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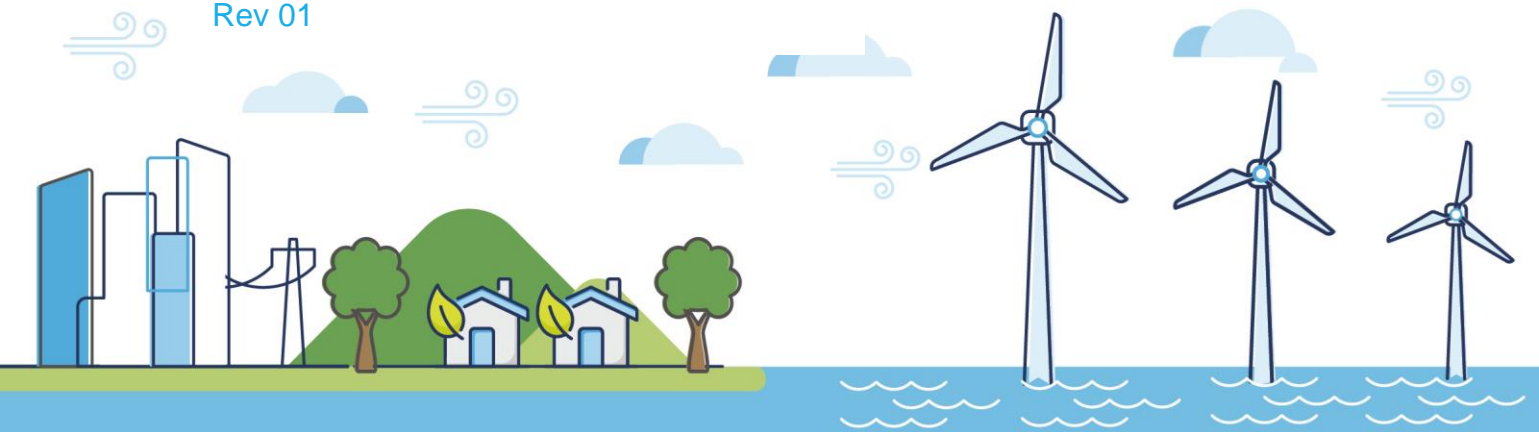
Morecambe Offshore Windfarm: Generation Assets Examination Documents

Volume 9

Appendix B: Note on the R (Parkes) v Secretary of State for the Home Department [2024] EWHC 1253 (Admin) judgement

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Glossary of Acronyms

AfL	Agreement for Lease
DCO	Development Consent Order
EEZ	Exclusive Economic Zone
ExA	Examining Authority
ISH	Issue Specific Hearing
MLWS	Mean Low Water Springs
PA	Planning Act
UK	United Kingdom
UNCLOS	United Nations Convention on the Law of the Sea

Glossary of Unit Terms

km	kilometre
nm	nautical miles
m	miles

Glossary of Terminology

Agreement for Lease (AfL)	Agreements under which sea bed rights are awarded following the completion of The Crown Estate tender process.
Applicant	Morecambe Offshore Windfarm Ltd
Application	This refers to the Applicant's application for a Development Consent Order (DCO). An application consists of a series of documents and plans which are published on the Planning Inspectorate's (PINS) website.
Generation Assets (the Project)	Generation assets associated with the Morecambe Offshore Windfarm. This is infrastructure in connection with electricity production, namely the fixed foundation wind turbine generators (WTGs), inter-array cables, offshore substation platform(s) (OSP(s)) and possible platform link cables to connect OSP(s).
The Planning Inspectorate	The agency responsible for operating the planning process for Nationally Significant Infrastructure Projects.
Windfarm site	The area within which the WTGs, inter-array cables, OSP(s) and platform link cables would be present.



