Date: 1 March 2021

AQUIND Interconnector application for a Development Consent Order for the 'AQUIND Interconnector' between Great Britain and France (PINS reference: EN020022)

Mr. Geoffrey Carpenter & Mr. Peter Carpenter (ID: 20025030)

in relation to Little Denmead Farm

Affected Party and Additional Affected Party Costs Application

Submitted in relation to Deadline 8 of the Examination Timetable

Blake Morgan LLP
6 New Street Square
London EC4A 3DJ
www.blakemorgan.co.uk

APPLICATION FOR COSTS

1. This is an Application by each of the Affected Party and the Additional Party ("the Affected Parties") for their costs in full, alternatively in part, of the Examination into the application for a development consent order by Aquind Limited ("the Company"). **Appendix A** sets out relevant Facts, Law and Guidance. In the event of refusal of authorisation of compulsory purchase powers, the Affected Parties reserve their right to then apply for their costs in line with the Secretary of State's Costs Guidance.

2. The Affected Parties make these applications without prejudice to numerous other unlawful matters engendered by the Company's application for a development consent order.

3. The Affected Parties own freehold land known as Little Denmead Farm the greater majority of which is asserted to be required for changed vegetation, a temporary haul road asserted to be required permanently, and development in the field of commercial telecommunications outside of the scope of the Planning Act 2008 ("PA 2008"), by the Applicant who is evidently also insolvent by dint of having at this time no funds to meet its subsisting blight liability of the Affected Parties (and by logical extension, any other affected party or additional affected party).

4. The Secretary of State is barred by Regulation 4(2) of the Infrastructure Planning (Environmental Impact Assessment) Regulations 2017 from granting development consent because of the failure by the Applicant to provide the Regulation 20(3) certificate evidencing discharge of the requirements of that regulation in relation to numerous additions considered necessary by the Applicant to be included within its previously certified (25th February 2020) "environmental statement", and with the result that, without them within the statement (as so "updated"), the certified statement is (on the Applicant's own case) inadequate.

5. Further, the failure to comply with the Infrastructure Planning (Compulsory Acquisition) Regulations 2010, Regulations 12 and 13 and 15(4) results to preclude the application of draft DCP compulsory acquisition powers over land outside of the Order Limits as originally submitted in the Application to the Secretary of State. Therefore, that land cannot be included within the scope of the Application as originally made.

6. Furthermore, in being unable to qualify as a person interested in land under section 106(1) of the Town and Country Planning Act 1990 results to preclude the Company from satisfying relevant guidance in EN-1 notwithstanding the requirements of section 104(3) of the PA 2008. This is because, the core decision making process of the PA 2008 establishes a statutory decision making sequence that cannot be circumvented under section 120(5)(a). The proposal of Article 8(4) by the Applicant cannot supply a lawful means by which to resolve that *legal* chronological impossibility arising: that Parliament's EN-1 and section 104 requires evaluation of the planning obligation in advance of the making of an order under section 114(1). That is, no reliance can in law be placed on Article 8(4) to seek to cure a legal requirement of section 106(9)(b) and (c) of the TCPA 1990 in advance of the Order containing that Article being both made under section 114 such that the envisaged Article 8(4) can have no status in law before the exercise of section 114.

7. The foregoing results in wasted costs to the Affected Parties arising from the unreasonable behaviour of the company in that the Company:

   a) Misled the ExA by letter dated 11th December 2020 into considering there to be no specified procedure for updating the certified environmental statement whereas Regulation 20 supplies a specified procedure (resulting in suspension of the Examination and minimum periods to expire before responses to consultation and notice are required;

   b) Failed to ensure that the ExA adhered to Regulations 12, 13 and 15 of the Infrastructure Planning (Compulsory Acquisition) Regulations 2010 as the ExA required of its in its letter of 18th December 2020;

   c) Failed to negotiate the acquisition of a land interest from the Affected Parties who were interested in selling their land to the Company;

   d) Applied for and continued through the Examination whilst insolvent and without balance sheet funds to even unable to purchase any of the Affected Parties' land nor to enable execution of any development consent planning obligation required under EN-1 and in light of section 104(3) PA 2008.

