FIVE ESTUARIES
OFFSHORE WIND FARM

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10.20.7 LEGAL NOTE - COMPULSORY ACQUISITION CASE

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This note has been prepared by Five Estuaries Offshore Windfarm Limited (the Applicant) in response to action point 3 arising from the Compulsory Acquisition Hearing 2 on 31 October 2024.

The Applicant has been asked to submit this note on the impact of the judgment in FCC Environment UK Limited versus Secretary of State for Energy and Climate Change and Covanta Rookery South Limited ([2015 EWCA] Civ 55) (the "**FCC CA Case**") on the relationship between s104 and s122.

1. SECTIONS 104 AND 122 OF THE 2008 ACT

1.1.1 S104 of the Planning Act 2008 Act (the "**2008 Act**") requires an application for a nationally significant infrastructure project to be determined "in accordance with the national policy statement" ("**NPS**")[1], subject to the limited exceptions set out in subsections 104(4) to 104(8).

1.1.2 S122(3) of the 2008 Act requires the decision maker to include the provisions authorising compulsory purchase in the Development Consent Order only if it is satisfied that there is "a compelling case in the public interest for the land to be acquired compulsorily"[2].

1.1.3 The compulsory acquisition guidance[3] states at paragraphs 12 and 13 that the decision maker "must be satisfied that there is a compelling case" and that there is "compelling evidence" that the public benefits would outweigh the private loss that compulsory acquisition would entail. In addition, any land that is 'incidental to or is required to facilitate the development' should also be limited to that which is proportionate.

2. ACTION POINT 3 IN TABLE 2:1: ACTION POINTS ARISING FROM CAH2

2.1.1 The ExA asked the Applicant to comment on any:

a) implications the Court of Appeal's judgement (most particularly relating to Ground 1) in respect of the FCC CA Case might have for the Applicant's Compulsory Acquisition case; and

b) other case law considered to be relevant to the Applicant's Compulsory Acquisition case.

2.1.2 The Applicant does not consider that FCC CA Case changes the understanding of the legal position or has any implication for the compulsory acquisition case made by the Applicant.

2.1.3 The FCC CA case concerned a DCO Order which was challenged on two grounds. Both grounds were dismissed at first instance in the High Court by Mitting J. The decision was appealed to the Court of Appeal.

[1] S104(3) of the Planning Act 2008
[2] S122(3) of the Planning Act 2008
[3] Planning Act 2008, Guidance related to procedures for the compulsory acquisition of land, September 2013, Department for Communities and Local Government

2.1.4 The first instance Court accepted in paragraph 17 of its judgment the Respondent's submission on the interrelationship between section 122(3) of the 2008 Act, which requires the decision maker to include the provisions authorising compulsory acquisition in the Order only if it is satisfied that there was a compelling case in the public interest for the land to be acquired compulsorily, and section 104(3) of that Act which requires the decision maker to decide the application in accordance with any relevant national policy statement ("NPS"), subject to subsections (4)-(8). The relevant NPSs in the FCC case were the Overarching National Policy Statement for Energy (EN-1), and the National Policy Statement for Renewable Energy Infrastructure (EN-3). These provided that the need for new renewable energy projects was urgent and that the decision maker "should act on the basis that the need for infrastructure covered by this NPS has been demonstrated". There is no challenge to this paragraph of the first instance Court's judgment. The key issue for the Court of Appeal was the <u>further</u> interpretation of the relationship between sections 104 and 122 of the 2008 Act then set out. The first instance Court noted the following further interpretation about the relationship between s104 and s122 of the 2008 Act:

"18. For my part I find it difficult to conceive of circumstances in which the Panel in applying statutory guidance, as it must, which established an urgent need for development, could legitimately conclude that there was not a compelling case as a necessary element of the scheme, justifying compulsory acquisition of rights in land. To that extent, the established distinction between tests for the grant of planning consent and the grant of a power of compulsory acquisition (see Trusthouse Forte Hotels Ltd v Secretary of State for the Environment (1986) 53 P&CR 293 at page 299, paragraph 2 and page 300, paragraph 6) has been modified by statute."

2.1.5 This paragraph (paragraph 18) is the basis for the Ground 1 in the FCC CA case. In the FCC CA Case, all three parties agreed that the judge erred in paragraph 18 of the first instance judgement[4], and the finding of compliance with s104 does not affect the distinction between tests for the grant of planning consent and the grant of a power of compulsory acquisition.

