

TR010006
Len Mayatt

ABC's comments, as landowner, on HE's Response to ABC's submissions as landowner at Deadline, 3 Vol 11.1 Feb 2017

Rep3-001: There is an error in HE's document. The written comments are from Ashford Borough Council as local authority, not as land owner.

Rep3-002: ABC, as landowner has the following comments on HE's responses to ABC's submissions as landowner at Deadline, 3 Vol 11.1 Feb 2017:

PIN Ref Rep3-002	Responses from Highways England	ABC's comments
002.01	<p>2) Noted. The Applicant considers that there is some confusion as to the relevant legal tests. The overall scheme has to be judged under section 104 as to whether it is in accordance with any relevant National Policy Statement, subject to the factors specified in section 104, including whether the adverse impact of the proposed development would outweigh its benefits (the Overarching Section 104 test"). Where compulsory acquisition powers are sought the scheme must satisfy the tests relating to compulsory acquisition (the "CA tests"). Where compulsory acquisition of open space is proposed, then the scheme must satisfy the test under section 131 or 132 as appropriate (the "OS test") in addition to the normal CA tests. It is essential that there is complete clarity as to which tests are being applied when considering the various arguments which have been put forward by ABC. Some points may be relevant to more than one test. When considering the OS test it is essential to bear in mind the definition of open space:</p> <p>"open space" means any land laid out as a public garden, or used for the purposes of public recreation, or land being a disused burial ground (emphasis added)</p>	<p>2) The Council agrees that there are 3 tests, the overarching test under 104 PA, the compulsory acquisition test under s121 Planning Act 2008 and then there is the test under s131 Planning Act 2008 for the open space. ABC's submission relate to the OS test.</p> <p>ABC has not misapplied the test under s131 Planning Act 2008. See ABC's response to the ExA's supplementary question 5 (ii) in ABC's written summary of the Compulsory Acquisition Hearing, held on 23 February 2017.</p>

	<p>The only relevant element of this definition to the scheme is the use of the relevant plots for public recreation. The Applicant has taken a precautionary approach in treating the plots in question as open space, as will be clear from any site visit, given that the footprint of the two plots mostly comprise the existing footbridge, overgrown shrubs and dense trees. This question of the land being open space for the purposes of public recreation frames the entire legal analysis and sets a very real boundary as to those arguments which can be taken into account in applying the OS test as distinct from those which may be relevant to the CA tests or the Overarching Section 104 test. It means, for example, that the land's status as a Local Nature Reserve is not relevant to the OS test, though it would be potentially relevant to the CA tests or the Overarching Section 104 test.</p> <p>The Applicant's response to the representations by ABC address the OS test as the representation has been cast in those terms. The Applicant's case in relation to the CA tests are set out in the Statement of Reasons and in relation to the Overarching Section 104 test in the full set of application documents taken in their totality but particularly in the Case for the Scheme.</p> <p>3) Noted. The Applicant has taken a precautionary approach in treating the plots in question as open space, as will be clear from any site visit, given that the footprint of the two plots mostly comprise the existing footbridge, overgrown shrubs and dense trees.</p> <p>4) Noted. The local nature designation is not relevant to the application of the OS test to the two plots, though it is potentially relevant to the CA tests and the Section 104</p>	<p>3) The order land is clearly laid out and used for public recreation. See ABC's response to the ExA's supplementary question 5 (ii) in ABC's written summary of the Compulsory Acquisition Hearing, held on 23 February 2017 for ABC's description of the order land.</p> <p>4) The designation of Church Road as local Nature Reserve is relevant to the 131(4)(b).It is a statutory</p>
--	--	--

	<p>Overarching test. The same applies to the fact that the plots form part of the Ashford Green Corridor. What counts is use for the purposes of public recreation, as per the legal test. A designation in a local plan of this type is at most a gloss on this.</p> <p>5) As already noted, the OS test must only take into account public recreation and the specific plots affected. Most of the points made here are not relevant to the OS test, though they may be relevant to the CA tests or the Overarching Section 104 test.</p> <p>6) Noted.</p> <p>7) The legislation obliges the provision of replacement land. Whilst it is always preferable for the landowner to be a willing recipient of the replacement land, if this is not the case, that is not relevant to the legal test. The Applicant has no choice under the legislation, and there is no provision in the legislation to take account of the landowner's views on this point.</p> <p>8) The DCO does not provide for temporary acquisition of any land, as this is not possible as a matter of law. It provides for temporary possession (not ownership) and permanent rights.</p> <p>9) The Applicant is obliged under normal CA principles to seek the minimum interference with the landowner's interest to deliver the scheme. Whilst ABC may prefer the land to be acquired outright, the Applicant considers this would go beyond what it could justify to meet the normal CA tests. The Applicant may be prepared to reach an</p>	<p>designation and is an incident that attaches to the replacement land. It is not a local plan policy designation.</p> <p>The Council agrees with HE that the Ashford Green Corridor is not relevant to the OS test, as this is a local plan policy and is not considered to be a right, trust or incident.</p> <p>5) The Council has considered public recreation and the specific plots. ABC does not consider the points made are irrelevant to the OS test. See ABC's response to the ExA's supplementary question 5 (ii) in ABC's written summary of the Compulsory Acquisition Hearing, held on 23 February 2017.</p> <p>7) This is not correct, as there is an exemption, where the applicant does not have to provide replacement land (see s131 Planning Act 2008). The replacement land is not suitable to have the same rights ,trusts and incidents attached to it as the order land.</p> <p>HE has not fully addressed the definition of replacement land. The replacement land must be no less advantageous to those who have a right to use the order land.</p> <p>HE has not demonstrated how it will satisfy the test under s131(4). See ABC's response to the ExA's supplementary question 5 (ii) in ABC's written summary of the Compulsory Acquisition Hearing, held on 23 February 2017.</p>
--	---	--