8. Because the company is trading insolvent, the Affected Parties request that the Secretary of State immediately direct that those individuals (whether persons or companies) standing behind the company be liable for the costs incurred by the Affected Parties.

APPENDIX A

FACTS AND LAW

9. The Facts are set out in the Deadline 8 responses of the Affected Parties, in particular, the Response to Change Request 2 and the Statements and Notes in relation to Funding.

10. Mr Stott has provided in Appendix 8 to earlier Submissions his expert evidence on subsisting blight liability of the Company to the Affected Parties.

11. In particular, extracts from EN-1 include as follows.

12. By NPS EN-1, Parliament has made provision for consideration of development consent obligations in the evaluation of whether or not a particular project may or may not be acceptable. See "planning obligation" within the statutory guidance.

13. By paragraph 4.1.8 of EN-1:

> *The IPC may take into account any development consent obligations[73] that an applicant agrees with local authorities. These must be relevant to planning, necessary to make the proposed development acceptable in planning terms, directly related to the proposed development, fairly and reasonably related in scale and kind to the proposed development, and reasonable in all other respects*

14. By footnote 73 of EN-1:

> *Where the words "planning obligations" are used in this NPS they refer to "development consent obligations" under section 106 of the Town & Country Planning Act 1990 as amended by section 174 of the Planning Act 2008.*

15. By paragraph 5.3.19:

> *Where the applicant cannot demonstrate that appropriate mitigation measures will be put in place the IPC should consider what appropriate requirements should be attached to any consent and/or planning obligations entered into.*

16. By footnote 112:

> *Where mitigation is required using a condition or planning obligation, the tests set out at paragraphs 4.1.7 – 4.1.8 in EN-1 should be applied.*

17. Paragraph 5.7.10 includes:

> *… In addition, the development consent order, or any associated planning obligations, will need to make provision for the adoption and maintenance of any SuDS, including any necessary access rights to property. The IPC should be satisfied that the most appropriate body is being given the responsibility for maintaining any SuDS, taking into account the nature and security of the infrastructure on the proposed site. The responsible body could include, for example, the applicant, the landowner, the relevant local authority, or another body, such as an Internal Drainage Board.*

18. Paragraph 5.7.22 includes:

… There may be circumstances where it is appropriate for infiltration facilities or attenuation storage to be provided outside the project site, if necessary through the use of a planning obligation.

19. Paragraph 5.10.21 includes:

… The IPC should also consider whether mitigation of any adverse effects on green infrastructure and other forms of open space is adequately provided for by means of any planning obligations, for example exchange land and provide for appropriate management and maintenance agreements. Any exchange land should be at least as good in terms of size, usefulness, attractiveness and quality and, where possible, at least as accessible.

20. Paragraph 5.12.8 provides:

The IPC should consider any relevant positive provisions the developer has made or is proposing to make to mitigate impacts (for example through planning obligations) and any legacy benefits that may arise as well as any options for phasing development in relation to the socio-economic impacts.

21. Paragraph 5.13.6 includes:

… Applicants may also be willing to enter into planning obligations for funding infrastructure and otherwise mitigating adverse impacts.

22. Paragraph 5.13.7 provides:

Provided that the applicant is willing to enter into planning obligations or requirements can be imposed to mitigate transport impacts identified in the NATA/WebTAG transport assessment, with attribution of costs calculated in accordance with the Department for Transport's guidance, then development consent should not be withheld, and appropriately limited weight should be applied to residual effects on the surrounding transport infrastructure.

23. Paragraph 5.15.7 provides:

The IPC should consider whether appropriate requirements should be attached to any development consent and/or planning obligations entered into to mitigate adverse effects on the water environment.

COSTS GUIDANCE

24. The Secretary of State has published guidance entitled: "Awards of costs: examinations of applications for development consent orders (July 2013)" that includes as follows.