2.1.6 The FCC CA Case simply re-iterates the principle that where the NPS establishes an urgent need for development under s104 of the 2008 Act, this does not mean that the "compelling case in the public interest" test in s122 of the 2008 Act is automatically and necessarily met, and that any or all of the compulsory powers sought are therefore <u>automatically</u> justified[5]. The Court at first instance erred in holding that the statute had modified the previous position. The Court of Appeal judgement accordingly provides that the correct interpretation of the law remains as it was prior to the first instance judgement.

2.1.7 Compliance with the NPS and the determination under s104 that need is established does in and of itself not pre-determine the outcome of the decision under s122, which must still be separately considered. The conclusion that the need for the development is established and that it complies with government policy under s104 (where it applies) will usually, as has always been the case, form a core part of the compelling case and is indeed put forward as such in this Application by the Applicant. It does not however mean that s122 does not fall to be determined on its own merits.

[4] Paragraph 9 of the FCC CA Case
[5] Paragraph 10 of the FCC Case

2.1.8 Section 104(3) of the 2008 Act requires "the application", which would include all powers sought, to be decided in accordance with any relevant NPS. The tests for whether to grant powers of compulsory acquisition are set by s122(2) and (3) of the 2008 Act and include, in s122(3), that there must be "a compelling case in the public interest". S104(3) is a broad provision, dealing with the determination of the application as a whole and leading to an order granting development consent which may include compulsory acquisition provisions, whereas s122(3) is a narrower test dealing specifically with compulsory acquisition powers.

2.1.9 There is no conflict between s104 and s122 as each section operates "distinctly" in the determination of the application overall as in the case of section 104(3), and in a request for compulsory acquisition powers (in the case of s122(3)). Any conflict between s122 and s104 is avoided by virtue of s104(6)[6]. S104(3) means that, in assessing whether there is a "compelling case in the public interest", the need for the development must be treated as established and cannot be questioned, but it may be possible to meet the need without the use of the requested powers of compulsory acquisition. The Court of Appeal accepted the submission that:

"The full and proper application of the section 122(3) test is guaranteed by section 104(6) which disapplies the requirement in section 104(3) where it would lead to unlawfulness under any enactment (i.e. including under a different provision of the 2008 Act) – thus, if there was any potential conflict between sections 104(3) and 122(3), the "compelling public interest" test in section 122(3) would not be overridden by section 104(3)."[7]

2.1.10 The Applicant therefore submits that the case has no impact on the case for compulsory powers submitted as the tests which apply remain those set out in the Act and guidance, and which have been considered in the Application.

3. APPLICANT'S CASE

3.1.1 It is not the Applicant's submission that where an NPS establishes the urgent need for development that this means that the "compelling case in the public interest" test in s122 is automatically and necessarily met for each plot over which powers are sought or that the s122 test is undermined. It is the Applicant's submission that the compliance with s104 and the establishment of the need for the development is however an important element of the compelling case as it demonstrates the clear public interest in the development being delivered.

3.1.2 Government has concluded that there is a critical national priority ("CNP") for the provision of nationally significant low carbon infrastructure. Section 4.2 of NPS-EN1 (Overarching National Policy Statement for Energy) states that offshore renewable generating technologies are CNP infrastructure. That NPS sets out that:

[6] Paragraph 10 of the FCC Case
[7] Paragraph 10 of the FCC Case

"During decision making, the CNP policy will influence how non-HRA and non-MCZ residual impacts are considered in the planning balance. The policy will therefore also influence how the Secretary of State considers whether tests requiring clear outweighing of harm, exceptionality, or very special circumstances have been met by a CNP Infrastructure application"[8].

"Where residual non-HRA or non-MCZ impacts remain after the mitigation hierarchy has been applied, these residual impacts are unlikely to outweigh the urgent need for this type of infrastructure. Therefore, in all but the most exceptional circumstances, it is unlikely that consent will be refused on the basis of these residual impacts"[9].

3.1.3 S104 makes it clear that the SoS *"must decide the application in accordance with any relevant national policy statement, except to the extent that one or more of the subsections"* of specified exceptions apply. Therefore, subject to the exceptions in s104, the SoS should start with a presumption in favour of granting consent to applications for energy NSIPs. The Applicant has set out the need case and policy compliance of the development in the Planning Statement (APP-231) and also noted that compliance with the legislative tests must also be considered and are submitted to be complied with[10].

