing energy from waste facility coming onto the land that is the subject of WRWA's lease has two effects. First, it robs WRWA of part of its security. Secondly, it has the clear potential to reduce the throughput in the original facility, thus reducing the waste capacity WRWA is entitled to demand. Mr Broxup indicated that this is a major concern for the Authority. It is a single purpose Waste Disposal Authority. Disposing of residents' waste is its purpose; and the compulsory acquisition powers in the DCO threatens WRWA's ability to do that.

The WMSA & RVA

42. Mr Chandler addressed various detailed matters arising in relation to the contractual arrangements.
43. A summary overview of the Waste Management Services Agreement ('**WMSA**') appears at Annex 2 of the WR. A note setting out the impact of the proposed compulsory acquisition on the provisions of the WMSA appears at Annex 3 of the WR. The oral submissions were made with reference to both documents and were not intended to supersede the detail of the arguments as set out in the WR and at Annex 3 in particular.

44. The Riverside Resource Recovery Facility ('**RRRF**') was project financed in 2008. Project finance is a funding mechanism whereby finance is raised to construct an asset and the repayment of the debt is dependent upon the performance of the

funded asset. In this regard it differs from corporate debt where security is taken from the entire group. Riverside Resource Recovery Limited ('**RRRL**') was set up as a special purpose vehicle within the Cory group to design, build, finance, own and operate RRRF.

45. Funders were concerned by the constraints of the planning permission which had been obtained for RRRL. Condition 5 of the permission required that, beyond the 85,000 tonnes that Condition 41 allowed to arrive by road, the RRRF could only process waste arising from Greater London or transported to it from a riparian waste transfer station in Greater London (see the Secretary of State's decision letter dated 15 June 2006, which appears at Annex 4 of the WR). This led to WRWA being tied more closely to the RRRF than was originally intended. The plant had initially been intended to be a purely merchant facility with the Authority a major customer whose obligations were limited to transferring waste arisings to Cory and paying a gate fee. All the risks associated with the ownership of RRRL were meant to be retained by Cory. However, the planning constraint made the RRRF dependent upon the use of WRWA's riparian transfer stations (at Smugglers Way and Cringle Dock). If access to these transfer stations were denied, the plant would have ceased to be viable as the permitted levels of tonnage which the plant was permitted to import by road were not sufficient.

46. This dependency upon WRWA's transfer stations necessitated an enhanced level of public sector support in order to make it bankable. At the time, the Private Finance Initiative ('**PFI**') was being used as a mechanism to fund the construction of public sector assets using private finance and the funders required that, for financing purposes, the RRRF should be treated like a PFI project which meant that, if the WMSA was terminated early for whatever reason, it would revert to WRWA's ownership and compensation would be paid at a level depending upon the reason for the termination.

47. The PFI came with a set of standard terms and conditions which had been evolving over time and with which banks participating in PFI financings had become comfortable. This required an amendment to the WMSA and the introduction of PFI-style clauses to benefit the RRRF. The WMSA was split into two severable

parts, each with its own terms. The first was for the operation of civic amenity sites, the construction of a Materials Recovery Facility at Smugglers Way, the operation of WRWA's waste transfer stations at Smugglers Way and Cringle Dock, and the transfer of general waste onto barges (the '**Authority Site Services Contract'**). The second covered the construction and operation of the RRRF, the transportation of waste to the RRRF on the barges and the subsequent thermal treatment of the waste at the RRRF (the '**EfW Contract**'), and largely followed PFI required drafting.

48. One of the issues with the RRRF was that the debt has to be repaid within the term of the WMSA, and this necessitated a gate fee to be set at a sufficiently high level to achieve this. This meant that the RRRF would have been paid for before the end of RRRF's design life, and whilst WRWA was required to buy the asset upon an early termination of the WMSA, it was agreed that there should be no such transfer should the WMSA come to its natural end – ownership would remain with RRRL in this circumstance. In order for WRWA to recoup its investment, WRWA was granted rights under a Residual Value Agreement ('**RVA**') so that it could continue to receive benefit from the facility that its gate fee had (to a significant extent) funded. Under the RVA it has the choice either to continue to send tonnage to the RRRF at a rate determined by an agreed formula until 11 October 2046 on similar terms to the EfW Contract (excluding the PFI termination and asset transfer provisions), or alternatively to earn a royalty on waste tonnage accepted at the RRRF.

