



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

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

All Interested Parties, Statutory Parties
and Other Persons

Your Ref:

Our Ref: EN020022

Date: 11 November 2020

Dear Sir/ Madam

The Planning Act 2008, Sections 59, 89, 102, 102A and 102B, and The Infrastructure Planning (Examination Procedure) Rules 2010 - Rules 9 and 17

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

Notification of a Procedural Decision and request for further information

I am writing to advise you of a Procedural Decision taken by the Examining Authority following the receipt of several requests by persons with interests in the Eastney and Milton Allotments to become Interested Parties in the Examination under s102A of the Planning Act 2008.

Background

The Examining Authority has investigated the background to the matter through a request for further information from the Applicant and Portsmouth City Council under Rule 17 of the Infrastructure Planning (Examination Procedures) Rules 2010 [PD-014]. Responses to our questions were received from both parties at Deadline 3 ([REP3-020] and [REP3-026] respectively).

We have read in full and analysed the two replies in reaching a conclusion on the matter. Our deliberations were also informed by submissions from allotment holders, including, but not limited to, the Chairman of the Eastney and Milton Allotments Association [REP1-307] and the large number of representations that we received from non-registered parties at Deadline 1 ([REP1-321] to [REP1-325]). We were also guided by our own observations from an Unaccompanied Site Visit (USI2) [EV-002] to the area, including the access road from Locksway Road and other public areas outside the allotment gardens but with some visibility into them.

In brief, we asked the Applicant for information on the following issues in our Rule 17 request:

1. Should 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?
2. In relation to Plot 10-12, (the access into the allotments), should allotment holders be listed in the Book of Reference by virtue of having a right of access across the land?
3. In relation to plots 10-13 and 10-14 (that encompass the allotments), should affected allotment holders be included in the Book of Reference?
4. What action does the Applicant consider the Examining Authority should take in response to s102A requests from affected allotment holders?
5. Whether the Applicant intends to make any changes to the Book of Reference.

The Applicant's response set out the diligent inquiry process that had been followed and provided a reply to each of our questions. These can be summarised as:

1. The assessment should be based on the land over which the authorised development is proposed, being the land that will be affected, which includes the subsoil to the allotments, but not the surface, except for rights of access on foot over the existing paths in the allotments.
2. The Applicant is not aware that every allotment holder has a relevant interest in relation to Plots 10-12 or 10-13, but should it be confirmed they do, then the Applicant will seek to include them in the Book of Reference.
3. The development proposed in Plot 10-14 is the drilling of ducts and pulling of cables beneath the surface via HDD. Only persons with a sufficient interest over subsoil, or who it is confirmed have a sufficient interest over the existing paths within the plot, should be included in the Book of Reference. The Applicant is not aware that the allotment holders do have such interest, but if this is demonstrated, the Applicant will seek to include those persons in the Book of Reference.
4. Should evidence demonstrate that the allotment holders are within one or more of the categories set out at section 102B, then the ExA should notify those persons and the Applicant that those persons have become interested parties under section 102(1)(ab).
5. The allotment holders do not have sufficient interests over Plot 10-12, 10-13 or 10-14 to be required to be included in the Book of Reference, and the Applicant has no current intention to make any changes. Should evidence confirm that they are within one or more of the categories set out at section 102B, the Applicant will seek to include those persons in the Book of Reference.

In brief, in our Rule 17 request we asked Portsmouth City Council for the following information:

1. If the Council had a concern that Affected Persons with an interest in land at the Eastney and Milton Allotments and its access had not been notified as part of the statutory Compulsory Acquisition process.

2. The Council's response to the Applicant's earlier assertion that Portsmouth City Council had failed to respond to requests for information in this matter.
3. The rights that allotment holders have away from their specific allotments over the access road and the common areas of the allotments, such as paths and tracks.
4. If there is a vertical restriction to the allotments and associated rights and, if so, to what depth; does the Council retain all rights and the freehold of the subsoil beneath that depth?
5. The nature of the legal agreements between the allotment holders and Portsmouth City Council as freeholder of the land. Do these arrangements constitute an interest which would bring the affected allotment holders within Category 1 or Category 2 of the Book of Reference?

