

Ian Maguire
Assistant Director Planning
& Economic Growth
Floor 4, Core 2-4
Guildhall Square
Portsmouth
PO1 2AL

Phone: 023 9283 4299
E-mail: Ian.Maguire@portsmouthcc.gov.uk
Our Ref: 20201103R17
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Examining Authority for the
Aquind DCO
Via email to
aquind@planninginspectorate.gov.uk

Dear Sirs,

Re: Response to Examining Authority ("ExA")'s Rule 17 Letter dated 27 October 2020 addressed to Portsmouth City Council ("PCC") and the Applicant ("Aquind")

1. PCC is grateful to the ExA for turning its attention to this matter explicitly following the large number of representations that it accepted into the Examination from concerned residents.

PCC's concerns in relation to certain allotment holders as overlooked Affected Persons

2. As the ExA will be aware, Aquind makes no mention of allotment holders in the Book of Reference in relation to plots 10-12, 10-13 and 10-14. PCC takes the view that such allotment holders are persons within Category 1 or alternatively Category 2 of sections 59 and 102B Planning Act 2008. The basis for this will be elaborated below.
3. The omission of the allotment holders as occupiers and tenants of the above plots from the Book of Reference means that they have not been notified of the application and crucially the potential impact of the DCO proposal upon their interests in land. It also means that the duty under section 59 Planning Act 2008 to provide notice to the Secretary of State of each affected person has been substantively failed. With regard to the objective test in section 59(4) of "diligent inquiry" it is PCC's position that Aquind clearly were aware that the land was allotment land and that it was occupied by allotment holders. As such Aquind should reasonably have concluded that there were, at the very least, noteworthy occupiers of the allotments if not tenants which fall within the definition of Affected

Persons. The failure to identify them is an evident procedural and fundamental flaw in Aquind's procedures and within the draft Development Consent Order ("dDCO").

Land Interest Questionnaire and Confirmation Schedule

4. With regard to the inquiries Aquind did carry out in respect of interests in land, Aquind rely solely upon those made of PCC and that it failed to respond.
5. PCC accepts that in this instance the Land Interest Questionnaire and Confirmation Schedule were overlooked at a time when PCC had limited resources available for commitment to a private project in formative stages. Aquind nevertheless was aware of the nature of the landholding as allotments and that PCC is the freehold owner.
6. It is not clear why the matter was not raised but it may well be that with the emphasis (as now) on the suggested physical impact of the proposal being limited to subsoil and not the surface, assumptions were made about the nature of the rights that would be sought.
7. In any event as noted above PCC's lack of response does not explain why Aquind did not consider the nature of the allotment holders' interests in the allotment land given that it was clearly aware when preparing the Book of Reference and recognised plots 10-13 and 10-14 as allotment land, according it special category status as well.
8. It appears therefore that Aquind simply failed to turn its mind to whether the various persons making use of the allotments might be termed (at the very least) occupiers, if not persons with an interest in the land. It has not been clearly suggested by Aquind that it did turn its mind to that question and concluded that allotment holders did not meet the tests for Affected Persons under the Planning Act 2008.
9. In PCC's view, if it did then such a decision would plainly be absurd.
10. PCC's concerns arise in respect of the allotment tenants due to the contrast between what Aquind states it intends to do, namely to limit its impact to the subsoil of the allotments both in terms of construction and future maintenance and the nature of the rights it seeks to acquire. These rights are clearly wide ranging in particular across plot 10-14 (some 40,000 sq m) and not limited in the way described by Aquind to the allotment holders directly or within their current submissions. In particular, the rights are clearly not limited to the subsoil.
11. Even if Aquind was to seek to amend the nature of the rights sought to interests in the subsoil, it is still arguable that the allotment holders as well as PCC as freehold owner of the land would have subsoil rights.

The nature of the legal agreements between tenants and PCC and the extent of allotment holders' interests

12. The extent of allotment holders' interest is to be read in accordance with the terms of the individual tenancy agreement and case law.
13. It is necessary to highlight at the outset that PCC has changed its approach to granting tenancies to allotment holders since 2019. Prior to 2019, an allotment

agreement was entered into with tenants in the form in Appendix B to this letter. Subsequently, tenancies have been granted in accordance with the documents in Appendices C, D and E.

