



AQUIND Limited

AQUIND INTERCONNECTOR

Highway Subsoil Acquisition Position Statement

The Infrastructure Planning (Examination Procedure) Rules 2010, Rule 8(1)(b)
The Planning Act 2008

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**Statement in relation to approach acquisition
of subsoil beneath the highway associated
with AQUIND Interconnector**

Herbert Smith Freehills LLP



1. INTRODUCTION

- 1.1 This statement is made by Herbert Smith Freehills LLP on behalf of AQUIND Limited (the '**Applicant**') in relation to the application for development consent to authorise the elements of AQUIND Interconnector within England and the waters adjacent to England up to seaward limits of the territorial sea (the '**Proposed Development**')
- 1.2 The application for development consent in relation to the Proposed Development was made on 14 November 2019 (the '**Application**'). The Application was accepted for examination by the Planning Inspectorate ('**PINS**') on behalf of the Secretary of State on 12 December 2019.
- 1.3 The Examining Authority ('**ExA**') has issued a number of written questions in relation to the Proposed Development. This statement has been prepared in response to the ExA written questions with reference CA 1.3.5 and CA 1.3.100, in relation to the proposed approach to be taken to the acquisition of subsoil interests beneath the land forming the surface and supporting structure to the highway without negotiation and the payment of compensation.
- 1.4 For ease of reference, the ExA written questions with reference CA 1.3.5 and CA 1.3.100 state as follows:
- 1.4.1 *"The Statement of Reasons [APP-022] states there would be direct acquisition of subsoil beneath the highway without negotiation and without compensation. Is there sufficient legal justification for not negotiating or contacting landowners whose rights extend to the subsoil beneath the highway? Is there precedent for this?"*
- 1.4.2 *"The s51 meeting note dated 9/8/19 (available on the Planning Inspectorate's National Infrastructure project web page at <https://infrastructure.planninginspectorate.gov.uk/projects/south-east/aquind-interconnector/?ipcsection=advice&ipcadvice=329e4c36ae> records that the Applicant's approach for highway subsoil interests (being not to negotiate the private acquisition for the rights or pay compensation because the owner has no use or enjoyment of it, its use is not prejudiced by the proposed development and the highway subsoil has no market value) has precedent in relation to High Speed Two. Provide details of this precedent and the relationship of the Applicant's approach with Government guidance on Compulsory Acquisition. This guidance includes Planning Act 2008, Guidance related to procedures for the compulsory acquisition of land, dated September 2013.*
- The response should also refer to any potential for provisions under the New Roads and Street Works Act 1991 to be used for works in the highway. (Point 2.10 in [RR-185] refers.)"*
- 1.5 ExA written question with reference CA 1.3.94 is also relevant to this matter, relating to the explanation of what land forms the highway and why it is therefore necessary to seek to acquire rights in the subsoil below such land. The response to this question is also addressed in this statement for completeness. For ease of reference, the ExA written question with reference CA 1.3.94 states as follows:
- 1.5.1 *"Why are Compulsory Acquisition powers being sought over and above the statutory framework that exists in the New Roads and Street Works Act 1991, and why does the dDCO [APP-019] not include protective provisions to protect highway interests? (Refer to paragraph 2.10 of [RR-185]."*

2. EXPLANATION OF THE OWNERSHIP OF THE HIGHWAY AND THE LAND WHICH FORMS PART OF IT

- 2.1 Not all land beneath the surface of a highway forms part of the highway. This is explained at paragraphs 7.5.1 and 7.5.2 to the Statement of Reasons [APP-020], which states as follows:
- 2.1.1 *The surface of a highway and the first metre or so required to maintain it are deemed to be owned by a highway authority where the road is maintainable at*



the public expense, as most highways are. Usually, utility companies installing cables and pipes for water, gas, electricity and telecommunications install them within this upper part of the highway under statutory licence from the highway authority.

