Mallard Pass Solar Farm DCO

Richard Williams – Interested Party No. MPSP-012

Deadline 7: Written Submissions by Town Legal LLP following Compulsory Acquisition Hearing 2

1. To avoid unnecessary repetition, these submissions should be read alongside previous submissions made by Mr Williams:

   - REP2-234: "What Happens if Mallard Solar Farm Doesn't" in response to ExA Q1.2.6
   - REP3-053: Comments on responses to ExA's first written questions
   - REP4-066: Deadline 4 submission in relation to ISH3 and decommissioning
   - REP5-046: Response to ExA's further written questions (ExQ2)

2. Mr Williams' primary basis of objection to compulsory acquisition is that the land owned by the Williams family ("**the Williams Land**") is not required to deliver the solar farm.

3. Appendix A of the summary of the applicant's oral submissions at the first compulsory acquisition hearing (REP4-042) show that the Mallard Farm proposal requires more land per MW generation than any other solar project authorised to date and in at least one case (Cleve Hill) more than twice as much.

4. While the land requirements does fall within the indicative range in the draft NPS, this is aimed at smaller projects and the draft NPS (published in 2021 notes that "*this is expected to change over time as the technology continues to evolve to become more efficient*."

5. The applicant contends that it requires more land to be included in the CA red line than will actually be required for the solar farm because it has not yet completed its detailed design and requires flexibility. Mr Phillips for the applicant said at CAH1:

   "*that at the point of detailed design is submitted to the local planning authority for approval the land required for the project crystallises. This may be less than currently suggested but, at this stage, it is recognised that there is a need for flexibility in the redline of the DCO because the lead-in period for detailed design and discharging requirements could be three years away. If at the point of detailed design, the land is not required then the rationale to use compulsory acquisition powers falls away*"(REP-042 p9)

   It is unclear why the applicant could not have undertaken its detailed design in advance of the applicant.

6. It is for the Examining Authority to satisfy itself that there is a compelling case in the public interest to justify the compulsory acquisition of the Williams Land and in particular that

the Williams Land is required for the delivery of the solar farm scheme. The Applicant has failed to demonstrate that it is; only that it might be, depending on the final design.

7. The Applicant sought at CAH1 to persuade the Examining Authority that there are a number of safeguards in place at the detailed design stage (or afterwards) and by implication that the Examining Authority would not itself have to decide whether the Williams Land is required for the scheme at that stage.

Jurisdiction of the Upper Tribunal

8. At CAH1, Mr Phillips contended that "*Once the detailed design has been approved by the local planning authority, then there is a second stage of consenting in terms of land acquisition as it is not the case when a DCO is granted that a developer can seize the land. Mr Phillips described how the developer could use one of two ways to compulsorily acquire the land (GVD or notice to treat) with each process having notice provisions, providing the landowner the opportunity to contest the acquisition and if there is a dispute it can be decided at the Lands Tribunal like a court case to decide if it is an appropriate use of the land"* (REP4-042 p8).

9. Mr Williams responded (REP5-046) that this was not true. The Upper Tribunal (Lands Chamber) has no such jurisdiction and there is no opportunity for a landowner to contest the compulsory acquisition in the Tribunal.

10. In responding (REP06-042 p46) the applicant does not address this point at all. It is unclear whether the applicant continues to assert that the Tribunal has jurisdiction. If so, it has failed to cite the basis for that assertion with reference to the Tribunal's rules and practice directions or an example of a determination made by the Tribunal.

Judicial Review

11. Mr Williams has explained that it is unclear whether a decision by a private company to exercise compulsory acquisition powers under a DCO can be challenged by way of judicial review. The applicant refers to four cases in which the exercise of compulsory purchase powers has been challenged and says that "*none of these cases suggest that it is not possible to do this against a private body exercising powers under a DCO.*"

12. Of course they do not. All four cases concerned the exercise of powers under a compulsory purchase order by public authorities and so the question of whether it is possible to challenge a private body simply did not arise. There has never been a case in which a private body's exercise of compulsory acquisition powers has been challenged.

