

National Infrastructure Planning
Net Zero Teesside DCO Case Team

BY EMAIL:
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Your Ref
Unique Reference: 20029934

Our Ref
RAQ/TGH/203316.0001

Date
26 October 2022

Dear Sir or Madam

Application by Net Zero Teesside Power Limited and Net Zero North Sea Storage Limited (NZN) for an Order Granting Development Consent for the Net Zero Teesside Project (the Project)

Deadline 11 - South Tees Development Corporation (STDC) - Post Hearing Submissions for ISH5 and CAH3

STDC make the following post hearing submissions:

(1) Issue Specific Hearing 5 on the draft Development Consent Order on 18 October 2022 (ISH5)

Article 2 'permitted preliminary works'

STDC has previously set out its concerns about permitted preliminary works in detail in its written representation [REP2-097a].

STDC refers the Examining Authority to the Statement of Common Ground (SoCG) submitted at Deadline 8 [REP8-038]. The Applicants have stated at entry 23 of the tables at part 3 of the SoCG that "Any works (including PPW) that impact STDC's interests will be subject to compliance with relevant protective provisions". It has been agreed between the parties that paragraphs 227 and 228 of the protective provisions at Part 19 of Schedule 12 to the DCO will be updated to include permitted preliminary works.

STDC notes that the protective provisions currently in the draft DCO [REP6-002] have not yet been amended to make clear that permitted preliminary works are also subject to STDC approval. STDC expects this amendment to be made in light of the confirmation by the Applicants in the SoCG.

STDC will submit its preferred set of protective provisions at Deadline 12.

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Article 8 Consent to transfer benefit of the Order

STDC notes action 4 of the ISH5 Action Points [EV9-007]:

“Provide proposed wording for Article 8 to secure notification from the Applicants to South Tees Development Corporation (STDC) for transfer of powers. Respond to Applicants’ proposals of 17 October 2022.”

On 17 October 2022, STDC received notification of a proposed amendment to article 8 from the Applicants’ solicitors, although no specific drafting has been provided at this stage. We understand that their position, namely notifying STDC within ten working days of a transfer taking effect, remains unchanged. However additional drafting would be inserted to require that STDC must be notified where there is a transfer and powers are to be exercised sooner than the ten working day period post the transfer.

STDC considers that the Applicants’ proposal is unnecessarily complicated, and in any event it does not resolve STDC’s concern. STDC proposes simply that article 8(14) and (15) are deleted, and article 8(9) is amended as follows:

(9) Where the consent of the Secretary of State is not required under paragraph (4), the undertaker must notify the following persons ~~Secretary of State~~ in writing before transferring or granting a benefit referred to in paragraph (1) or (2)–

(a) the Secretary of State; and

(b) STDC and Teesworks Limited, in respect of any transfer or grant affecting the STDC area.

STDC’s position is that it is entirely reasonable for the Applicants to provide STDC with advance notice of any transfer of powers affecting STDC’s land. STDC’s justification for seeking this change is four-fold:

(i) The amendment proposed by STDC is in line with other DCOs such as article 8(5) of the Thurrock Flexible Generation Plant Development Consent Order 2022.

(ii) The Examining Authority should note that the current drafting proposed by the Applicants, where a transfer may be made without Secretary of State consent is significantly more flexible than on several other DCOs which do not permit transfers to unnamed parties without Secretary of State approval. For example, see article 8 of the Southampton to London Pipeline Development Consent Order 2020 and article 9 of the M25 Junction 10 / A3 Wisley Interchange Development Consent Order 2022. In this context, the additional level of assurance being sought by STDC is reasonable.

(iii) Given the scale of the development within the STDC landholding area and the level of cooperation required between the parties, it is reasonable for STDC to be informed of transfers of powers that affect its land and interests, prior to the transfer being made. It is important that any such notification takes place regardless of whether powers are due to be exercised so that STDC may take necessary steps to notify its tenants and manage its wider estate. The Examining Authority will also note that the Applicants’ justification for these powers in the Explanatory Memorandum [REP8-006] does not account

for STDC's unique position as owner of the site required for the main facility and connection corridors, while also managing various other tenants and projects of significant economic importance to the region.

(iv) STDC's request does not impose an unnecessary burden on the Applicants. It is not seeking an approval role, and the administration associated with providing advance notification will have been undertaken in any event for the purposes of notifying the Secretary of State. STDC merely wishes to be notified at the same time as the Secretary of State, and in the same terms.

Schedule 2 of the dDCO – Requirements

As set out by STDC in the SoCG, STDC maintains that it should have an approval role over the requirements it is currently consulted upon. STDC previously set out its rationale in its post hearing submissions at deadline 5 [REP5-042]. STDC reserves its right to comment further on this matter at Deadline 12.