- 2.1.2 *Part of the onshore HVDC cables is to be buried in land which is highway or subsoil to the highway, depending on the final confirmed burial depth of the cables. The precise extent of the highway authority's deemed ownership is not defined by law, and in order to ensure that Applicant is able to lawfully install and operate the Proposed Development within the highway at the necessary depth the Order provides for the Applicant to acquire rights over the subsoil of the highway.*
- 2.2 For clarity, we confirm that reference to the 'subsoil of the highway' above is referring to land which is beneath, and which does not form part of, the surface and supporting structure of the highway.
- 2.3 Paragraph 7.5.3 to the Statement of Reasons [APP-020] then explains the position regarding the ownership of the subsoil of the highway, being land beneath the highway and which does not form part of it:
- 2.3.1 *"In most cases, the owner of the subsoil below the part of the highway deemed to be owned by the highway authority is not formally registered. However, there is a legal presumption that in such cases the owners of the subsoil are the owners of the land or houses on either side of the highway up to the middle of the road (known as the ad medium filum rule)."*
- 2.4 The most recent and relevant judgment of the Courts of which we are aware regarding the extent of the land beneath the surface of the highway which is legally considered to form part of the highway is the Supreme Court judgement in the case of *London Borough of Southwark and another v Transport for London [2018] UKSC 63*, a copy of which is provided at Annex 1 to the statement for ease of reference.
- 2.5 The most relevant passages of this judgment are those which discuss the statutory history of what constitutes the highway, paragraphs 6 to 12. These paragraphs confirm the Baird Principle and the principle of the "zone of ordinary use", which identify the extent of the vertical plane which forms the highway and is vested in the local highway authority.
- 2.6 The Baird Principle provides that statutory vesting of land in a highway authority confers ownership only of that slice of the land over which the highway ran, viewed in the vertical plane, as was necessary for its ordinary use, including its repair and maintenance (paragraph 8).
- 2.7 The principle of the zone of ordinary use further and more fully identifies the slice of the vertical plane which constitutes the highway, being "*the surface of the road over which the public had highway rights, the subsoil immediately beneath it, to a depth sufficient to provide for its support and drainage, and a modest slice of the airspace above it sufficient to enable the public to use and enjoy it, and the responsible authority to maintain and repair it, and to supervise its safe operation*" (paragraph 9).
- 2.8 Accordingly, land which is not within the zone of ordinary use does not form part of the highway and is not vested in the highway authority. Such land is presumed to be in private ownership of the owners of land either side of the highway by virtue of the ad medium filum ruke.
3. **THE APPROACH TAKEN IN RELATION TO THE AQUIND DEVELOPMENT CONSENT ORDER**
- 3.1 As has been explained at paragraph 7.5.4 to the Statement of Reasons [APP-020], where the Proposed Development is to be situated at a depth which is below the zone of ordinary use which is vested in the highway authority, it is necessary to acquire rights over such land to ensure the installation and operation of the Proposed Development in that location is lawful.