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1 Introduction

1. Morecambe Offshore Windfarm Limited ('the Applicant') is promoting an application for a development consent order in respect of the generation assets for the Morecambe Offshore Wind Farm Project ('the Application') under section 37 of the Planning Act 2008 (the "PA 2008"). The Morecambe Offshore Wind Farm (the "Project") is to be sited approximately 30km from shore. This is outside the UK territorial sea limits (i.e., beyond 12nm) and within the Exclusive Economic Zone (EEZ).
2. As part of Issue Specific Hearing 1 (ISH1) the Applicant has agreed to provide the Examining Authority (ExA) with a written explanation as to why it has not provided a book of reference within the Application. A book of reference (as defined under regulation 7 of the Infrastructure Planning (Applications: Prescribed Forms and Procedure) Regulations 2009 ('the APFP Regulations') is required to accompany an application for an order granting development consent where applicable. The Applicant's position is that a book of reference is not applicable for this application as the site does not fall within the definition of "land" under the PA 2008 and therefore is not required under the APFP Regulations. This note sets out the Applicant's position as to what is captured by the definition of "land" contained in the PA 2008 and therefore what documents require to be provided to support the application for the Project. It also references the judgment of the High Court in the recent case of *R (Parkes) v Secretary of State for the Home Department* [2024] EWHC 1253 (Admin) (the "Parkes Case").

2 What is meant by land for the purposes of the planning act 2008?

2.1 Definition of Land in the PA 2008

3. "Land" is defined under section 235 of the PA 2008 as including:
"buildings and monuments, and land covered with water, and in relation to Part 7 must be read in accordance with section 159"
4. Part 7 of the PA 2008 relates to Orders Granting Development Consent (including where the order includes provision for the compulsory acquisition of land). Section 159(2) adds to this definition of "land" for Part 7 to include "Any interest in or right over land". Section 159(3) continues "Acquiring a right over

land includes acquiring it by the creation of a new right as well as by the acquisition of an existing one.”¹

5. “Land” is not generally defined in the APFP Regulations. For the purposes of Regulation 7 of the APFP Regulations “land” includes “*any interest in or right over land*”. This aligns with the extension of the definition of land made for Part 7 of the PA 2008, and is logical because Regulation 7 relates to the book of reference which is part of the suite of compulsory acquisition documents, so it makes sense that the definition of land should align with the Part of the PA 2008 which also addresses compulsory acquisition.
6. Otherwise, “land” in the APFP Regulations, with the exception of Regulation 7, has the same definition as in Section 235 of the PA 2008.²
7. We note that within the definition of land in the PA 2008 is the phrase “and land covered with water”. This is not unique to the definition of land found within the PA 2008, and similar definitions of land are found in other legislation, including the Interpretation Act 1978. The Applicant does not consider that a jump should be made to assume land covered with water includes the sea bed where the Project is located (see also **Section 18** below).
8. More generally, under English property law “land” or buildings is usually understood to mean corporeal hereditaments (i.e., something physical that is capable of being owned and inherited). It is noted that the Land Registry (the register of land in England and Wales) will only register “onshore” land and also the area of foreshore extending down to Mean Low Water Springs (MLWS); it does not treat the sea bed further out to sea from MLWS as “land” and does not have the ability to register it.
9. An “interest” or “right” in land is not defined in the PA 2008 but, similarly, under English law is usually understood to mean an incorporeal hereditament (i.e., an intangible right in land, such as an easement).

¹ The definition of “land” ordinarily includes interests and rights in land. Part 7 of the PA 2008 includes provision for the compulsory acquisition of land, and Regulation 7 of the APFP Regulations sets out the meaning of the “book of reference”, which also relates to compulsory acquisition. Case law states that where an authority wishes to acquire an estate or interest in the land then it must have express statutory power to do so (*Sovmots Investments Ltd v Secretary of State for the Environment* [1979] AC 144, HL). Therefore these provisions, which relate to compulsory acquisition, expressly make it clear that the definition of land also includes any interest in or right over land. This does not mean that interests in land are excluded from the ordinary definition of land within the PA 2008, but rather they are expressly included for the purposes of compulsory acquisition so as to not fall foul of the case law.

² Section 11 of the Interpretation Act 1978 states “where an Act confers power to make subordinate legislation, expressions used in that legislation have, unless the contrary intention appears, the meaning which they bear in the Act.”