Portsmouth City Council's response can be summarised as:

1. The Council believes that allotment holders are persons within Category 1 or Category 2 of sections 59 and 102B Planning Act 2008 and elaborated on its basis for that conclusion.
2. The Council accepted that it had failed to respond to inquiries from the Applicant in this matter.
3. The Council provided details of the two types of tenancy agreements that have been used and other supporting information. The access into and through the allotments is not formalised in the tenancy agreements, but the Council believes that allotment holders benefit from an 'easement of necessity', as, without the provision of the desired easement, it becomes impossible to make use of the individual's tenement.
4. In relation to the depth of the allotments, the Council quoted *Bocardo SA v Star Energy UK Onshore Ltd* [2011] and believes that, as freeholder, it is able to grant leasehold interests to any depth, though there is no stated limit in the tenancy agreements.
5. The Council regards the allotment holders as tenants and believes that the holders of allotments that lie within the Order limits are in Category 1. By virtue of implied access rights across the access road, tracks and paths, the Council believes that each allotment holder falls within Category 2.

The Examining Authority's reasoning

From the evidence before us, we are content that the Applicant's intention is for the cable installation across the Eastney and Milton Allotments to be via HDD, and that the surface of the allotments will be unaffected. (Nevertheless, the definition of this, and the matter by which it is properly secured, remains a live issue in the Examination.)

Notwithstanding this, the Applicant's diligent inquiry process should have been based on the full extent of the allotment land over which the authorised development is proposed, including the subsoil. Portsmouth City Council's failure to respond to the Applicant's legitimate inquiries does not obviate the need for the Applicant to consider the nature of allotment holders' interests in the land given that it was clearly aware of the nature and use of the relevant Plots when preparing the Book of Reference following diligent inquiries.

Weighing up all of the evidence before us at this stage in the Examination, our conclusions on this matter are as follows:

1. Each allotment holder is party to a legal tenancy with the freeholder, Portsmouth City Council. We consider each affected allotment holder in Plot 10-14 to fall within Category 1 as defined in section 102B(1) of the Planning Act 2008 as '*an owner, lessee, tenant (whatever the tenancy period) or occupier of the land.*'
2. Each allotment holder has implied rights of access across the access road from Locksway Road (Plot 10-12) and across at least some of the tracks and paths within the allotment garden land (Plots 10-13 and 10-14). We are content that this access road offers the only practicable access into the allotment gardens. We consider each allotment holder to fall within Category 2 as defined in section 102B(2) of the Planning Act 2008 as being '*interested in the land.*'
3. We also note that the Applicant has suggested that one of the reasons for seeking rights of access across the allotment land on existing tracks and paths is to monitor for problems during construction, such as the break-out of bentonite and drilling fluids. We consider this an indication that it is possible that allotment holders within Plot 10-14, under which the cable would be drilled, could suffer damage to the land during construction and '*might be entitled as a result of the implementing of the order to make a relevant claim.*' We consider this places them in Category 3 as defined in section 102B(4) of the Planning Act 2008.

Consequently the Examining Authority notifies the following allotment holders that have made requests under s102A of the Planning Act 2008 and the Applicant that these persons have become Interested Parties under section 102(1)(ab):

- Julian Lloyd;
- Millie Ansell;
- Bernard George;
- Andrew Leonard;
- Brian Simmons;
- Philippa Pettitt;
- Derek McCullough;
- Malcolm Williams;
- Mark Lemon;
- Catherine Reddy;
- Kirsten McFarlane.

We intend to publish the submissions from these parties at Deadline 5. We request that the Applicant adds these persons to the Book of Reference, and to consider further the position and interests of every allotment holder at the Eastney and Milton Allotments in relation to the Book of Reference. Portsmouth City Council should provide full assistance to the Applicant by providing the necessary details to ensure that all relevant parties are properly included in the Book of Reference.

The updated Book of Reference should be submitted into the Examination no later than Deadline 5, which is 30 November 2020.

Yours faithfully

Andrew Mahon

Lead Member of the Panel of Examining Inspectors