49. With long term contracts such as the WMSA, indexation alone does not allow the gate fee to adapt to changing circumstances, and in particular to changes in law which might affect the waste or power sector but not the economy as a whole. In accordance with PFI terms, RRRL was therefore given specific change in law protection which allowed it to claim compensation should unforeseeable (as at 2008) changes in law occur (see paragraph 7 of Annex 2 to the WR).

50. However, RRRL/RRRL's funders wanted additional protection beyond what the PFI clauses offered due to the fact that (unusually) the WMSA did not contain a minimum tonnage guarantee from WRWA, making the project particularly sensitive

to changes in law which effected a reduction in tonnage (and therefore revenue). This resulted in EfW Qualifying Change in Law (g) (see paragraph 7(g) of Annex 2 to the WR).

51. In return for EfW Qualifying Change in Law (g), WRWA was granted rights over the unused RRRF land at the main site, which had to be made available to WRWA at its request should this specific change in law occur so that WRWA could arrange for the construction of facilities to mitigate its exposure to RRRL (see paragraph 8 of Annex 2 to the WR). This currently unused land at the main site is now the subject of the proposed compulsory acquisition. The land is currently also potentially available (with WRWA consent) to RRRL to mitigate other changes in law in the most cost efficient manner e.g. changes to emission standards requiring additional infrastructure to be built at the site, a proportional part of the cost of which would be passed back to WRWA (see paragraph 7(a)(ii) of Annex 3 to the WR).

52. The importance placed on the land can be demonstrated by the extent of the lease granted to WRWA for the duration of the WMSA and the RVA (see Appendix A of Annex 2 to the WR). The main site is leased to WRWA in its entirety, whilst the Belvedere Surplus Land to the south of the main site is not, and is subject to the sole restriction that any proceeds of sale are applied to reduce the senior debt (see paragraph 9 of Annex 2 to the WR). The grant of the lease to WRWA was intended (amongst other things) to prevent disposals of any part of the main site as this would reduce its security value to WRWA (see paragraph 4 of Annex 3 to the WR).

53. The unused land at the main site is however not just relevant for change in law purposes. As mentioned above, under PFI terms the public sector authority is required to buy the financed facility in an early termination scenario, the price paid determined by the reason for the early termination (see paragraph 15 of Annex 2 to the WR). In certain scenarios (and force majeure in particular – see paragraphs 11 and 15 of Annex 2 to the WR) the price paid bears no relationship to the value of the asset, and WRWA has to repay the senior debt. WRWA could therefore be left in a position where it has paid a great deal for an asset which (objectively) may be worth very little. In circumstances where the RRRF is left unusable (e.g. due to

contamination) the existence of the unused land would potentially allow WRWA to take mitigating action to offset its losses – potentially even building a REP as Cory is now seeking to do. By taking the land, this opportunity would be lost to WRWA.

54. Indeed, allowing REP to be constructed so close to the RRRF increases the likelihood of a force majeure event occurring, especially the likelihood of RRRF becoming an Economically Unviable Insurance Proposition following repeated site-wide claims caused by either or both of REPL and RRRL (see paragraph 11(d) of Annex 2 to the WR).

55. Operationally, REP's existence also causes problems. The WMSA contains provision to WRWA of energy payments and revenue shares which depend upon the success of RRRL and which will be adversely affected in the event of competition from REP for both tonnage and local heat/power offtake opportunities (see paragraph 8(a) of Annex 3 to the WR). Further, in the event that WRWA has to step in and take over the RRRF, it can be envisaged that any harmonious co-existence that may exist whilst REPL and RRRL are part of the same group will no longer be present, making the shared use of assets more problematic (see paragraph 8(a) of Annex 3 to the WR).

56. The existence of protective provisions in the DCO do not resolve WRWA's concerns as, ultimately, the land that provides WRWA's security for its waste stream will have gone.

