

From: [REDACTED]
To: [Richard Price](#)
Subject: Manston DCO
Date: 12 April 2019 13:18:43

Dear Richard,

Following on from the examination hearings held last month and the issue of the Examining Authority's second written questions, I just wanted to raise a couple of issues where we would appreciate guidance from either the Planning Inspectorate or the Examining Authority. These relate to the following two areas;

1. The continued failure of the Applicant to provide the examination with the explanation and justification of the Works that form the NSIP development and the Works that comprise Association Development. This is despite the request made by the Examining Authority and the commitment given by the Applicant at the dDCO hearing held on 10 January 2019. As we set out in more detail below, this information is of critical importance to the examination and, in so far as it is able to, we would request guidance on whether the Examining Authority intends to require the Applicant to provide this information to the examination in order that the Application can be adequately and fairly tested.
2. The timing of applications for costs awards to be submitted for consideration and the Examining Authority's ability to make a procedural decision that requires an Applicant to place funds in escrow to secure payment of potential cost/fee liabilities due to affected parties and the Planning Inspectorate.

1. The Applicant's Failure to Provide an Explanation and Justification of the Works that comprise NSIP Development and Associated Development.

In view of the Applicant's continued failure to furnish the examination with this important information and given the very short time left in the examination, SHP is concerned that this omission was not flagged to the Applicant in the second round of written questions issued on 5 April.

As set out in SHP's detailed submissions, there are many elements of development that the Applicant has listed as NSIP development that do not satisfy the required criteria under s23 of the Planning Act 2008 and there are many elements of the purported Associated Development that do not comply with the relevant guidance criteria.

In order to assess whether development satisfies the criteria for associated development set out in the relevant guidance, an assessment must first be made about development that comprises the principal (i.e. NSIP) development. This requires a clear explanation and justification of the NSIP development to be provided by the Applicant and for the evidence to be tested in the examination to ensure it satisfies the required tests under section 14 and section 23.

Under the guidance, associated development must be proportionate to the nature and scale of NSIP development, the purpose of associated development should not be to cross-

subsidise and associated development should be subordinate to principal development. Without having clarity over the applicability of the claimed NSIP development, no assessment of these tests can be made. There are also related questions, to which the Examining Authority alluded to in earlier hearings regarding the need for detailed business plan and forecasts to be provided by the Applicant to allow an assessment of the cross-subsidy test. Based on the information currently before the examination, no assessment can be made.

It is SHP's view that it is critically important that the categorisation of the Works are properly explained and justified, so that the evidence can be adequately and fairly tested. To date, the only substantive evidence before the examination on the Works that meet the relevant NSIP development and Associated Development criteria has been provided by SHP. The lists (without explanation or justification) provided by the Applicant are effectively un evidenced assertions, and the limited information provided on Works 15-17 falls well short of the requirements.

A summary of SHP's post application submissions on this point are summarised below;

- 8 October 2018: Submission of Relevant Representations. Please refer to paragraphs 3.11, 5.5, 5.6, 5.8, 7.6 – 7.12 and 9.8 of SHP's Relevant Representations [RR-1601]
- 19 January 2019: Deadline 1 Submission: Please refer to paragraphs 3.1 – 3.14 of the written summary of SHP's oral submissions at dDCO Hearing [REP1-023] which confirms the request that was made by the Examining Authority and the commitment provided by the Applicant. This can be checked via the recordings from the hearing.
- 15 February 2019: Deadline 3 Submissions: Please refer to sections 5 and 6 of Appendix 1: Rebuttal of NSIP Justification, which forms part of SHP's written representations [REP3-025]. As set out in the analysis, Works 1, 2 10, 11 and 13 would not qualify as NSIP works as they do not have the effect required by section 23 of the Planning Act 2008. Further detailed analysis is also provided on the non-compliance with the associated development criteria.
- 8 March 2019: Deadline 4 Submissions: Please refer to paragraphs 1.3, 3.8 and 3.9 of SHP's covering letter [REP4-064] and SHP's comments on the Applicant's Response to Written Question DCO.1.1 [see page 10 and 11 of REP4-067].
- 29 March 2019: Deadline 5 Submissions: Please refer to paragraphs 2.9.3, 2.9.16 and 2.9.17 of SHP's Comments on the Applicant's Comments on the Written Representations [Rep5 - reference to be provided] and paragraphs 3.1.2 – 3.1.5 and 9.1 of SHP's written summary of oral submissions put at the Compulsory Acquisition hearing on 20 March 2019 [REP5 reference to be provided].