14. Turning firstly to the tenancy agreements used prior to 2019, the pro-forma creates a tenancy on a yearly basis, detailing the "allotment garden" by number and its area in metres squared granted to the tenant. Rent is payable on the first day of November each year. The bulk of the short agreement is concerned with termination of the tenancy agreement by either party in different circumstances. The tenant agrees, among other things, to comply with PCC's Allotments and Leisure Gardens Rules. The tenant, upon entering such a tenancy agreement, obtains a legal interest in the land.
15. With regard to the tenancy agreements that have since been used and are currently used, PCC raises an invoice to the would-be allotment holder describing the plot, rent and other charges that comprise the "allotment tenancy". PCC imposes its Allotment and Leisure Gardens Rules upon its tenants, which are drawn to the would-be allotment holder's attention in an offer-letter.
16. The following table shows the breakdown of PCC's tenants on each tenancy agreement type. Not all of these allotment holders will necessarily be within the Order limits. PCC has produced an overlay plan of plots within the Order limits that was circulated to allotment holders (Appendix A). It must be stressed that this is not to be taken as a definitive plan, firstly because it was created by manual transcription of the perceived Order limits (as PCC does not have them in a transferable electronic form), and secondly, the perceived Order limits were overlaid onto an indicative plan of allotments because PCC does not have definitive plans for the allotment boundaries (as these have never been necessary). Nonetheless, PCC believes Appendix A to be of illustrative assistance to the ExA.

	Total Number of plots	Number of plot and hut records pre-2019 tenancy agreement process	Number of plot and hut records post-2019, simplified letting process
Milton	207	179	28
Eastney	278	227	51

17. The ExA has asked about any rights of access that allotment holders might enjoy between their plot and Locksway Road. An access route is not formalised in the tenancy agreements, which are simple documents. Given PCC's view that these are tenancies, this would suggest that allotment holders stand to benefit from the doctrine of 'easements of necessity', whereby:

"It is open to the courts to imply the grant of an easement on grounds of necessity where a claimant can establish that, without the provision of the desired easement, it becomes impossible to make use of his own tenement."¹

18. Within this doctrine it is also arguable that there is a common intention between PCC and allotment holders for them to have such an easement, even if this is not written into the tenancy agreements. PCC would therefore suggest that *all* allotment holders, even those with plots outside the Order limits, stand to be potentially

¹ Gray & Gray, 'Elements of Land Law', para 5.2.21, 5th Edit, 2009

affected by the imposition of the New Access Rights Aquind seeks over plots 10-12 and 10-13.

19. In answer to the ExA's specific question PCC consider this would appear to bring all allotment holders within Category 2 of s102B in respect of this easement.

20. The ExA has asked whether it is possible for allotment holders to transfer their interest to a third party.

21. Under the Allotment and Leisure Garden Rules:

"A tenant may register one co-worker on their plot. This registration must be in writing to the Parks Service. Once a co-worker has been registered for one year (three years at Milton allotments and Salisbury Road allotments), they will gain the right to take over the tenancy when the existing tenant surrenders the plot. Note this rule will not apply if the plot is repossessed for non-cultivation. There will normally be no objection to the transfer of a tenancy to a family member, provided the plot has been held for one year (three years at Milton allotments and Salisbury Road allotments)."²

22. To understand the physical extent of the individual interests held by allotment holders it is necessary to consider case law. The legal maxim 'cuius est solum, eius est usque ad coelum et ad inferos', or that the freehold owner of the surface of land owns all that between heaven above and hell below, was affirmed by the Supreme Court in *Bocado SA v Star Energy UK Onshore Ltd* [2011] 1 AC 380. It follows that PCC, as the undisputed freehold owner, is free in principle to grant leasehold interests out of the allotment land to any depth that it desires.

23. In *Gorst & Anor v Knight* [2018] EWHC 613 (Ch) the issue arose as to whether a tenancy agreement in respect of a maisonette formed from a single larger house which encompassed the ground floor, included the subsoil (so that a basement could be dug by the tenant). It was common ground that *Bocado* was the leading authority for this purpose. It was also common ground that there was no evidence that the estate of the freeholder was restricted in any relevant way. To that end whilst both the subsoil under the house and the airspace above it were available to the freeholder to be the subject of a demise, the question was whether the subsoil was so demised. This the High Court held was to be:

"ascertained by reference to the terms of the grant, consisting only in the actual words used (and any other indicia of the actual intentions of the parties) taken with the context in which they were used, in relation to which the state and extent of the freehold available is of course one factor".

