

## Winchester City Council

### Summary of comments made at Hearings held from 9 December through to 15 December 2020

For ease of reference, the following will use the agenda item reference number before any comment. The *postscript* is any additional note that emerged after the original comment was made.

#### **Issue Specific Hearing1 draft DCO**

##### Part 7

##### 3.34 (Article 42)

Winchester City Council made reference to the recent service of a Preservation Order on trees on the north side of Hambledon Road and which lie within the Order limits. A copy of this TPO has been circulated to the applicant and the ExA. The Order offers a significant frontage to Hambledon Road on the north side. To date the applicant has been unwilling to refine the break through point. It is the Councils desire that the breakthrough point comes through the section of hedgerow west of the Soake Road junction. The tree immediately on the corner of the junction and the trees beyond the hedgerow are now covered by the TPO and valued for their landscape contribution. Some decision on the breakthrough point would remove these concerns.

*Postscript: The Council notes the support for a decision on this matter from Denmead Parish Council and welcomes the applicants offer to respond on this matter at deadline 6.*

#### **4 Schedule 1, the Authorised Development**

##### 4.2 (Variable Height to Converter Station Building)

Winchester City Council notes the applicants explanation relating to the variation in the height of the equipment which is driving the request to maintain some flexibility in the height of the proposed converter station building. However, the Council notes the reference in the applicants explanation that the design of the roof will also play a role in the overall height of the building. If the choice to be made by the contractor comes down to one of a lower roof but at a higher cost, what weight is going to be given to minimising landscape impact in that decision process? How is the overall desire to bear down on height to be embedded in the final decision on building design?

##### 4.3 (Spare Capacity Fibre Optic Cable)

Winchester City Council has made detailed representations on the Fibre Optic Cable (FOCs) issue in its local impact report and in its various submissions at the deadlines. The one aspect that we wish to raise is the applicants reluctance to offer an clear indication of the capacity that the two FOCs will offer. References to 192 fibres per cable and a 20-80 split between the Interconnector and commercial use has been offered but the question remains on how many lines that will actually be offered.

*Postscript: The Council notes the applicant's intention to offer a response on this matter by deadline 6.*

*The Council recalls the conversation on whether the removal of the telecommunications building will necessitate a larger converter station to accommodate that element of the fibre optic cable link to be dedicated to the inter connector. The applicant indicated they would respond to this matter at deadline 6. The Council will await that response. However, it was understood that this split may already have been factored into the proposal as the telecom building is positioned outside the secure Converter Station area in anticipation that a commercial operator could obtain access to the FOC set up without the need to enter the energy site.*

## 5 Schedule 2 Requirements

### 5.3 Issue around use of term “commencement”

Winchester City Council notes the applicants attempt to resolve the problems associated with the term “commencement” by adding caveats to the requirements, but the Council views this as simply confusing the situation further. It is the Councils view that the simplest way to resolve and clarify this matter is to remove certain types of activity from the list of onshore site preparation works. These are:

- site clearance
- removal of hedgerows, trees and shrubs,
- remedial works in respect of contaminated ground,
- erection of construction plant and equipment and
- erection of temporary buildings.

A revised list of what constitutes pre commencement work would then fit in with what appears in other DCOs under this heading.

*Postscript: The Council notes the applicants confirmation that this matter is under consideration.*

### 5.6 Employment and Skills Plan

Winchester City Council wishes to see an additional requirement imposed in the DCO that seeks an Employment and Skills Plan from the applicant. The Council notes the applicants concerns that any plan contains realistic objectives and it believes this concern can be addressed. The matter continues to be the subject on discussions with the applicant and the Council is hopeful of a positive outcome.

*Postscript: In later discussions on legal agreements, an ESP was referred to as part of an agreement. Winchester is flexible as to which mechanism is used (requirement or legal agreement) to cover this issue.*

Before the conclusion of the discussion on the requirements, Winchester City Council made several general comments on their contents. Officers did not intend to go through them line for line but raised several important issues. Reference was made to R4, which at present only refers to the micro siting option relating to the converter station. It was pointed out that the launch site for HDD5 at Denmead Meadows is currently offering two alternatives and that

needs to be recognised in the requirements (if no final decision is made during the Examination). R4 seems to be a suitable place to do this by adding a second element to the requirement.

The Council considers that R7, 8 & 9 are unnecessarily complicated and would benefit from redrafting. R7 is attempting to cover multiple areas that in the Council's opinion would be better separated out into different requirements.

Finally, the Council wishes to see a new Grampian type requirement that prohibits any start on the UK side until the French side is approved.

The above are set out in detail in the Council's submissions.