Construction and operational impacts

57. A Technical Note prepared by Wood and Annexed to WRWA's Preliminary submissions on Protective Provisions dated 6 June 2019. Wood identified approximately a dozen construction risks and a dozen operational risks, as well as considering the draft protective provisions.

58. The impact on utilities in particular should be considered. Buried services are only protected within the development boundary, but they extend outside and could be interrupted due to the works. This is an example of a matter that could cause serious disruption to the activities of RRRL. There is also a need to ensure that protective provisions allow mitigation of consequential losses.

59. The proposed facility will 'piggy-back' on RRRF's assets (e.g. jetty, cranes and access road). This will accelerate the need for repair and maintenance at the existing plant. Works and disruption on the access road may also affect operations at the RRRL facility. There is also no evidence of how combined construction movements and RRRL operational movement in event of a jetty outage will be managed within the Construction Traffic Management Plan

60. In the event that WRWA has to exercise its step in rights, this usage will represent an increase in costs from that which otherwise would apply.

61. There are a number of risks in the operational phase, all of which will affect WRWA's position if it has to exercise its 'step in' rights under the WMSA.

62. While a Royal Haskoning study has been carried out on the capacity of the wharf to accommodate additional throughput, this has an important caveat. It only considered the wharf's physical capacity and did not undertake a full logistics chain simulation of river, jetty and landside operations. There is no consideration, for example, of how the increased number of tractor trailer vehicles using the wharf can operate in harmony without conflict with one another.

63. The proposed facility will utilise an area currently being used for containers by RRRF. Alternative plans for retaining the functionality of the container area are required, particular in event of river contingency events when bottom ash transport needs to switch to road. Without this buffer capacity for storing containers a just-in-time delivery/offtake system may be required in contingency events, which would put strain on the existing Facility.

64. Notwithstanding that assessments have been undertake on the capacity of the road network to accommodate more traffic, there is also likely to be a rise in accidents on and around the site generally – the probability inevitably rises together with an increase in traffic. This would be detrimental to the RRRL Facility.

65. It does not appear from the Applicants assessment that there will be capacity for both the proposed development and the RRRF to support a local Combined Heat and Power ('CHP') scheme. A CHP scheme can only be provided at one or other of the facilities, or partially by both. If it is not wholly provided by RRRF this will limit further improvement to the facility's environmental credentials. This is turn impede WRWA's ability to have its waste managed in a more sustainable manner.

66. The question of 'need' for the facility from a waste disposal perspective is addressed in Section 3 of Wood's original technical note, which appears at Annex 8 of the WR. The focus here is on the amount of waste available to feed the proposed facility and not the 'need' for electricity generation. The executive summary of the Project and its Benefits report over simplifies the position which is presented by the underlying evidence. The figures used by the Applicant in terms of the availability of waste are presented in the best possible light. However, if the longer-term picture is considered (for example, 2036 and beyond, and the upper end of the proposed throughput range) the position is less clear cut than stated in the Applicant's assessment. The 'London Plus' scenario is considered the most likely outcome as much municipal waste disposal is on long-term contracts, and some waste will simply not be available to the proposed facility (e.g. West London Waste Authority).

67. Furthermore, the Applicant makes generalised statements that there is enough waste in the areas surrounding London that would be more than sufficient to make up for any deficit. This requires substantiation. The East London Waste Authority has attempted to quantify the contractual positions of surrounding areas in its submissions. The GLA evidence shows that some scenarios, there may even be an excess of capacity in those surrounding areas. An insufficient supply of waste will inevitably lead to competition between the new facility and the RRRF which will

be detrimental to WRWA's contractual risk profile as described by Mr Broxup and Mr Chandler.

Materiality of need

68. WRWA put at issue the need for the new facility in the context of the sufficiency of waste to supply it and the existing energy from waste facility. This is material to WRWA's case because it is directly relevant to WRWA's ability to dispose of waste within the existing facility between 2032 and 2046, as Mr Broxup explained. If and to the extent that there is uncertainty about the effect of a competitor facility as at that date, WRWA is entitled to say, as it does, that is a material consideration. The security of its waste disposal route is a matter of public interest. If that is put at risk, that factor weighs against confirmation of compulsory acquisition powers.