24. It follows in the case of the PCC allotments that the common understanding of PCC and its allotment holders is that their interest confers a right to use the subsoil in connection with the cultivation of crops. There is no express limit on the depth of these subsoil interests and PCC submits that any such limit would ultimately be for a court to decide. This subsoil could potentially be subject to interference and

² Allotment and Leisure Garden Rules, 2019 v.5, page 2 of the pdf under the heading 'Tenancy'

disturbance arising from construction (indeed, Aquind say they need to monitor for this during the construction phase). However, as presently drafted the acquisition rights sought by Aquind in the Book of Reference and Land Plans as noted earlier are not limited to the subsoil (despite the stated intention to HDD through the allotments), and following construction, the New Connection Works Rights in the Book of Reference retain the right to access with vehicles and equipment and to clear land as required.

25. Whilst Aquind's intentions are noted, there is nothing on the face of the dDCO or the Book of Reference or Land Plans which prevent these rights being utilised at will across the relevant Plots. As such the dDCO proposes significant potential interferences with allotment holder rights both at surface and subsoil level.
26. Turning to the Planning Act 2008, the interests described above that lie within the Order limits are plainly Category 1 interests per section 102B Planning Act 2008 as tenants:
- "A person is within Category 1 if the person is an owner, lessee, tenant (whatever the tenancy period) or occupier of the land".
27. In addition, as set out above the wider allotment holders fall within Category 2 of s102B in respect of the easements across the pathways proposed for acquisition as well.
28. Consequently, it is respectfully suggested that the ExA must have regard to its duty to consider the status of allotment holders under section 102A Planning Act 2008.

The status of the allotments as special category land

29. It is noted that tAquind has assumed and identified the allotment land as 'special category' land. This is not a matter that it discussed or explored with PCC, nevertheless PCC considers itself duty bound to ensure the ExA has the correct information and is not misled.
30. PCC has considered its records and historic mapping of the allotments and has concluded that these allotments do not fall within the definition of "fuel or field garden" allotments of the kind that constitute "special category land" for the purposes of sections 131 and 132 Planning Act 2008³ but instead are subject to statutory protection under the Allotments Acts, specifically the Allotment Act 1925.
31. In simple terms, PCC does not consider the land, and certainly its use as allotments, to have commenced as a consequence of any Inclosure Act. The special categorisation of fuel or field garden allotments are generally derived from Inclosure Acts from the nineteenth century whereas the subject allotments are understood to have originated in the early-mid twentieth century.
32. For the avoidance of doubt, PCC is of the view that the allotments are "allotment gardens". These do not fall within the "special category" of sections 131 and 132

³ i.e. "means any allotment set out as a fuel allotment, or a field garden allotment, under an Inclosure Act;". This is also the definition which appears in s.19 of the Acquisition of Land Act 1981 and also which applies under the Planning Act 2008 (ss 131 and 132).

Planning Act 2008. They therefore are governed and protected by the twentieth century Allotment Acts.

33. This of course does not diminish the strong socio-economic value of the allotments in any way and the need to prevent disruption to treasured local assets, but it is an important point of clarification for the ExA and the DCO.

34. It is, regrettably, another instance of Aquind failing to properly engage with the complexity of the DCO process and act with diligence as to the nature of the interests and land it is seeking to acquire compulsorily and affect.

35. Covid-19 restrictions on access to the Civic Offices have presented some difficulty in accessing records in the usual way but PCC has sought to address the matters raised by the ExA or by Aquind as and when they arise.

36. If the ExA has further questions of PCC it should not hesitate to ask.

Yours faithfully,

A handwritten signature in black ink, appearing to read 'Ian Maguire', with a long horizontal stroke extending to the right.

Ian Maguire
Assistant Director Planning & Economic Growth

Enc's:

Appendix A - Plan showing allotments affected (not definitive)

Appendix B - Allotment Tenancy Agreement until 2019

Appendix C - Allotment and Leisure Garden Rules, 2019 v.5

Appendix D - Pro-forma Allotment Invoice

Appendix E - Allotment Offer Letter under simplified letting process, 2019 onwards

Cc

David Williams, Chief Executive, Portsmouth City Council

Tristan Samuels, Director of Regeneration, Portsmouth City Council



National Infrastructure Planning
Temple Quay House
2 The Square
Bristol, BS1 6PN

Customer Services: 0303 444 5000
e-mail: aquind@planninginspectorate.gov.uk

AQUIND Limited
Portsmouth City Council

Your Ref:

Our Ref: EN020022

Date: 27 October 2020

Dear Sir/ Madam

Planning Act 2008 (as amended) and The Infrastructure Planning (Examination Procedure) Rules 2010 - Rule 17

Application by AQUIND Limited for an Order Granting Development Consent for the AQUIND Interconnector Project

Request for further information

We write to request further information from the Applicant and Portsmouth City Council under Rule 17 of the Infrastructure Planning (Examination Procedures) Rules 2010.