*Postscript: The applicant's acknowledgement that the dDCO has been the subject of ongoing discussions with the Council is welcome and that the proposals set out by the Council are under active consideration.*

*Having noted the discussions at CAH1 on the regulatory requirements associated with the project on the European side, the Council feels its proposals for a "no start requirement" as outlined above would address those concerns.*

## **Compulsory Acquisition Hearing 1**

### 3 Summary of DCO Provisions

#### 3.3 Deed of Covenant

WCC have reviewed the template deed of grant and do not consider that in its current form it is fit for purpose. The purpose being to enable implementation of and ensure compliance in perpetuity by Aquind and a subsequent operator with the landscaping mitigation proposed by the applicant. The landscaping has been put forward by the applicant as screening for the interconnector building. Consequently the landscaping screening must be guaranteed by Aquind and the operator for the full period that the building is standing on the land and not just whilst the building is operational. Hence the WCC request that to ensure that the applicant is empowered to ensure that the landscaping is implemented and maintained in perpetuity.

Secondly the deed is a template which may be entered into and quite probably will be amended through landowner discussions and hence not fit for purpose of ensuring the landscaping is implemented and maintained in perpetuity or the existence of the building.

Finally, the deed of grant is considered to omit matters such as the following:

1. Access rights to the landscaping areas by the applicant.
2. Acknowledgement by both parties to comply with any notices served by the WCC.
3. Acknowledgement that both parties are jointly and severally liable to pay all reasonable associated time and costs incurred in the inspection, preparation and enforcement of such notice(s).
4. Ensuring that any actions or inaction required within such notice such as fencing as erected / complied with within the timeframe prescribed by such notice.
5. Rights to WCC to enter the land is required to undertake works prescribed and not undertaken in a notice that both parties are jointly and severally liable to pay all reasonable associated time and costs incurred by both WCC and contractors engaged by WCC to act on their behalf.

6. A link to the implementation of the DCO landscaping plan or DCO requirements, for example currently the standard of maintenance is to “good agricultural practice” and should include additional obligations linking to the DCO
7. A link to the purpose of the landscaping being to mitigate environmental effects of the building as long as the building remains standing.

Finally the applicant has stated that WCC may take enforcement action through a civil route to ensure that the landscaping is implemented and maintained, such as suggestion is illogical as by the time a court date is set a tree will be dead. Additionally WCC is not resourced to take such action and it is submitted that the responsibility for enforcement should rest first with the applicant and WCC as last resort.

### **Issue Specific Hearing 3: Environmental Matters**

#### 4 Landscape, visual impact and tranquility

##### 4(d) Lighting

As noted by the applicant, the Council has been a party to the discussions on lighting and the limitations on when this will be used. The one question raised is whether the dDCO actually includes a provision that no additional lighting will be added to that submitted and approved under R6? Having checked the dDCO there does not seem to be any such provision and one should be added.

*Postscript: Additional bulkhead lights could be installed on the site without their presence triggering the need for any planning consent or further consent under the terms of the DCO. This seems a logical suggestion in the same way that there is a section of R6 that requires any replacement of the cladding to be the same colour.*

##### 4(e) Landscape and Visual Impact Assessment

The Council notes the applicant’s indication that mobile tower cranes will be used on site. However, it questions what control is in place within the dDCO to prohibit any contractor from wishing to use a tower crane instead of a mobile crane? Such equipment is a more common feature on construction sites. Should the dDCO not contain such a restriction?

*Postscript: The Council notes and welcomes the request for a post hearing note on this matter from the applicant.*

#### 6 Noise

##### 6(o) DCO Provisions

###### Article 9

*(When making comments on Article 9 the officer from WCC confirmed he was also speaking on behalf of the Environmental Health Officer at Havant and East Hampshire).*

*(The following includes the post hearing note that was requested by the ExA)*

There has been considerable and ongoing correspondence between Winchester City Council (WCC) and Martyn Jarvis Senior Associate at Herbert Smith Freehills LLP on behalf of the applicant. Reference was made to the latest version sent by Mr Jarvis to Winchester City Council by email on Sunday 13 December (*see appendix for this version, that had not been made available to other parties by the applicant at the time of this hearing*). WCC's position was presented with reference to this latest proposal.

**In summary:**

The applicant had not demonstrated the need for Article 9 within the proposed draft DCO and when clarification has been requested, they simply advised that this is a common condition. WCC accepts this is true but does not consider that this is a site-specific justification, as there are also DCOs commonly without this provision. WCC does not consider that it is appropriate to seek exemption from primary legislation (*Environmental Protection Act 1990 – Part III – Statutory Nuisance*) without site-specific justification. It is considered Section 80 of this legislation provides adequate defenses in terms of approvals under the Control of Pollution Act 1974 (COPA) (*Section 80 (9)(a)*) and in the demonstration of Best Practical Means (BPM) (*Section 80 (7)*).

