Aquind Interconnector: Non-compliance with obligation to take account of liability for blight claims

Client:	Mr. Geoffrey Carpenter & Mr. Peter Carpenter
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1. Introduction

1.1 I attended the Compulsory Acquisition ('CA3') Hearing on 19 February 2021, on behalf of Messrs Carpenter.

1.2 During the CA3 hearing I set out my concerns that the resource implications of a possible acquisition resulting from a blight notice have not been taken account of by the Applicant, as required by paragraph 18 of Government guidance related to procedures for the compulsory acquisition of land under the Planning Act 2008 ('the Guidance').

1.3 In particular, Mr Bird's response reflected the **[REP6-021]** Funding Statement 2, that states:

> ***7.9 Blight***
>
> *7.10 The current cost estimate (see section 5 of this Statement) includes an amount to cover the total costs of the payment of compensation for the compulsory acquisition of land and rights included in the Order and required in connection with the Proposed Development.*
>
> *7.11 It is not anticipated that any claims for blight will arise. Should any claims for blight arise as a consequence of the Application the cost of meeting such claims will be met from the sources of funding described above at section 6 to this Statement.*

1.4 During the CA3 hearing, on behalf of the Applicant Simon Bird QC stated:

> *"The applicant well understands the implication of the both provisions of the 1990 Act, and has taken into account the potential for blight in accordance with the guidance and concluded as we've set out in the funding statement that it does not anticipate any claims are likely to be made"*

1.5 In response, I expressed my expert opinion that:

> *"given the fact that there's no doubt at all that the Carpenters are in a position where they could serve a blight notice tomorrow if they wish to do so, I think it may be of interest to the examining authority to understand more from the applicant, how they would respond to such a notice, given that there does seem to be agreement between agents that the value of the Carpenters' interest is greater than the amount of money that Aquind have available to them at this moment in time."*

1.6 It was self-evident to me that the Applicant did not itself have a ready response and as such Mr Bird QC confirmed that his client would respond to the point in writing.

1.7 I am providing this note to set out, as requested by the ExA, the points that I made during the CA3 hearing, and to further explain, as requested by the ExA, why I consider it is evident on the basis of the material submitted to the Examination that the Applicant has failed to take account of its liabilities in relation to statutory blight.

2. Overview of the statutory blight procedure

Statutory provisions

2.1 Section 125 of the Planning Act 2008 applies compulsory purchase compensation provisions if an order includes authorisation for acquisition. "Blight" is a category of compensation that arises in the foreshadow of compulsory purchase powers. i.e. in advance of powers being granted but when powers are threatened. That is the current actual situation here and has been since at least the submission by Aquind of its Application for a development consent order to contain compulsory purchase powers.

2.2 Section 149 of the Town and Country Planning Act 1990 ('TCPA') defines 'blighted land' as land falling within Schedule 13 of that Act.

2.3 Paragraph 24(3) of Schedule 13 states that land falls within the definition if "an application for an order granting development consent seeks authority to compulsorily acquire the land"

2.4 The Explanatory Notes to the Planning Act 2008 provide further clarification, as follows:

281. A national policy statement identifying a location as a suitable (or potentially suitable) location for a nationally significant infrastructure project may create blight at that location, reducing land values and making it hard to sell the land. Blight may also result from an application being made for an order granting development consent authorising the compulsory acquisition of land or from such authorisation being given.

282. Section 175 amends TCPA 1990 (which extends to England and Wales), so as to allow owner occupiers adversely affected in this way to have the benefit of the existing statutory provisions relating to blight. The effect of subsection (6) is that the "appropriate authority" (who should receive the blight notice) in the case of blight caused by a national policy statement is the statutory undertaker named as an appropriate person to carry out the development in the national policy statement, or the Secretary of State where there is no such named undertaker. The Secretary of State is to determine any disputes as to who should be the appropriate authority. Subsection (4) prevents the appropriate authority from serving a counter-notice to a blight notice on grounds of having no intention of conducting the development. Subsection (7) makes it clear that the "appropriate enactment" for a blight notice is the development consent order, or the draft order in the terms applied for.

2.5 Section 150 of the TCPA specifies that blight notices may be served by qualifying parties, including owner occupiers of residential property, owner-occupiers of business premises with a net rateable value not exceeding £44,200 in Greater London and £36,000 in the rest of England) and an owner-occupier of an agricultural unit or part of an agricultural unit.

2.6 Section 150(3)(a) further explains that if a person is entitled to an interest in the whole of an agricultural unit, he is unable to make any claim or serve any notice in respect of his interest in part of the unit, whereby blight claims must relate to the entirety of a party's interest, even if only part is required by the blighting authority.

3. Application of statutory provisions in the context of Messrs Carpenter's landholding

3.1 There is no dispute of the facts that:

3.1.1 Aquind has submitted an application for an order granting development consent which seeks authority in Part V to compulsorily acquire part of the Carpenter's land; and

3.1.2 The Carpenter's land forms part of an agricultural unit;

3.2 It follows, therefore, that Aquind has had in fact, from the date of its Application for its order being made, and subsisting in fact at this time, a *live compensation liability* in relation to blight and Messrs Carpenter evidently fall within the definition of 'qualifying party' under the TCPA, whereby they may serve a blight notice subject to demonstrating that the pre-requisites of section 150(1)(c) have been adhered to.

3.3 Further, it is common ground in fact between the respective agents acting for the parties (Mr Henry Brice for Messrs Carpenter and Mr Alan O'Sullivan for the Applicant) that the market value of the *entirety* of Messrs Carpenter's landholding is in excess of £2.1m (for the avoidance of any doubt Mr Brice considers in his expert opinion that the value is considerably higher than that figure).