In view of the Applicant's failure to submit the required evidence to the examination, we consider that the submissions provided by SHP provide the only detailed analysis on the applicability of the purported NSIP development and Associated Development that is before the examination. It is also highly revealing that the Applicant has chosen not to comment on, or challenge, the evidence provided in sections 5 and 6 of Appendix 1: Rebuttal of NSIP

Justification, which forms part of SHP's written representations [REP3-025].

Should the Examining Authority be able, we would respectfully request guidance on whether the Examining Authority intends to require the Applicant (in either its next round of written questions or via a procedural decision) to provide an explanation and justification of works that comprise both NSIP development and associated development to enable the application to be adequately and fairly tested. We are also conscious of the quantum of submissions that the Examining Authority are reviewing and would request guidance on whether we should continue to make reference to these issues in future submissions.

2. Cost Claims and Recovery of any Cost Claims

SHP has reviewed the relevant guidance "*Awards of costs: examinations of applications for development consent orders*" and considers that the criteria for a successful award of costs in its favour would be met as a result of the Applicant's unreasonable behaviour, which has caused SHP to incur unnecessary or wasted expense during the examination.

For example, the failure of the Applicant to provide the examination with information requested by the Examining Authority months previously, meant that the application was not capable of being properly tested at the Compulsory Acquisition (and other) hearings. SHP had invested significant sums in preparing diligently for the hearings with its advisory team yet many of the topic areas (e.g. Funding, scope of associated development etc) could not be adequately tested as the information was either not before the examination or the information provided was proven to be inaccurate. As a result of this, the Examining Authority has scheduled a further Compulsory Acquisition hearing in June, leading SHP and others to incur further unnecessary and wasted expense.

Similarly, the failure of the Applicant to provide any explanation or justification of the works that comprise NSIP development and associated development, meant that SHP was forced to incur significant costs in preparing necessary evidence for the examination. The obligation is on the Applicant to ensure that its Application is ready to be examined and it is wholly unreasonable for the onus to be placed on an affected party to explain why the criteria has not been satisfied. There are also many other examples where we consider the Applicant's unreasonable behaviour would result in a successful costs awards.

At this stage we are simply seeking confirmation as to when the Examining Authority would consider a costs claim. We have reviewed the guidance, which states that an application for an award of costs must be received by the Inspectorate within 28 days of either (i) the date of the notification that the examination has been completed (paragraph 31) or (ii) the date of the notification of the withdrawal of the application for development consent, or of the notification of the curtailment or cancellation in whole or in part of the examination (paragraph 32). There does not appear to be anything that prevents an application for an award of costs being made at any time (i.e. prior to notification being given that an examination has completed or has been brought to an end) but we would appreciate if the Planning Inspectorate or Examining Authority could confirm the position.

Our desire to submit an early costs claim has been further informed by the evidence

presented and tested at the Compulsory Acquisition hearing. It is clear that this is a very unusual Application and Applicant, being a special purpose vehicle ("SPV") with an opaque offshore ownership and funding structure, anonymous investors/funders and no previous experience of airport development. Whilst we recognise it is not unusual for an Applicant to be a SPV, in such circumstances the shareholding companies are generally large companies with relevant sectoral experience, strong balance sheets reputations to protect. In such circumstances, the Planning Inspectorate and the Examining Authority can take comfort that these shareholders would stand behind any cost claims made against the Applicant vehicle. No such comfort is available in this DCO.

As we heard at the hearings, the Applicant has no committed funding in place to meet any properly adjudicated award of costs made in favour of affected parties. Indeed, the Planning Inspectorate can take no comfort that any funding would be available to meet the remaining costs and fees that will be due to it as part of this examination. This risk is particularly enhanced should the Applicant decide to withdraw from the examination as the evidence (including the documentation submitted at Deadline 5) shows that decision to fund any material costs are at the discretion of MIO Investments Ltd.

As a result, no affected party can have any confidence that its rights are being properly protected during the examination. In view of the highly unusual circumstances, we would request guidance on whether it is within the powers of the Examining Authority to make a procedural decision requiring the Applicant to place such funds in escrow that would be sufficient to secure both the payment of any future successful costs claims and the remaining payments due to the Planning Inspectorate for the costs of the examination?

Best regards
Jamie

Jamie Macnamara
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