- 3.2 It is for this reason rights to acquire the subsoil beneath the highway, being land which does not form part of the vertical plane which comprises the highway, included for within the Book of Reference [APP-024] relate to the land which is presumed to be in the ownership of the owner of the land either side of the highway. No rights are sought in the Book of Reference [APP-024] in relation to the part of the land which is vested in the highway authority.
- 3.3 Where the Proposed Development is situated in land which is vested in the highway authority, the statutory framework provided by the New Roads and Street Works Act 1991 is to be relied upon for the purposes of installation and the continued presence of the Proposed Development thereafter for the purposes of operation.
- 3.4 It is for this reason that Article 11 to the draft Order [APP-019] provides the undertaker with the necessary statutory authority for the purposes of sections 48(3) and 51(1) of the New Roads and Streets Works Act 1991, therefore providing the statutory right for the undertaker to place and keep apparatus under a street.
- 3.5 There is a clear division of the approach to be taken in relation to land which does form part of the highway and land which does not form part of the vertical plane of the highway and is therefore not vested in the highway authority.
- 3.6 As is also set out at paragraph 7.5.4 to the Statement of Reasons [APP-022], where the Proposed Development requires rights over the subsoil beneath the highway from owners of highway subsoil, that interest is proposed to be acquired via compulsory acquisition without negotiation or the payment of compensation.
- 3.7 This is because the relevant owner of the subsoil beneath the highway has no use or enjoyment of that subsoil land, is not prejudiced in any way by the rights to be granted over that land that are necessary for the Proposed Development to be installed and for its operation, and because the subsoil of a highway is not recognised to have any market value.
- 3.8 The Applicant considers that the approach taken in relation to the acquisition of rights over land which is beneath the land forming part of the highway is supported by many recent precedents, details of which are set out in more detail in section 4 of this statement.
- 3.9 Multiple infrastructure projects since 1996 involving tunnelling works have recognised that there is no market for subsoil interests and that no market value can be established for compensation. In these cases, primarily related to the construction of railway tunnels, a nominal value for the subsoil interest needed for the passage of the railway under a property has been set (most commonly £50).
- 3.10 It should be noted that in these precedent examples, this is the position adopted for all subsoil interests. The distinction between these precedent examples and the Proposed Development is with the Proposed Development the approach of not negotiating for and paying no compensation in relation to the acquisition of such rights relates only to subsoil interests beneath the highway.
- 3.11 It is also the case that the highway subsoil interests to potentially be acquired in connection with the Proposed Development differ from those acquired in the precedents set out in respect of their size, and in turn their level of interference. The “tubes” of subsoil required for the main tunnel of the Thames Tideway Tunnel, for example, had an internal diameter of between 6.5 and 7.2 metres, as well as requiring further subsoil for the protection zone to surround the tunnel.
- 3.12 The element of the Proposed Development to be located in the highway beneath the subsoil consists of electrical cables in ducts, which are of a much smaller diameter and do not require protection zones outside of the ducts within which they are to be located.
- 3.13 The use and enjoyment available to the presumed owners of the highway subsoil over which rights are proposed to be acquired in connection with the Proposed Development is obviously limited by the presence of the highway above this, and in a way that non-highway subsoil, as considered and nominally valued in the precedents, was not. As any nominal value for the highway subsoil would be negligible at best, no compensation for the



acquisition of rights over it is therefore proposed, and it is not considered to be proportionate or in anyone's interest for there to be a need to negotiate for those rights where there is not compensation payable in relation to their acquisition.

- 3.14 It should also be noted that, as is confirmed within the section 51 meeting note dated 9/8/19 (available on the Planning Inspectorate's National Infrastructure project web page), the consultation with owners of the subsoil of the highway involved circa 3,000 adjacent landowners/persons with a presumed interest, which the Applicant was informed by the relevant local planning authorities caused confusion and alarm.
- 3.15 A driver behind the Applicant's approach has also been to limit unnecessary confusion and alarm, whilst taking a legally sound and robust approach, ensuring those persons were contacted only in so far as is necessary in accordance with the consultation requirements provided by the Planning Act 2008 (the "Act").

4. PRECEDENT EXAMPLES

4.1 Thames Tideway (2014)

4.1.1 The Thames Tideway project adopted a fixed value compensation scheme for the freehold acquisition of the subsoil required for tunnelling and other works beneath property. The amount offered was £50 per interest (representing the perceived limited value of the subsoil) and £250 as a contribution towards professional fees.

4.1.2 Acceptance of the fixed compensation was not mandatory and the promoter explained that anyone affected would be able to pursue a claim by negotiation and follow the statutory process for agreeing compensation.

(A) The same would be the case in respect of the Proposed Development, with each presumed owner of land being entitled to follow the relevant legal process for a determination of compensation, should they wish to do so.

4.1.3 The amount offered was based on the presumption that the market value of subsoil is low because of its depth and the limited use to which it could be put.

4.1.4 An explanatory note in relation to the approach taken to the acquisition of subsoil interests in connection with the Thames Tideway project is available here - <https://www.tideway.london/media/2076/guide-to-the-acquisition-of-subsoil.pdf>

4.2 Crossrail 2 (2015)

4.2.1 The same approach as set out above was adopted in relation to the acquisition of the subsoil land within which Crossrail 2 infrastructure was to be located, whereby a fixed value compensation scheme was proposed.

4.2.2 As above, the level of compensation was nominal and stated to be in region of £50 for each single interest. The basis for this nominal amount was stated to be because "*there is no open market in the sale and purchase of subsoil*".