2.2 Where is ‘land’ used in the Planning Act 2008 and APFP Regulations?

10. Section 37(3) of the PA 2008 provides that the Secretary of State may prescribe which documents need to be submitted to support an application for an order granting development consent. Accordingly, the APFP Regulations include provisions setting out the supporting documents which must accompany an application.
11. Regulation 5(2)(d) of the APFP Regulations provides that “where applicable, [a] book of reference” must accompany the application for an order granting development consent. Regulation 7 of the APFP Regulations sets out the meaning and contents of a “book of reference”. The five parts of a book of reference as prescribed by Regulation 7 are each required to be included where the proposed order will have an effect on “land”. In relation to the Crown specifically, Regulation 7(1)(d) of the APFP Regulations provides that Part 4 of a Book of Reference is required to specify “*the owner of any Crown interest in the land which is proposed to be used for the purposes of the order for which application is being made*” (emphasis added).
12. Regulation 5(2)(i) of the APFP Regulations provides that a “land plan” must be provided which, at a minimum, identifies “**the land** required for, or affected by, the proposed development” (emphasis added).
13. Regulation 5(2)(n) of the APFP Regulations provides that “where applicable, a plan with any accompanying information identifying any **Crown land**” (a ‘Crown Land plan’) must accompany the application. “Crown land” is not defined in the APFP Regulations however, it is a defined under section 227 of the PA 2008 as:

“land in which there is a Crown interest or a Duchy interest.” (emphasis added).”
14. In short, a book of reference is only required to include information, including Crown Interests, insofar as it relates to “land” (as opposed to areas which are not “land” such as the sea bed on which the Project is located – explained below). In addition, the requirement to produce a land plan and Crown land plan also relate to “land”.

2.3 The Parkes Case

15. The Parkes Case does not provide a definitive definition of “land”. Instead, it directs a review of the underlying legislation in each context.
16. In the Parkes Case Holgate J referred to the judgment of the Supreme Court in *R (PACCAR Inc) v Competition Appeal Tribunal* [2023] 1 WLR 2594 which held that:

“In an appropriate case “the potency of the term defined” may provide some guidance as to the meaning for that term as set out in a statutory definition.”
[48]

17. In the Parkes Case, Holgate J applied this “potency of the term” principle to the term “land”, as defined under section 336(1) of the Town and Country Planning Act 1990. Holgate J accepted the proposition that land must refer to the solid part of the earth’s surface as opposed to the sea.

“The sea must include the underlying sea bed. That was the approach adopted by the Inner House in Argyll and Bute District Council. Indeed, if land were to be treated as including the sea bed, there would be no logical stopping plan before the limits of this country’s territorial sovereignty are reached”.

18. Holgate J also commented on the decision of the Inner House in *Argyll and Bute District Council v Secretary of State for Scotland* (1976) S.C. 248. Here the Inner House considered the definition of “land” under the Town and Country Planning (Scotland) Act 1972. This definition of “land” included “land covered with water” (similar to the PA 2008). The Court decided that “land” did not extend beyond MLWS for the purposes of the Town and Country Planning (Scotland) Act 1972.

19. Secondly, the Parkes Case distinguished between the concept of land which is inheritable, and land which is incapable of being inherited. The definition of land within the Town and Country Planning Act 1990 is “*means any corporeal hereditament, including a building*”³ (i.e., as discussed above, capable of being inherited). The Parkes Case explained that land “held” is to be distinguished from allodial land. Allodial land is land of the monarch, not held under any form of tenure. The Parkes Case notes that allodial land is said to comprise “*primarily the ancient possessions of the Crown, the foreshore and the sea bed below LWM extending to the seaward territorial limits*”.⁴ The notion of “perpetual succession” applies to allodial land, meaning that it is not capable of inheritance.

20. Holgate J concludes in relation to allodial land that, in his opinion, the definition of land within the Town and Country Planning Act 1990 is restricted to corporeal hereditaments, and does not include the sea bed (up to 12nm) as it is allodial land. He states that even if this analysis is wrong with respect to allodial land, the sea bed above which the Bibby Stockholm barge was moored is not subject to planning control for the reasons at set out earlier in the

³ Section 336(1), Town and Country Planning Act 1990.