Reference was made to the statutory nuisance statement that concludes “no nuisance is likely to occur” (*PINS Reference EN020022*) and it was questioned if this document was therefore correct.

WCC then referred to its understanding from the applicant that the need for Article 9 also related to concerns over potential construction delays by third parties from Section 82 actions (*Environmental Protection Act 1990 – Part III*) or as recently suggested that the lack of Article 9 would prejudice their position from an “Agent of Change” perspective.

The Council does not understand the Agent of Change argument (*detail was not provided to this reasoning but at the request of the inspector this is expanded upon at the end of this note*).

Regarding concerns over delays in construction, WCC has entered into further discussions with the applicant on potential rewording. They have provided a steer that as a reasonable authority, they have less concern over Article 9 if the clause seeks only to provide additional assurances regarding nuisance action during the construction phase. WCC accepts that these impacts are of shorter-term duration and that the proposed Construction Environmental Management Plans (CEMP) and COPA provisions provide a degree of assurance during the construction phase.

However, WCC still has concerns with Article 9 referencing the operating (use) period. This was initially about the inclusion of the term “cannot be reasonably be avoided” considered to water down the test of BPM that would otherwise be in place. Latterly, the applicant (in the latest version circulated) has now proposed a defense based upon following the Noise Management Plan (NMP) as referenced with “condition 20” of the draft DCO (*clarification was subsequently sought by the ExA that this should have been referenced as Requirement 20 - Control of noise during the operational period*).

WCC advised that although it welcomes the inclusion of a NMP, the Council has concerns that it was unreasonable over the 30-year life of such an operation to seek an exemption from statutory nuisance solely based on a NMP set in “tablets of stone” before all equipment and operational realities had been established. It the ExA was minded to follow such a route the Council wishes to see requirement 20 revisited.

Upon questioning by the Inspector it was clarified that there was a flexibility to the details of such a requirement. It could be based on an agreed period e.g. every 5 years or following changes in use or in the operator. The point of changes in use was suggested by the applicant to be a non-argument as the use was controlled by the DCO and could therefore not change (*to clarify WCC's reference to use related to operational or equipment changes and not to use as defined by "use classes" under planning law*).

The applicant questioned why the NMP would need refreshing as it specified noise levels that would still need to be followed. WCC advised that its position is that a NMP covers more than just noise levels including matters such as a complaints procedure, which any new operator may in fact welcome changing. In addition all acoustic impacts (low frequency hums being referenced) are difficult to fully control using numerical acoustic noise criteria set within a NMP (*this point was not pursued in detail during the hearing but WCC are happy to enter into further technical representation of this point if necessary*).

### **Agent of Change – Requested Clarification on WCC's position**

The revised paragraph 182 of the National Planning Policy Framework (NPPF) states:

“Planning policies and decisions should ensure that new development can be integrated effectively with existing businesses and community facilities (such as places of worship, pubs, music venues and sports clubs). Existing businesses and facilities should not have unreasonable restrictions placed on them as a result of development permitted after they were established. Where the operation of an existing business or community facility could have a significant adverse effect on new development (including changes of use) in its vicinity, the applicant (or ‘agent of change’) should be required to provide suitable mitigation before the development has been completed.”

This is expanded within the associated Planning Guidance on noise Paragraph: 010 Reference ID: 30-010-20190722 (<https://www.gov.uk/guidance/noise--2>).

This should provide the applicant with reassurance, not concern, that any future development that could prejudice their operation would be assessed in planning terms in accordance with the Agent of Change principle. The Planning Authority would be required to ensure that any proposals for sensitive receptors closer to the applicant's site would not therefore prejudice agreed operational parameters. The applicant is therefore seeking planning controls via this DCO to negate a concern that the NPPF already provides adequate controls and duties upon the planning authority to prevent.

The Agent of Change principle is not part of a defense to proceedings in statutory nuisance under the Environmental Protection Act 1990 (or in common law nuisance) and it maybe that it is this that applicant is referring to. However, it is considered that the argument of Agent of Change is gaining traction within case law and although not a statutory defense it does not mean it is not a material consideration, with the concepts being part of a wider re-interpretation of what amounts to reasonable use of land. The Agent of Change concept should therefore assist in providing the applicant with a great confidence with regards to their position with any such future actions. It certainly is not, in WCC's view, a reason to seek total exemption from allowing the Courts to judge upon such matters.

*Postscript: the Council will seek further discussions with the applicant to seek a common position on this matter.*

End