	<p>agreement outside the DCO process, but that is not a matter for this Examination.</p> <p>10) The Applicant agrees that it is essential that the scheme avoids SPP, which would involve a substantial delay. The Applicant has been mindful of this in preparing the application and is confident that the proposals meet the OS test so as to avoid SPP</p> <p>11) The Applicant has had significant discussions with ABC, and to date it has not proved possible to reach an agreed solution, whether involving the use of CA powers or otherwise. The Applicant is confident that the proposals meet the OS test (and the CA tests and Overarching section 104 test) and whilst further discussions are ongoing with ABC on points of detail, it should not be assumed that any major change to the Applicant's compulsory acquisition proposals will be brought forward in respect of the open space issue.</p>	<p>9) HE is carrying out engineering operations to the Plot 3/14/a and the plot will be severed from the remaining POS .</p> <p>10) HE has not demonstrated how it will satisfy the test 131 (4)</p> <p>11) The applicant has had 2 discussions with ABC.</p> <p>Please see ABC's response to the ExA's supplementary question 5 (ii) in ABC's written summary of the compulsory Acquisition Hearing, held on 23 February 2017 for the above matters.</p>
002.02	<p>Plot 3/14/a</p> <p>1) Noted</p> <p>2) Noted</p> <p>3) The Applicant is seeking temporary possession and use of the whole of this plot and once temporary possession has been relinquished it requires a permanent new right over the land "to construct operate and maintain the Church Road overbridge and related works and mitigation measures including access with or with vehicles plant and machinery over approximately 1588.07square metres of special category land (open space) located east of former A2070". The permanent right is secured</p>	<p>3) HE is also carrying out engineering operations to plot 3/14/a, therefore it should be permanently acquired and considered under s131</p> <p>'east' should be deleted and replaced with 'west'</p>

	<p>through the compulsory acquisition process and once implemented will be noted, in the usual way, on the land registry title.</p> <p>4) Noted.</p> <p>5) Discussions are ongoing with ABC regarding the open space land. Please see Highways England responses to the written representation PINS document NO. REP3-002.</p> <p>6) The Applicant does not consider that the reasons provided by ABC mean that the land will be no less advantageous when burdened with the Order rights.</p> <p>8) As set out at 002.01 above this is not relevant to the OS test. Any use by children and dog walkers is accepted as relevant. Whilst the Applicant has not conducted a formal survey, it is suggested that the nature of most of the plot means this use is minimal.</p> <p>9) As set out at 002.01 above this is not relevant to the OS test.</p> <p>10) As set out at 002.01 above this is not relevant to the OS test.</p> <p>11) The impact on local residents is not relevant to the OS test. The temporary loss of vegetation (as replanting will be undertaken) will not prevent the public using the public openspace.</p> <p>12) The impact on local residents is not relevant to the OS test. The temporary loss of vegetation (as replanting will be undertaken) will not prevent the public using the public open space.</p> <p>13) As set out at 002.01 above this is not relevant to the OS test.</p> <p>14) The Applicant disagrees with this statement</p>	<p>4) Noted</p> <p>5) Noted</p> <p>6) Noted. HE has not provided any explanation why it disagrees.</p> <p>8) & 9), 10) 11) 12), 13) Noted. See ABC's comments at 4) for 002.01 regarding the local nature reserve. ABC's comments are relevant to the test under s132 (3).</p> <p>14) HE has not properly applied the test in 132(3) or provided any reasons why it disagrees</p>
002.03	Plot 3/14/b	The Council's position has changed with regards to

TR010006
Len Mayatt

ABC's comments, as landowner, on HE's Response to ABC's submissions as landowner at Deadline, 3 Vol 11.1 Feb 2017

		<p>the requirement for a 2.4 metre. It now only requires a 2 metre gap between the bridge and the childrens' play area.</p> <p>See ABC's response to the ExA's supplementary question 5 (ii) in ABC's written summary of the Compulsory Acquisition Hearing, held on 23 February 2017.</p>
002/04	Replacement land	<p>ABC's position remains as set out in its written representations and ABC's response to the ExA's supplementary question 5 (ii) in ABC's written summary of the Compulsory Acquisition Hearing, held on 23 February 2017.</p>
002.005	Alternative replacement land	<p>ABC is disappointed that HE did not fully consider options for suitable replacement land before it submitted its application.</p>