⁴ Parkes Case, [185].

judgement, including the potency of the term ‘land’ and that the geographical extent of the Town and Country Planning Act 1990 ends at MLWS.

2.4 Analysis

21. It is the Applicant’s position that the area of sea bed where the Project is to be located does not constitute “land” for the purposes of the PA 2008, and therefore documents such as a book of reference, land plan and Crown land plan are not required under the APFP Regulations as they are all required in relation to “land”.
22. The Applicant’s principal reason is that, as a bare minimum, land is something that is capable of ownership. In the Parkes Case Holgate J considered the type of ownership was relevant (heritable, not allodial). However, in the current case the Project is located beyond the limits of the territorial sea (which was the subject of the discussion in the Parkes Case), within the EEZ. While the Crown has (allodial) title of the sea bed to the extent of the territorial sea, the sea bed within the EEZ is not owned by the Crown and is considered incapable of ownership⁵. Whilst not amounting to ownership of the sea bed, a state has exclusive rights to “*explore, exploit, conserve and manage*” natural resources in its EEZ.⁶ As such, the sea bed within the EEZ falls outside the definition of “land” in the PA 2008 and the Crown’s rights in the EEZ are not an “interest” in “land”.
23. In addition, as was found in the Parkes Case, land has a potency which distinguishes it from sea bed, see **Section 16 to 17** above. Applying this principle to the definition of “land” within the PA 2008, it is submitted that it is also such a potent term as distinguished from sea bed. This is supported by the discussion of land plans in the Examining Authority Report for the Burbo Bank Extension Examining, see **Section 28** below, where the Examining Authority reported that Triton Knoll, like the Burbo Bank Extension related to development exclusively within the marine area, with no development on land. It is the Applicant’s view that references to ‘land covered by water’ within the

⁵ United Nations Convention on the Law of the Sea (UNCLOS), Article 56 1(a) notes that in the exclusive economic zone, “*the coastal state has sovereign rights for the purpose of exploring and exploiting, conserving and managing the natural resources, whether living or non-living, of the waters superjacent to the seabed and of the seabed and its subsoil, and with regard to other activities for the economic exploitation and exploration of the zone, such as the production of energy from the water, currents and wind.*”

This is contrasted with Article 2 which states “*the sovereignty of a coastal State extends, beyond its land territory and internal waters and, in the case of an archipelagic State, its archipelagic waters, to an adjacent belt of sea, described as the territorial sea*”. Territorial Sea being defined in Article 3 of UNCLOS as “*Every State has the right to establish the breadth of its territorial sea up to a limit not exceeding 12 nautical miles, measured from baselines determined in accordance with this Convention.*”

⁶ United Nations Convention on the Law of the Sea (UNCLOS), Article 73.

PA 2008 definition of land is referring to, for example, rivers and lakes and not the sea bed.

2.5 Precedent

24. The Applicant is not aware of any application for an offshore wind Development Consent Order (DCO) which includes within the book of reference (or land plans) the offshore elements of the development (below MLWS).⁷
25. The Applicant is aware of two other DCO applications solely for the generation assets of offshore wind farms; Triton Knoll Offshore Wind Farm and the Burbo Bank Extension. Triton Knoll is located 32km from the coast (just over 17nm) and therefore within the EEZ. Burbo Bank Extension is located within 12nm and within the territorial sea.
26. The Applicant has reviewed the Burbo Bank Extension Examining Authority Report and Secretary of State decision letter. In that case, whilst the Examining Authority noted that although there would have been no other substantive content, a book of reference would have included a Part 4 which would have specified the Crown Estate as the owner of a Crown interest in the land proposed to be used for the purposes of the order for which the application was made. The Report noted that:

*“I find that, although there is a formal requirement for a Book of Reference in this case, no harm has been done by its absence. In circumstances where the only substantive reference within it would be to the Crown Estate, but where the Crown Estate has separately confirmed its satisfaction with and consent to the application proposal, there is no reason to require a Book of Reference to be produced.”*⁸
27. In that case, the Crown Estate confirmed to the ExA that it was satisfied with the proposal.
28. The Examining Authority for the Burbo Bank Extension application also considered the Triton Knoll application. For that application, the draft DCO did not include powers for the compulsory acquisition of land or interests in land or rights over land within the proposed development consent order area, on the basis that the applicant had yet to finalise the location and design detail of

⁷ For example, Outer Dowsing Offshore Wind Farm, Five Estuaries Offshore Wind Farm, Dogger Bank South Offshore Wind Farm, Sheringham and Dudgeon Extension Projects, and Hornsea Project 4 Offshore Wind Farm.