25. Part A concerns general principles and includes as follows.

26. By paragraph 2:

> *2. The guidance applies to any "interested party" as defined in Section 102 of the Planning Act 2008. This includes any "affected person" as defined in Section 59 of the Act. It also applies to any "additional affected person" and any "additional interested party" as defined in Regulation 2 of The Infrastructure Planning (Compulsory Acquisition) Regulations 2010 and any other person who at the discretion of the Examining Authority takes part in an examination.*

27. The Carpenters' are:

    a) An Affected Person, Objector reference ID: 20025030, and their land is identified in the Schedules to their Written Representation. Plots within their land are envisaged to be taken against their will by reliance on compulsory acquisition powers sought by Aquind in Part V of its draft DCO;

    b) An Additional Affected Person, by reason of their ownership of Stoneacre Copse envisaged to be included for the purpose of acquiring rights to manage that woodland under Change Request 2.

28. Parts B and C concern the development for which development consent is sought.

29. Parts B and C include as follows.

30. By paragraphs 6 and 8:

> *6. All parties will normally be expected to meet their own costs….*
>
> *8. If an award of costs is made, it constitutes an order which can be enforced in the courts and will state that one party must pay to another party their costs, in full or in part. The costs order will state the broad extent of the expense the party can recover from the party against whom the award is made. It does not settle the amount. Settling the amount of the costs awarded is addressed below.*

31. The Conditions for an Award are:

> *11. Costs will normally be awarded where the following conditions are met:*
> *• the aggrieved party has made a timely application for an award;*
> *• the party against whom the award is sought has acted unreasonably; and*
> *• the unreasonable behaviour has caused the party applying for the award of costs to incur unnecessary or wasted expense during the examination – either the whole of the expense because it should not have been necessary for the matter to be examined and/or determined, or part of the expense because of the manner in which the party behaved during the examination.*

32. Condition 11, bullet 1 is satisfied because the Affected Party is making this application before the conclusion of the Examination Period on the 8th March 2021.

33. Condition 11, bullet 2 and 3 are addressed below.

34. Paragraphs 15-19 cover full and partial awards. This application is made in the alternative throughout. The Affected Party seeks its costs of its Objection in full or in part, including the expense of making this application.

Condition 11, bullet 2: Unreasonable

35. Paragraphs 22-25 concern the meaning of "unreasonable":

> *22. The word unreasonable is used in its ordinary meaning as established by the Courts in Manchester City Council v SSE & Mercury Communications Limited [1988] JPL 774.4 Further explanation of what is likely to be regarded as unreasonable behaviour is set out in Part C.*
>
> *23. The most common examples concern non-compliance with procedural requirements or failure by a party to substantiate a relevant part of their case…*
>
> *25. Where a party has indicated an intention to apply for an award of costs and has clearly set out the basis for the claim, their case will be strengthened if the opposing party is unable to explain why the relevant facts or matters referred to have not led to a change of stance or position.*

36. The Affected Party indicated its intention to apply for an award of costs in Deadline 7 submissions and clearly set out the basis for the claim in this and in earlier representations. Their case is strengthened because the Aquind Limited has been unable to explain why the relevant facts or matters referred to have not let to a change if stance of position.

37. Examples of "unreasonable behaviour" include (by reference to Part C):

> *Part C …*
>
> *1. Behaviour which is alleged to be unreasonable in relation to an examination of a consent application can either be procedural (relating to the examination process) or substantive (relating to substantive issues arising during the examination). More detail on these is set out below…*
>
> *3. The following are examples of unreasonable behaviour on procedural grounds which may result in an award of costs:*
>
> *• Late submission of any documents or late compliance with any requests made by the Examining Authority…*
>
> *• Introducing fresh or substantial evidence at a late stage, necessitating the preparation and submission by any other party or parties of additional submissions or evidence that would not have been required if the fresh or substantial additional evidence had been submitted on time.*

38. Paragraph 4 includes:

> *The following are examples of unreasonable behaviour which may result in a substantive award of costs:*
>
> *• An application for development consent is for a proposal that is clearly contrary to or flies in the face of a relevant designated national policy statement and no, or very limited, other relevant and important issues are advanced with inadequate supporting evidence.*
>
> *• Acting contrary to, or not following, well-established relevant case law…*
>
> *• An applicant for consent refusing to enter into or provide a development consent obligation or to provide an obligation in appropriate terms, where the Examining Authority considers that such an obligation is necessary to make the proposed development acceptable, as referred to in paragraph 204 of the National Planning Policy Framework.*

39. Part D concerns costs awards relating to compulsory acquisition requests.

40. Part D includes as follows.

> *1. Special considerations apply where an applicant seeks development consent order provisions authorising the compulsory acquisition of land. In this Part of this guidance this is referred to as a*

"compulsory acquisition request" and those whose interests are sought to be acquired are referred to as "objectors".