3.4 It is also a fact that, when a blight notice is accepted, the claimant is entitled to recover disturbance costs (as assessed under Rule 6 of Section 5 of the Land Compensation Act 1961) and professional fees, whereby the Applicant's liability is likely to be considerably higher than £2.1m, even if (for the purpose of this exercise) one were to assume that Mr O'Sullivan's assessment of market value is accurate.

3.5 I have reviewed the Applicant's Funding Statement and the accounts for 2018 and 2019 appended thereto and also paragraph 4.5 of Aquind's Exemption Request relating to EU Regulation 2019/943 and paragraph 9.2 on page 4 of Examination Library document reference REP7-075, where Aquind states that it has no funds presently. Having done so it is evident that the Applicant is unable to service the implications of a blight notice from Messrs Carpenters, let alone any other party who may be entitled to serve a blight notice.

3.6 As I expect will happen, the Applicant will reference in its (asserted) written response to this point (i.e. as committed to by Mr Bird QC) that its Funding Statement (both versions 1 and 2) includes an asserted statement that *"should any claims for blight arise as a consequence of the Application the cost of meeting such claims will be met from the sources of funding described above at section 6 to this Statement".* However, this follows the statement that the Applicant does not anticipate any such claims (for reasons not explained) and, when one refers to section 6 of the Statement, the information provided about the funding of the 'development stage' (which I take to mean up to the point that the DCO is granted) is scant to say the least:

The Applicant has secured from its current investors financing sufficient to support the Project until the completion of the development stage, which includes obtaining all necessary permissions and authorisations, including the DCO. The Applicant has invested approximately £35m in the development of the Project as of 30 June 2020. The residual cost of completing the pre-construction stage of the Project is forecasted at £15m.

3.7 Somewhat surprisingly for an NSIP and in contrast to many other DCO Funding Statements, Section 6 does not in any way, shape or form actually demonstrate that the Applicant has monies readily available to service its *subsisting* liability for blight. Even if the Applicant were able to use some of the (asserted) £15m that it claims to have secured from current investors

(no evidence of which is provided) for the purpose of servicing blight claims, one must assume that it would not then have adequate funds available to cover whatever costs the £15m is allocated for (which is also not made clear). In any event, it has recently stated it has no money at all (see paragraph 4.5 of Aquind's Exemption Request relating to EU Regulation 2019/943 (which states: "*AQUIND is not in a position to finance the Project on "balance sheet" as national TSOs and utilities may be in a position to do*", and paragraph 9.2 on page 4 of Examination Library document reference REP7-075) which states "*The Applicant has … confirmed in response to agenda item 5.2 of CAH1 that the monies secured to date from its current investors do not include the costs associated with compulsory acquisition*" and so the suggested £15m sum appears irrelevant to the subsisting liability for blight.

3.8 When one assesses the situation in the cold light of day and considers the facts and not the hyperbole, it is clear that the Applicant has either not in fact taken account of the resource implications of a possible acquisition resulting from a blight notice (in which case it has failed to comply with the Guidance), or, if it has done so, it has failed to have regard to the fact that Messrs Carpenter could serve such a notice and it does not have the funds available to be able to service its liability. In this respect, the Secretary of State's Guidance on compulsory acquisition under the Planning Act 2008, read in the ordinary way as a whole includes: (Emphasis added)

General Considerations …

9. The applicant must have a clear idea of how they intend to use the land which it is proposed to acquire. They should also be able to demonstrate that there is a reasonable prospect of the requisite funds for acquisition becoming available. Otherwise, it will be difficult to show conclusively that the compulsory acquisition of land meets the two conditions in section 122 (see paragraphs 11-13 below)…

12. In addition to establishing the purpose for which compulsory acquisition is sought, section 122 requires the Secretary of State to be satisfied that there is a compelling case in the public interest for the land to be acquired compulsorily.

13. For this condition to be met, the Secretary of State will need to be persuaded that there is compelling evidence that the public benefits that would be derived from the compulsory acquisition will outweigh the private loss that would be suffered by those whose land is to be acquired. Parliament has always taken the view that land should only be taken compulsorily where there is clear evidence that the public benefit will outweigh the private loss…

Resource implications of the proposed scheme …

17. Any application for a consent order authorising compulsory acquisition must be accompanied by a statement explaining how it will be funded. This statement should provide as much information as possible about the resource implications of both acquiring the land and implementing the project for which the land is required…

18. The timing of the availability of the funding is also likely to be a relevant factor. Regulation 3(2) of the Infrastructure Planning (Miscellaneous Prescribed Provisions) Regulations 2010 allows for five years within which any notice to treat must be served, beginning on the date on which the order granting development consent is made, though the Secretary of State does have the discretion to make a different provision in an order granting development consent. Applicants should be able to demonstrate that adequate funding is likely to be available to enable the compulsory acquisition within the statutory period following the order being made, and that the resource implications of a possible acquisition resulting from a blight notice have

been taken account of.

3.9 By evidence above reflects the guidance of the Secretary of State. There is no evidence that Aquind can presently meet its subsisting liability to blight from presently available funds because it has no such funds to meet that liability upon its crystallisation. It cannot meet its current liability. There is no evidence that it has present funds for "possible acquisition resulting from a blight notice".

4. My conclusions

4.1 it is evident, in my opinion, that the resource implications of a possible acquisition resulting from a blight notice have not been taken account of;

4.2 there is no basis, in my opinion, for the Applicant's statement in its Funding Statement that *"it is not anticipated that any claims for blight will arise";* and

4.3 I am unable to identify any evidence that supports Mr Bird QC's statement that the Applicant *"has taken into account the potential for blight in accordance with the guidance".* If it has done so, it begs the question, on which the Examining Authority will wish to be satisfied: on what basis has it concluded that there is no potential for Messrs Carpenter to serve a blight notice?

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