13. Even where public bodies are challenged by way of judicial review in relation to the exercise of compulsory acquisition it is very difficult for a landowner to succeed. Mr Willaims would have to show that the acquiring authority had acted irrationally in

exercising its powers - that is that the decision to exercise compulsory acquisition powers in relation to the Williams Land was so unreasonable that no reasonable person could have made it. To establish such a case, Mr Williams would have to have secure details of the design of the solar farm. Since there is no requirement that the planning requirements in relation to detailed design have been discharged before compulsory acquisition powers are exercised, that is an impossible bar.

14. It is therefore the case that it is for the applicant to demonstrate that Mr Williams land is essential for the solar farm and that there is a compelling case in the public interest for the applicant to be granted CA powers in relation to it. There is no opportunity for further scrutiny. The fact that the Applicant refers to judicial review as a safeguard against the improper use of compulsory acquisition powers is indicative that it is not able to establish a clear compelling case that the Williams Land is required.

15. The Applicant must also show that it has made reasonable attempts to acquire Mr Williams land by agreement. We understand that there has been some progress in recent days but there remain significant issues outstanding between them. These include terms that are standard landlord protections in any commercial lease and with respect to the removal of the solar panels and associated infrastructure following decommissioning. The Applicant has refused to share details with the Examining Authority of the negotiations with Mr Williams (REP4-042) on the basis that the negotiations are commercially confidential. It is therefore not possible for the Examining Authority to be satisfied that the applicant has made reasonable attempts to secure the Williams Land by agreement.

The Crichel Down Rules

16. At CAH1, the applicant indicated that the Crichel Down rules provided some comfort to Mr Williams in that if the land was not needed following compulsory acquisition or decommissioning, the former owners of the Williams Land (or their successors) would be offered the land back at its then market value.

17. In its subsequent representations, the applicant correctly retreated from that position acknowledging that the Crichel Down rules do not apply to non-public bodies.

18. The Examining Authority has asked that Mr Williams "*provide justification for the scope to include a Crichel Downs provision within the DCO*". As noted above, it was the Applicant who first referred to the Crichel Down rules as providing a form of protection to landowners affected by the compulsory acquisition of their land in the event that the land was not ultimately needed for the scheme but the Applicant has since accepted that landowners have no such protection. Mr Williams' primary position remains that it is for the Applicant to demonstrate and for the Examining Authority to be satisfied that his land is required for the Scheme.

19. The Crichel Down rules are non-statutory arrangements which bind Government departments when disposing of surplus land which had been compulsorily acquired or acquired under the threat of compulsion. They are also recommended to other public bodies including local authorities and private bodies who hold land which has been compulsorily acquired. The effect of the Crichel Down rules is that where land is acquired compulsorily for a particular purpose and is found not to be required for that purpose it should be offered back to the original owner (or his successors) at its market value. The rationale behind the rules is that the granting of compulsory acquisition powers can only be justified where those powers facilitate a scheme which would secure public benefits which outweigh the human rights of the existing landowner to hold his property free of interference. If it subsequently appears that the land is not required for the scheme which justified the compulsory acquisition, then fairness requires that the original landowner is given the opportunity to re-purchase the land. There seems no reason why private bodies seeking compulsory acquisition powers should not be subject to the same obligations and safeguards.

20. At CAH2, the applicant and the Examining Authority requested that Mr Williams provide drafting which would apply the Crichel Down rules to the applicant. We propose the following straightforward wording which could be included in the DCO as article 27.

    Application of the Crichel Down Rules

    The Crichel Down rules (as published by the Department for Levelling Up, Housing and Communities from time to time) shall apply to the undertaker as if the undertaker was a department of government.

Town Legal LLP

10 October 2023