2. *Where the objections to a compulsory acquisition request have neither been disregarded by the Examining Authority nor withdrawn before the decision of the Secretary of State on a development consent application and the objectors have been successful in objecting to the compulsory acquisition request, an award of costs will normally be made against the applicant for development consent and in favour of the objectors. An award of costs in such a case does not, of itself, imply unreasonable behaviour by the applicant for development consent.*

3. *The general principles are stated above. To enable an award of costs to be made to a successful objector, they will need to have objected to the compulsory acquisition request and have:*

   • maintained their objection at all times before the decision of the Secretary of State on the development consent application;

   • participated in (or have been represented during) the examination by the submission of a relevant and/or written representation; and

   • had their objection sustained by the Secretary of State.

4. *For the purposes of this Part of this guidance, an objection will be taken to be sustained if:*

   • the Secretary of State refuses development consent; or

   the Secretary of State makes a development consent order but does not include provisions authorising compulsory acquisition of the whole or part of the objector's property.

41. Paragraph 6 provides:

> *An application for an award of costs on the ground of having successfully opposed a compulsory acquisition request cannot be made until it is known whether or not an order will be made authorising the compulsory acquisition of the objector's property. Therefore an application should be submitted within 28 days of notification of the Secretary of State's decision on the development consent order or, if applicable, within 28 days of notification of the withdrawal of the application for development consent or the withdrawal of the compulsory acquisition request.*

42. Paragraph 7 provides:

> *7. In some circumstances an award of costs may be made to an unsuccessful objector because of unreasonable behaviour. These circumstances are dealt with in Parts A and B of this guidance.*

43. In this respect, the Secretary of State's "Planning Act 2008: Guidance related to procedures for compulsory acquisition of land (September 2013)" includes:

> *8. The applicant should be able to demonstrate to the satisfaction of the Secretary of State that all reasonable alternatives to compulsory acquisition (including modifications to the scheme) have been explored. The applicant will also need to demonstrate that the proposed interference with the rights of those with an interest in the land is for a legitimate purpose, and that it is necessary and proportionate…*
>
> *24. Applicants are required under section 37 of the Planning Act to produce a consultation report alongside their application, which sets out how they have complied with the consultation requirements set out in the Act. Early consultation with people who could be affected by the compulsory acquisition can help build up a good working relationship with those whose interests are affected, by showing that the applicant is willing to be open and to treat their concerns with respect. It may also help to save time during the examination process by addressing and resolving issues before an application is submitted, and reducing any potential mistrust or fear that can arise in these circumstances.*
>
> *25. 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 to include provision authorising compulsory acquisition covering all the land required at the outset[3] .

26. Applicants should consider at what point the land they are seeking to acquire will be needed and, as a contingency measure, should plan for compulsory acquisition at the same time as conducting negotiations. Making clear during pre-application consultation that compulsory acquisition will, if necessary, be sought in an order will help to make the seriousness of the applicant's intentions clear from the outset, which in turn might encourage those whose land is affected to enter more readily into meaningful negotiations.

27. In the interests of speed and fostering good will, applicants are urged to consider offering full access to alternative dispute resolution techniques for those with concerns about the compulsory acquisition of their land. These should involve a suitably qualified independent third party and should be available throughout the whole of the compulsory acquisition process, from the planning and preparation stage to agreeing the compensation payable for the acquired properties. For example, mediation might help to clarify concerns relating to the principle of compulsorily acquiring the land, while other techniques such as early neutral evaluation might help to relieve worries at an early stage about the potential level of compensation eventually payable if the order were to be confirmed.

44. Paragraph 9 of the Costs Guidance continues:

9. Where an objector is partly successful in opposing a compulsory acquisition request, the Examining Authority will normally make a partial award of costs. Such cases arise, for example, where the Secretary of State in making an order excludes part of the objector's land from the land subject to compulsory acquisition powers.