⁸ Examining Authority's Report of Findings and Conclusions in respect of the Burbo Bank Extension Offshore Wind Farm, dated 26 June 2014, Paragraph 6.20 <[EN010026-000019-Examining Authority's Recommendation report submitted to the Secretary of State of Energy and Climate Change.pdf](#)> [Accessed 12.11.2024].

the grid connection, which was to be the subject of a subsequent development approval. The Examining Authority noted:

“As in this case, the proposed development consent order area was exclusively marine. No dry land was included in it and none was sought to be acquired. The marine area within the order limits was the subject of a conditional agreement for lease from the Crown Estate and there was no other interest in land involved.

Although a Book of Reference should again have been provided, the Triton Knoll application did not include one. The Panel Report recommended and the decision letter and statement of reasons issued on 11 July 2013 accepted that the DCO should be made. The absence of a Book of Reference was not identified as a matter of concern in the recommendation report or the decision and the applicant was not requested to provide one at any stage in the examination, recommendation or decision-making processes.”⁹

29. The Applicant notes that Burbo Bank Extension is located within the 12nm extent of the UK territorial sea. As such, the Examining Authority on Burbo Bank did not require to expressly make a finding on whether the sea bed beyond 12nm is “land” or whether the rights the Crown has beyond 12nm are capable of being an “interest” in land for the purposes of Regulation 7 of The Infrastructure Planning (Applications: Prescribed Forms and Procedure) Regulations 2009. It is unclear if the Examining Authority was addressed on the question, and as such the basis for the statement that a book of reference should have been provided with the Triton Knoll application is also unclear.
30. The Applicant is not aware that an applicant, Examining Authority report, or Secretary of State decision has expressly explained why a book of reference is not customarily required in relation to those elements of offshore wind projects **located in the territorial sea**. Whether it is because there is “no reason” for it to be produced and its absence causes “no harm” (per the Examining Authority Report on Burbo Bank Extension), whether the analysis of allodial land is engaged (per the Parkes Case), whether the potency of the term land excludes the sea bed under the PA 2008 as it was considered to under the TCPA 1990 (also per the Parkes Case), or for another reason.
31. However, the current situation is even more clear cut than for a projects located in the territorial sea such as Burbo Bank Extension. As discussed above, **this Project is located outside the territorial sea** and in an area of sea bed which is not capable of ownership. As such the Applicant’s clear position is that such an area of sea bed could not be considered “land” under

⁹ Examining Authority’s Report for Burbo Bank Extension, Paragraphs 6.18, 6.19

the PA 2008, and the rights enjoyed by The Crown Estate under international law could not be considered Crown “interests” in land. With no concept of ownership, the purposes of a book of reference (which are related to the acquisition of, and implications for, property and interests owned or enjoyed) are not relevant or engaged.

32. Furthermore, The Crown Estate has been consulted pursuant to section 42 of the PA 2008 and notified of the submitted application as a statutory consultee, and no concerns have been raised on these matters. Indeed, the Applicant has the benefit of an Agreement for Lease (AfL) with The Crown Estate providing for the development of the windfarm, and that AfL expressly requires that the Applicant progress the DCO application.

3 What documents need to be submitted?

3.1 Book of Reference

33. The Project does not affect any land which falls within the definition of “land” for the purposes of the PA 2008, therefore, the provisions of Regulation 7 of the APFP Regulations are not engaged in relation to the Project. In addition, as per the precedent set by the Burbo Bank Extension and Triton Knoll applications for DCOs, there is “no reason” to produce a book of reference when only Crown interests in sea bed are engaged. So even if the sea bed beyond 12nm is “land” (and the Crown’s rights in the EEZ ‘interests’) for the purposes of the PA 2008, there would be no reason to provide a book of reference. Accordingly, the provision of a book of references is not applicable for the purposes of regulation 5(2)(d) of the APFP Regulations in this instance.