4.2.3 An explanatory note in relation to the approach taken to the acquisition of subsoil interests in connection with the Crossrail 2 project is available here - https://consultations.tfl.gov.uk/crossrail2/october2015/user_uploads/g9.pdf

4.3 HS2 (February 2017)

4.3.1 The government consulted upon (in 2013) and adopted the same subsoil purchase scheme of fixed compensation as was used in Crossrail 1, which is the same as that deployed in relation to Crossrail 2 discussed above.

4.3.2 The 'Properties above tunnels' decision document outlines the government's approach to the purchase of subsoil rights and measures through which it intends to maintain confidence in the value of properties above tunnels and other below ground excavations for HS2.



- 4.3.3 A copy of the 'Properties above tunnels' decision document can be located here - https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/264080/8756.pdf.
- 4.3.4 Of particular relevance is paragraph 6.2 of the 'Properties above tunnels' document, which sets out the position to be taken, acknowledging that "*there is generally no market*" for the acquisition of subsoil.
- 4.3.5 Again it should be noted the approach in relation to HS2 related to the acquisition of subsoil generally (for instance beneath homes), whereas in relation to the Proposed Development the approach relates to the subsoil of the land beneath the highway presumed to be in ownership and for which there is no use only. The Applicant has very purposefully sought to avoid encroaching on land which forms part of a home or a garden, on the basis that it was considered doing so would not be an acceptable approach.
- 4.4 **Channel Tunnel Rail Link (1996)**
- 4.4.1 The government adopted a nominal value for subsoil interests of £50 and offered in some cases £500 compensation to subsoil owners towards legal and surveyor fees.
- 4.4.2 Further information about subsoil compensation for this scheme is set out in the summaries of the Upper Tribunal cases at paragraph 4.5.1 below.
- 4.5 **Upper Tribunal Cases on compensation for subsoil**
- 4.5.1 **O'Donoghue v Secretary of State for Transport [2011] UKUT 203 (LC)**
- (A) Determination of compensation payable by the acquiring authority for 26 subsoil interests for the Channel Tunnel Rail Link. The interests were a mixture of freehold and leasehold. The tribunal briefly summarised the statutory provisions relating to compensation.
- (B) As there was no market for a "tube" of subsoil, a nominal amount was payable. The amount adopted for the Channel Tunnel Rail Link was £50 per interest. This was agreed voluntarily with 900 interests and was adopted by the Tribunal in every case brought before it for the project (being 318 cases prior to 2011).
5. **RELATIONSHIP OF THE APPLICANT'S APPROACH TO GOVERNMENT GUIDANCE ON COMPULSORY ACQUISITION**
- 5.1 This statement does not seek to appraise the approach taken in relation to the Proposed Development against all aspects of the Government guidance related to procedures for the compulsory acquisition of land (September 2013, DCLG) (the '**Guidance**')¹. Rather, this statement takes a proportionate approach by focusing on those passages which specifically relate to the question raised, which is the approach of the Applicant not to negotiate for the acquisition of the rights required in subsoil land beneath the highway by way of private agreement.
- 5.2 The most relevant paragraph contained within the Guidance with regard to the need for applicants to seek to acquire land by negotiation is paragraph 25, which states as follows:
- 5.2.1 "*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*

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[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/236454/Planning Act 2008 - Guidance related to procedures for the compulsory acquisition of land.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/236454/Planning_Act_2008_-_Guidance_related_to_procedures_for_the_compulsory_acquisition_of_land.pdf)



to include provision authorising compulsory acquisition covering all the land required at the outset”.