Negotiations

Relevant correspondence

69. The relevant correspondence has been provided (WR annex 6), together with the WRWA letter of 4 June 2019 (submitted on 6 June 2019). It discloses a complete failure to comply with the relevant guidance. What follows is a summary of the submissions made in relation to the correspondence.

70. The first letter is dated 5 February 2018. It was directed to consulting WRWA about Cory's intention to develop, and I quote, "additional waste processing capacity" (energy is mentioned later), on land next to the existing energy from waste facility. That letter was written in a context in which there had been a presentation, as the written representation acknowledges, but so too had the DCO application already been notified, notification took place in November 2017. This letter contains no offer to purchase the leasehold interest. There are two points to highlight. On page 3, sections of text consider the implications for WRWA, concluding with this "we don't anticipate CEL requiring formal standalone consent from the Waste Authority or amendment of the WAMSA in order to construct or operate the plant". Nowhere else in the letter is the issue of the necessity for amending the WMSA

addressed. There was no offer, because there was no acknowledgement in the letter that there was anything worth negotiating about.

71. The next letter in the sequence is that WRWA of 17 July 2018. That was written in response to a consultation as can be seen from the bold text. In this letter WRWA pointed out the highly complex public private partnership arrangement in place and said that in its view the applicant should not be permitted to frustrate these arrangements on any basis other than terms fully agreed with the Authority, especially as these arrangements were entered into by an associated company to the Applicant, to enable the development of the existing energy from waste facility. It was made plain that the relevant issues do not revolve solely around monetary compensation, but include maintaining the security of the disposal route for the general waste generated by the constituent councils (see above). The letter pointed out that there were specific arrangements in place which required specific consideration; and it maintained that compensation was not adequate.

72. The next letter in the sequence is from Cory dated 28 March 2019. It refers to a master interface agreement which was to control the relationship between the two facilities. A draft agreement was not in fact provided until 3 May 2019. All comments in the letter, and various proposals included are all subject to one important qualification: see page 5, paragraph 26. Any documentation, amendments to leases amendments to the WAMSA, restrictions on the freehold will form part of the financing of the REP and shall only come into effect upon successful financing. The final agreed documents will require the approval of the RRRL lenders. The funders would not be party to the Agreement, they are in fact not yet identified; and they have a veto over the arrangements. There is in fact no secure offer, because it is all conditional upon the approval of someone else. In any event its details were not acceptable to WRWA.

73. Next is a response from WRWA dated 5 April 2019. It pointed out the wholly inadequate basis upon which the applicant was proceeding. What the Applicant sought to achieve was the withdrawal of the WRWA objection, on the basis of an agreement which could later be vetoed. At that point, a DCO would have been made and CA powers confirmed in respect of WRWA's leasehold interests. Those powers could be exercised with or without WRWA's consent; therefore, if at that

point there was no agreement with WRWA (because, say, it had been vetoed), there would be no constraint to the exercise of those powers.

74. The letter of 24 April 2019 reargues the points, with no real change in position. That had already been made about why the arrangement was conditional in the way that it was so no movement really and the answer to the point at page 7 seemed to suggest that the WRWA's objections were based on an unfounded fear.

75. At the hearing, it was said that project cannot proceed without RRRL lender consent. If the project doesn't go ahead the status quo remains. What this submission overlooks is that the Applicant seeks to have the objection can be withdrawn on the basis of an agreement which may not be capable of being honoured. If it is not, funders may approve the scheme on a different basis, with the DCO/CA powers in place, leaving WRWA without redress. The Applicant's position completely fails to grapple with the relevant circumstances at the time of the putative funder's decision.