Affected Persons at the Eastney and Milton Allotments

We have accepted into the Examination a letter from AQUIND Limited to Mr Samuels and Councillor Pitt at Regeneration Services, Portsmouth City Council [AS-047] (the 'letter'). We are aware this refers to earlier correspondence between the parties and with the Eastney and Milton Allotment Holders Association.

In relation to the content of this letter and its references to earlier exchanges between the Applicant and Portsmouth City Council, could **Portsmouth City Council** please explain;

- If the Council has a concern that Affected Persons with an interest in land at the Eastney and Milton Allotments and its access (plots 10-12, 10-13 and 10-14 on the Land Plans [REP1-011a]) have not been notified by AQUIND Limited as part of the statutory Compulsory Acquisition process.
- The Council's response to the assertion in the letter that: *'...a Land Interest Questionnaire was sent to the Council on 10th December 2018 as part of AQUIND's diligent enquiry to identify persons with an interest in the land to be affected, requesting information in relation to the Council's land interests but that no response was received from the Council.'*

Similarly, a Confirmation Schedule, the purpose of which was to seek the Council's confirmation of the information that AQUIND held in relation to land ownership and interests was correct and to identify any other persons who may have interests in the land to be affected so that AQUIND may contact them regarding the proposals, was sent to the Council on 2nd October 2019. Again, no response was received from the Council.' In relation to this response, please advise whether the Council's view on the matters referred to in the previous question has changed, and, if so, why.

- The rights that current allotment holders have away from their specific allotment land over the access road from Locksway Road and the common areas of the allotments, such as paths and tracks.
- If there is a vertical, depth restriction to each parcel of allotment land and the associated rights: if so what is that depth, and does Portsmouth City Council retain all rights and the freehold of the subsoil beneath that depth?
- Please explain the detailed nature of the legal agreements between the allotment holders and Portsmouth City Council as freeholder of the land, and whether each allotment holder benefits from a formal lease, a licence, or some other form of interest. Do these arrangements constitute an interest which would bring the affected allotment holders (as shown on the Land Plans [REP1-011a]) within Category 1 (as lessees or tenants) or Category 2 (as having an interest in the land) of the Book of Reference [REP1-027]? Are there any interests involved that could be conveyed to another party by an allotment holder? Please explain your response to these questions in the context of s102B of the Planning Act 2008.

We note that the land specified in the draft DCO (and covered by the Book of Reference [REP1-027]) covers the whole of the allotment area within the Order limits, not just the proposed route of the cable under it, and not just the routes along the existing paths and tracks that the Applicant indicates will be needed for maintenance walkthroughs. The land referred to is, 'the land to which the application relates or any part of that land'. Similarly, the rights being sought in the draft DCO are not limited to the paths only.

With reference as relevant to s102B of the Planning Act 2008, or any other applicable section, and referencing any made Orders or other precedents that you rely on, could the **Applicant** please advise:

- Should any assessment of persons for allocation into Categories 1, 2 and 3 in the Book of Reference [REP1-027] be based on the whole of the allotment area that lies within the Order limits? If not, why not?
- In relation to Plot 10-12, should each of the allotment holders be listed in Category 2 of Part 1, Part 2, Part 3 or any other part of the of the Book of Reference [REP1-027] by virtue of having a right of access across the land? If not, why not?
- In relation to plots 10-13 and 10-14, should each of the affected allotment holders be included in Category 1 of Part 1, Part 2, Part 3 or any other part of the Book of Reference [REP1-027]? If not, why not?

- On the basis of your responses to the above, what action does the Applicant consider the Examining Authority should take in response to s102A requests from affected allotment holders?
- Whether the Applicant intends to make any changes to the Book of Reference [REP1-027] as a result of the above, and if so, what consequential actions will be taken, and on what timescale.

Deadline 1 Submission [REP1-153]

Could the Applicant please explain if any information or data is missing from the map submitted at Deadline 1 entitled '*Environmental Statement Addendum – Appendix 4 - Figure 2 Additional Information on Herring Spawning*' [REP1-153]. If so, please could a replacement be provided.

Deadline for response to this request

The Applicant and Portsmouth City Council are requested to provide this information to the Examining Authority by no later than **Deadline 3** in the Examination Timetable, Tuesday 3 November 2020. If you have any questions about any of the matters raised in this correspondence, please contact the Case Team using the details provided at the top of this letter.

Yours faithfully

Andrew Mahon

Lead Member of the Panel of Examining Inspectors