3.1.4 The Applicant has explained the reasons for the inclusion of compulsory acquisition and related powers in the Order, and sets out why there is a clear and compelling case in the public interest, in accordance with s122 of the 2008 Act, for the Order to include such powers. Please see the Statement of Reasons (REP1-014), and the summaries of oral submissions at CAH1 (REP1-059) and CAH2 (REP3-022). The Applicant has also explained the reasons why the Application is in accordance with NPSs; please see the Policy Compliance Document (APP-232).

3.1.5 The Applicant notes the challenges made by some IPs to the extent of compulsory acquisition sought around the second set of ducts and the extent of the substation area, especially around the position that these are 'for' North Falls. The Applicant notes that the requirement of s104 applies to the whole application which must comply with the NPS. The updated National Policy Statements for energy and electricity networks infrastructure (specifically EN-1 and EN-5) require collaboration and co-ordination between projects to be sought where practicable. The projects have worked together to identify opportunities for collaboration to minimise or control cumulative impacts. In the circumstances, the Applicant is actively required to seek collaboration with North Falls by the terms of the NPS and also to address cumulative impacts. The Applicant addressed this in its post CAH1 submissions (REP1-059).

[8] NPS EN1 paragraph 4.2.8
[9] NSP EN1 paragraph 4.2.15
[10] Paragraphs 7.1.3 and 7.1.34

3.1.6 As set out in the Planning Statement (APP-231) at section 3.3 and the Co-ordination Document (APP-263), the objective of including the second set of ducts is to provide a route to minimise impacts where possible: "*The shared design keeps the potential impacts from the projects to a single swathe of land and enables coordination during construction, which has the potential to significantly reduce the impacts associated with the construction phase*"[11]. Land needed for mitigation of impacts can be, and routinely is, subject to compulsory acquisition as it is necessary to facilitate the overall development.

3.1.7 The Applicant notes that there has been criticism from some landowners that there is not enough co-ordination between North Falls and Five Estuaries[12]. The Applicant submits that its approach is demonstrative of the co-ordination that is being sought and the meaningful attempts being made to reduce overall impacts on landowners. The Applicant cannot deliver collaboration in accordance with the NPS, co-ordination as sought by landowners and reduce land take as also argued for by some landowners. In order to maintain the ability to minimise impacts by delivering the second set of ducts, the land take and powers sought by the Applicant are necessary. It is not excessive to include land for these works given that they properly form part of the associated development and are intended to allow mitigation to be delivered in the co-ordinated scenario. The public interest is served by allowing the option to collaborate and minimise impacts.

ANY OTHER CASE LAW

3.1.8 The Applicant has not identified any other relevant case law which the Applicant considers to be relevant to the Applicant's Compulsory Acquisition case.

EXAMPLES OF RELEVANT PREVIOUS DCOS

3.1.9 The Applicant notes that this Application is not the first project to seek compulsory powers in order to install a second set of cable ducts to serve a separate generation asset. The decision letter for East Anglia One ("EA1") granted in 2014, includes provision for the installation of ducting which would be used for cabling linked to the proposed East Anglia 3 and East Anglia 4 offshore wind farm projects. The relatively recent Norfolk Vanguard Offshore Wind Farm ("Vanguard") granted in 2022 included a scenario where it would install ducts onshore and other shared works for Norfolk Boreas Offshore Wind Farm ("Boreas"), a separate generation asset to be consented under a separate DCO. Both those applications' facts are clearly analogous to the current application.

3.1.10 In Vanguard, the second set of ducts were classified as associated development (as is proposed in the current application). Whether these properly form associated development is important as compulsory powers can only be sought for the 'authorised development'; if these ducts were not associated development, powers would not be available. The Secretary of State specifically considered this in Vanguard and concluded:

[11] Planning Statement APP-232, at 3.3.3
[12] As examples only, RR-10, RR-108, RR-109, REP2- 092, REP2-095

"One of the issues covered was whether the ducting related to the proposed Norfolk Boreas offshore wind farm could be classed as 'Associated Development' as defined in the Planning Act 2008 and thus be subject to compulsory acquisition powers [ER 8.7.1 et seq.]. The ExA considered relevant legislation (the Planning Act 2008) and guidance ("DCLG Guidance on Associated Development Applications for Major Infrastructure Projects" which was issued in 2013) before concluding that 'Boreas ducting' could be classified as Associated Development and would, therefore, benefit from the compulsory acquisition powers that the Applicant sought [ER 8.7.3 et seq.]. The Secretary of State agrees with this conclusion."[13]