76. Mr Broxup then spoke in detail in relation to the contents of the letter of 4 June 2019. The first section concerns WRWA's duties, which reiterates the fact that it is a single purpose waste disposal authority. WRWA is concerned that RRRL is not objecting to any of the proposals. It is failing to "future proof", which it ought to be considering, for the same reason WRWA wants security over future proofing. RRRL seems not to be concerned about that, WRWA considers is contrary to its interests. WRWA believes that had RRRL not been part of the Cory group, i.e. were another waste management company applying, they would be objecting strongly. WRWA cannot see any reason why, acting as an independent company, they would not object. The fact that the neighbouring land is taken reduces their ability to comply with their contractual obligations to WRWA in some respects. Not all of these points are about financial compensation. They are about the risk balance and looking ahead to the future, of what may or may not be required in waste disposal terms for the Authority. To maintain that risk balance, there would need to be changes to the existing contractual structure.

77. Mr Broxup indicated that it should be recognised that at the moment, the existing contract cannot be changed without funder consent. As yet, WRWA has not seen any proposals from Cory that do not include a veto. That's why WRWA says (in the second paragraph of the letter) that even if we could come to some acceptable agreement, there is no mechanism by which it can be secured.

78. As far as the Master Interface Agreement is concerned, Mr Broxup said that WRWA had not had sufficient time to go through it. Some points cause concern already. For example, the fact that for the moment it is terminable by either party upon 12 months notice. It is necessary to appreciate that there are certain circumstances where the Authority steps into the shoes of RRRL. In those circumstances this would not be an agreement between two parties within the same group and in a harmonious situation. This would be either a third party, a completely different company, or Cory from whom WRWA would just have taken a facility. At present, not only are there no terms which are agreed, there is no structure by which agreement can be reached.

Conclusions on negotiation

79. WRWA relies upon para. 25 of the Planning Act 2008 Guidance relating to procedures for the compulsory acquisition of land (September 2013) ("the Guidance") which reads:

"Applicants should seek to acquire land by negotiation wherever practicable. As a general rule, authority to acquire land compulsorily should only be sought as part of an order granting development consent if attempts to acquire by agreement fail. Where proposals would entail the compulsory acquisition of many separate plots of land (such as for long, linear schemes) it may not always be practicable to acquire by agreement each plot of land. Where this is the case it is reasonable to include provision authorising compulsory acquisition covering all the land required at the outset."

80. In submissions on behalf of WRWA, it was said that:
    a. Compliance with the Guidance is an important matter. In a compulsory purchase order context (the Aylesbury Estate), one of the grounds on which

the Secretary of State refused to confirm the CPO was the Council's failure to attempt to acquire the necessary leasehold land interests by negotiation.

b. There can be no suggestion that it was not practicable to seek to acquire land by negotiation here.
c. The long contractual history means that compulsory acquisition should have been a last resort, not (as has happened here), used as a first resort. The Applicant's approach has been deplorable in this regard.
d. Even by the date of the hearing, there had been no meaningful offer capable of being accepted by WRWA acting reasonably.

81. It will be appreciated that the Applicant's failure to comply with the Guidance is particularly egregious given that WRWA is a statutory body, entrusted with public functions. Its relationship with Cory is in quasi-public/private finance initiative form. Cory is attempting to use the DCO regime to undermine the key components of that contractual relationship, seeking to impose fundamental change on it, without attempting to negotiate those changes, in circumstances in which these parties have been contracting with one another since the mid-1980s.

Overall conclusions

82. WRWA submitted that the application constitutes an attempted misuse of Planning Act powers. It is a misuse, because it cannot have been Parliament's intention that the Planning Act 2008 powers could be used to undermine public private arrangements such as those here, wholly to the benefit of commercial operators, without so much as an attempt to negotiate in advance despite more than three decades of partnership.

83. Moreover, there is serious detriment here, the WMSA would be rebalanced in terms of its risk entirely in Cory's favour, and it puts at risk the arrangements the long-term security disposal of WRWA's waste disposal arrangements post 2032. In addition, the construction and operation of a new facility would be to WRWA's detriment.

84. Putting aside the statutory undertaker issue, in all the circumstances, there is no compelling case in the public interest for the proposed compulsory acquisition. The public interest does not decisively demand its confirmation, quite the contrary: the public interest lies in the maintenance of the negotiated contractual arrangements currently in place.