3.2 Land Plan

34. As above, the Applicant’s position is that the Project does not affect any land which falls within the definition of “land” for the purposes of the PA 2008. As such, a land plan was not required as part of the Application.
35. Nevertheless, the Applicant elected to provide a document in the form of a land plan (identified as the ‘Offshore Order Limits and Grid Coordinates Plan’) to assist the Examining Authority and the consultees with assessing the Project and as an aid for identifying the Project’s geographic location. Taking a precautionary approach, the document was submitted under Regulation 5(2)(i) of the APFP Regulations.

36. An offshore order limits and grid coordinates plan is common for offshore wind DCO applications for areas of sea bed beyond the 12nm (where a land plan is not commonly provided).¹⁰

3.3 Crown Land Plan

37. This definition of ‘Crown Land’ again is tied to the definition of “land” which, as above, is not applicable to the Project as the Project does not affect any “land” in terms of the PA 2008. Accordingly, it is the Applicant’s position that the provision of a Crown land plan is not applicable to the Project.
38. However, again taking a precautionary approach and given the absence of an express definition of Crown land in the APFP Regulations a document was prepared and submitted under Regulation 5(2)(n) of the APFP Regulations.

4 Conclusion

39. The Applicant’s position is that a book of reference is not required to accompany the Application because the Project is not located in an area which is “land” within the PA 2008 of APFP Regulations. If the ExA would prefer, a book of reference can be provided however, the Applicant would note that this may raise a precedent issue as to why a book of reference has not been provided for other wind farms under similar circumstances, or in respect of the sea bed below the MLWS, in the past.
40. For the same reasons, a land plan and Crown land plan were not required to accompany the Application but they have been provided on a precautionary basis, and because the land plan offers practical utility for interested parties in reviewing the Application. If the ExA views these plans as being superfluous as indicated during ISH1 they could be withdrawn by the Applicant. The Applicant would flag however that whilst the Crown Land Plan could be removed with minimal implications for the other Application documents, the Land Plan (i.e., the “Offshore Order Limits and Grid Coordinates Plan”) is referred to in numerous sections throughout those documents and so its withdrawal may require more extensive amendments. The Applicant also notes that such documents were provided with the Application for Burbo Bank Extension.
41. The Applicant’s preference would be to leave these plans referred to in the draft DCO in the current way. If the Examining Authority recommends, or the Secretary of State considers, that neither were technically required pursuant to Regulation 5(2)(i) or 5(2)(n) of the APFP Regulations, then this could be

¹⁰ For example, Outer Dowsing Offshore Wind Farm, Five Estuaries Offshore Wind Farm, Dogger Bank South Offshore Wind Farm, Sheringham and Dudgeon Extension Projects, and Hornsea Project 4 Offshore Wind Farm.

clarified in the report or decision letter. It would then be open to delete the reference to Crown Land Plan from Schedule 8 of the DCO, but it is considered that the Offshore Order Limits and Grid Coordinates Plan is necessary to identify the offshore location in the draft DCO (perhaps noting that in future such plans should properly be submitted under Regulation 5(2)(o) rather than 5(2)(i) although of course no prejudice has been caused in this case).

5 References

Examining Authority's Report of Findings and Conclusions in respect of the Burbo Bank Extension Offshore Wind Farm, dated 26 June 2014, <EN010026-000019-Examining Authority's Recommendation report submitted to the Secretary of State of Energy and Climate Change.pdf> (Accessed 12.11.2024).

Infrastructure Planning (Applications: Prescribed Forms and Procedure) Regulations 2009

Interpretation Act 1978

Planning Act 2008

R (Parkes) v Secretary of State for the Home Department [2024] EWHC 1253 (Admin)

Town and Country Planning Act 1990

United Nations Convention on the Law of the Sea (UNCLOS)