- 5.3 For completeness, the footnote to paragraph 25 of the Guidance states as follows:
- 5.3.1 *“It should be noted that in some cases it may be preferable, or necessary, to acquire compulsorily rather than by agreement. In the case of land belonging to and held inalienably by the National Trust, because the Trust has no power to dispose of land so held, the compulsory acquisition of Trust land must be authorised in an order even if the Trust is minded not to oppose the proposals.”*
- 5.4 Whilst the ‘standard’ position is that an applicant should seek to acquire land by negotiation wherever practicable, the Guidance recognises that will not be the case in all circumstances. In particular the Guidance recognises that where the proposals would entail the compulsory acquisition of may separate plots of land, such as in the case of the Proposed Development which is a long linear scheme, it may not always be practicable to acquire by agreement each plot of land. Further, the Guidance expressly notes that in some case it may be preferable to acquire compulsorily rather than by agreement.
- 5.5 It is the Applicant’s view that the acquisition of rights over the subsoil of the highway presumed to be in the ownership of landowners either side of the highway, and which such persons have no use or enjoyment of by virtue of the highway above it, is a case where it is preferable (and also practicable) to acquire such rights by compulsory acquisition rather than by private agreement.
- 5.6 It is also the case that the understanding of ownership of the subsoil beneath the highway by the owners of the land or houses on either side of the highway up to the middle of the road by virtue of the ad medium filum rule is based upon a rebuttable presumption, with such land being unregistered and it therefore not being possible to establish actual ownership with certainty. Accordingly, it is necessary for the compulsory acquisition of rights over the subsoil to be provided for in connection with the Proposed Development in any event, due to the potential for unknown owners or restrictions to be identified, which without an ability to acquire rights over the land by compulsion could be present an impediment to the delivery and operation of the Proposed Development.
- 5.7 Noting the above, the Applicant considers the approach taken by it in not seeking to negotiate private agreements for the potential acquisition of the rights over land which forms the subsoil of the highway to be necessary, proportionate, preferable and practicable and supported by the Guidance.

6. **CONCLUSIONS**

- 6.1 With regard to ExA written question with reference CA 1.3.5, the statement identifies multiple precedent schemes which have taken a similar approach to the Applicant in not negotiating with subsoil owners. There is distinction with the Applicant’s approach to not negotiating for the rights being more limited than those precedent examples, as it relates to the subsoil to the highway only.
- 6.2 It has also been confirmed that the approach of the Applicant is clearly supported by the relevant paragraphs contained in the Guidance.
- 6.3 ExA written question with reference CA 1.3.5 suggests that the Applicant has not contacted persons who are presumed to own the land beneath, but not forming part of, the highway. This is incorrect, the Applicant has carried out a diligent inquiry with all such persons, and has contacted them as required in accordance with both of sections 42 and 55 of the Act. The Applicant, following comments received from the relevant local planning authorities regarding the confusion and alarm caused by the Applicant carrying out its legal duties to contact such persons, chose not to further contact such persons to update the diligent enquiry prior to submission of the Application, noting only a short period had passed between the close of the consultation and submission of the Application. As is confirmed above however, all such persons were contacted following the acceptance of the Application for examination, as is required in accordance with section 55 of the Act.



- 6.4 With regard to ExA written question with reference CA 1.3.100, as stated above the statement provides multiple precedent examples of a similar precedent approaches being taken to the acquisition of subsoil interests by other projects, notably projects which have been progressed through the Planning Act 2008 regime and by the government. The Applicant has also addressed the relationship between the approach taken by the Applicant and the Guidance, confirming that support for the approach is provided by the relevant paragraphs contained in the Guidance.
- 6.5 The statement has also clearly confirmed the position in relation to the use of statutory authorities pursuant to the New Roads and Street Works Act 1991, and how this provided for in the draft Order [APP-019] and the approach confirmed by reviewing the Book of Reference [APP-024]. For sake of clarity, it is confirmed that where the Proposed Development is to be located in land forming part of the vertical plane which makes up the highway, the statutory authority provided by the Order by virtue of the New Roads and Street Works Act 1991 is to be relied upon, and no acquisition of rights over the land forming the highway are required and/or sought in this regard.
- 6.6 The above referenced information and confirmation also clearly responds to ExA written question CA 1.3.94.
- 6.7 Should the ExA have any further questions with regard to the approach taken by the Applicant to the acquisition of the subsoil beneath the highway in connection with the delivery and operation of the Proposed Development and its appropriateness, and/or its compliance with the relevant statutory requirements or its relationship with the Guidance, we politely request they make the Applicant aware of these at the earliest opportunity so that this matter may be satisfactorily resolved as early as possible in the examination process.

Herbert Smith Freehills LLP on behalf of the Applicant

[DATE]