Schedule 12 Part 19 to the dDCO – Protective Provisions

At the hearing, STDC commented that the latest draft protective provisions and a related side agreement had been received on Friday 14 October. STDC reported that progress was being made, and it continues to engage positively to reach agreement on its concerns regarding the draft DCO, but the outcome is connected to the main site option agreement being concluded. STDC will submit its preferred form of protective provisions and other DCO amendments at Deadline 12. It is noted that the Applicants confirmed at CAH3 that they do not expect to reach an agreement prior to the conclusion of the examination.

(2) Compulsory Acquisition Hearing 3 on 19 October 2022 (CAH3)

Progress on Negotiations

STDC notes that the Applicants stated that they do not expect to conclude the option agreement with STDC before the end of examination.

Without an agreement being reached, STDC will continue to pursue amendments to the draft DCO and associated plans to safeguard its interests within the Order limits. STDC's preferred protective provisions, and amendments sought to the draft DCO, will be submitted at Deadline 12 alongside a justification for the changes sought. This will include a mechanism in the protective provisions to control the exercise of compulsory acquisition powers over the STDC area.

Tees Dock Road – Temporary Possession

At CAH3 it was agreed with the Examining Authority that the parties would submit written comments on the Examining Authority's questions concerning human rights and alternatives associated with the Tees Dock Road access and temporary possession. STDC's submissions are as follows.

Article 1 of the First Protocol provides that no one should be deprived of their possessions except in the public interest and subject to law, and while the State can enforce laws as necessary to control the use of property in the general interest, it does need to show that this imposition is necessary and

proportionate. Those considerations apply equally to both compulsory acquisition and temporary possession.

In relation to compulsory acquisition, that test manifests itself in domestic law as the requirement for a “compelling case in the public interest”, and this is set out in s122 of the Planning Act 2008. Whilst section 122 is concerned with compulsory acquisition and not temporary possession, nevertheless temporary possession interferes with private property rights and may do so over a significant extent and period of time.

Applying Article 1 to temporary possession therefore, it must be “necessary” and in the public interest, and there must be no disproportionate or unjustified interference with property rights. In practice therefore, the same considerations are engaged for temporary possession as for the “compelling case in the public interest” test – albeit that the balance of proportionality may change given the temporary nature of the imposition.

STDC became aware of Net Zero Teesside’s proposal to create a means of access at Tees Dock Road during pre-application, and since that point STDC has consistently reiterated its objection to this proposal, due to an ongoing legal dispute with PD Ports over this point of access. STDC has identified that a reasonable alternative means of access exists, which importantly avoids the detrimental impact on its private interests that would be incurred if the Tees Dock Road access is used.

The alternative means of access at Lackenby Gate has been assessed and confirmed as reasonable and acceptable by the Applicants, including in submissions the Applicants made at Compulsory Acquisition Hearing 2 (CAH2) on 13 July 2022. See also the SoCG between the parties submitted at Deadline 8 [REP8-037] at part 3, row 28 of the table. It was open to the Applicants to take up the option of adding this route into the Order Limits, as suggested by STDC at CAH2 – see STDC’s summary of oral evidence [REP5-042] – but this was not pursued, and no substantive reasons were advanced to justify why. Nevertheless, STDC is willing and able to grant the necessary rights to the Applicants to utilise the access by agreement, and so it is not an impediment to delivery of the NZT project.

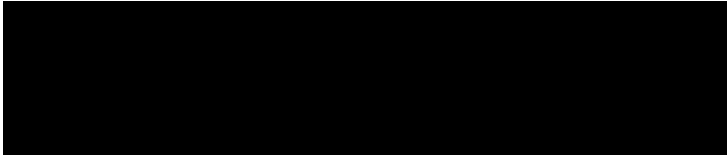
It is therefore not “necessary” (employing the wording of Article 1) for the Applicants to use temporary possession to take STDC’s land to form a means of access at Tees Dock Road. It is established that the Applicants can proceed with their project without temporary possession of this land.

The Applicants have prepared the necessary changes to the DCO and associated plans to remove the Tees Dock Road access, and agreed these with STDC. STDC had understood from correspondence with the Applicants that they would be informing the Examining Authority of the decision to remove the access from the DCO proposals, and that the Applicants were to submit formally the amended Order Limits boundary that reflected this at Deadline 8. However, this change was subsequently held back by the Applicants pending conclusion of negotiations with STDC in relation to the PCC site option agreement.

This is a wider commercial decision taken by the Applicants. Agreement over a means of access is not inextricably bound up with the main site option, and it is therefore not an adequate justification for failing to adopt the reasonable alternative available to the Applicants, in view of the infringement on STDC’s Article 1 rights associated with the Tees Dock Road access.



STDC therefore continues to request that the Examining Authority recommends the removal, from the scope of the Order, of the land required to form the Tees Dock Road access (plots 274/279). This is not necessary for the scheme to proceed, given that an alternative means of access at Lackenby Gate can be agreed with STDC.



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