3.1.11 Having classed the additional ducts as associated development and concluded that compulsory powers can be sought, the decision letter then considers one of the other key tests for such powers - whether human rights have been properly considered This demonstrates the separate consideration of s122 and s104:

"As far as human rights in relation to the proposals for compulsory acquisition and temporary possession of land and rights over land are concerned, the ExA is satisfied that: the Examination ensured a fair and public hearing; any interference with human rights arising from implementation of the proposed Development is proportionate and strikes a fair balance between the rights of the individual and the public interest; and that compensation would be available in respect of any quantifiable loss [ER 8.15.4 et seq.]. The Secretary of State sees no reason to disagree with the ExA's conclusion that there is no disproportionate or unjustified interference with human rights so as to conflict with the provisions of the Human Rights Act 1998."[14]

3.1.12 The decision then draws a conclusion on the compelling case which allowed compulsory powers for the additional ducts as part of the overall proposed development:

"The Secretary of State considers that relevant legislation and guidance relating to compulsory acquisition and temporary possession have been followed by the Applicant and that, given his overall consideration that development consent for the proposed Development should be granted, there is a compelling case in the public interest to grant compulsory acquisition and temporary possession powers to facilitate the Development."[15].

3.1.13 Similarly, and as for Five Estuaries, the EA1 Order includes *"provision, as "associated development", for the installation of ducting that would be used for cabling linked to the proposed East Anglia 3 and East Anglia 4 offshore wind farm projects in the event that they receive the necessary development consents. The Order also includes provisions for the compulsory acquisition of land necessary for the project"*[16].

3.1.14 In the EA1 decision letter, the SoS considered the inclusion of the additional ducts as associated development:

[13] Vanguard SoS decision letter, paragraph 6.5
[14] Vanguard SoS decision letter, paragraph 6.14
[15] Vanguard SoS decision letter, paragraph 6.15
[16] EA1 SoS decision letter, paragraph 1.3

"The principal issue in relation to associated development arising from the Application (ER 4.6) was whether the additional ducts proposed for future offshore wind farms off the Suffolk coast – East Anglia Three and East Anglia Four – could be considered associated development under s115 of the 2008 Act. The Panel found that the ducts for those future wind farms were associated development and not excluded by any part of section 115 of the 2008 Act (ER 4.7) and considered the application of Principle 5(iv) in the revised Department of Communities and Local Government guidance on Associated Development (ER 4.8). Having examined the case made by the Applicant for the inclusion of ducting for future projects (ER 4.9 – 4.16), the Panel concludes (ER 4.17) that the connection between the East Anglia One project and the laying of the ducting for East Anglia Three and Four can be regarded as development which is associated with the proposed East Anglia One wind farm. The Secretary of State agrees with the analysis and the conclusion reached."[17].

3.1.15 The decision on CA powers found that powers could be properly granted as sought, including for the additional ducts;

"The Panel considered each of the relevant issues and concluded that the proposed compulsory acquisition met each of the relevant requirements in terms of both the Development and the cable and ducting associated with the proposed East Anglia Three and East Anglia Four offshore wind farms (ER 5.32 – 5.107 and 5.111 – 5.173). The Panel concludes (ER 6.3) that, taking all these factors into account, there is a compelling case in the public interest for the compulsory acquisition powers in respect of the Compulsory Acquisition Land shown on the amended Land Plans that the proposal would comply with s122(3) of the 2008 Act (ER 6.3).[18]

…

The Secretary of State is satisfied that the Panel`s analysis of the issues is correct and that the proposed provisions in the recommended draft Order meet the relevant requirements."[19]

3.1.16 The approach taken by the Applicant is therefore well precedented and supported by decisions of the Secretary of State. The CA powers are sought for the 'authorised development' which includes, as associated development (and set out in schedule 1 of the dDCO) the second set of ducts. That inclusion complies with s122 as the powers sought are for the development for which consent is sought, and there is a compelling case in the public interest for them to be granted.

[17] EA1 SoS decision letter paragraph 4.4
[18] SoS decision letter paragraph 4.74
[19] SoS decision letter paragraph 4.75

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