

Dear Mike,

I attach on behalf of Associated British Ports our submissions on the case for cross-examination at both the Issue Specific Hearings and the CPO hearing.

For your assistance, we have dealt with the CPO hearing in one document and dealt with all of the other Issue Specific Hearings together in a separate document.

Regards,

Brian

Brian Greenwood
Partner
Head of Planning and Environment

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Planning Act 2008

Proposed Able Marine Energy Park

PINS Reference: TRO30001

ABP: [REDACTED]

Submissions on behalf of Associated British Ports on the case for cross-examination at the Compulsory Acquisition Hearing

1. Introduction

- 1.1 These representations comprise the submissions of Associated British Ports ('ABP') regarding conduct of the Compulsory Acquisition Hearings to be held by the Examining Authority ('the Authority') in connection with the application of Able UK ('the Applicant') for a development consent order ('DCO') in respect of a 'Marine Energy Park' ('MEP') at Killingholme.
- 1.2 In addition to permitting development in the form of the proposed MEP, the DCO would also authorise the Applicant to acquire compulsorily land in which ABP has a legal interest. The precise extent of this land ('the ABP Land') is identified in the Written Representations prepared by Mr John Fitzgerald on behalf of ABP. Those Written Representations also consider in detail the reasons why the application for powers to compulsorily acquire the ABP Land should be rejected by the Authority.
- 1.3 The DCO would also authorise the compulsory acquisition of land currently in the ownership of Network Rail ('the Network Rail Land') in order to facilitate construction of the MEP. For the reasons set out in the Written Representations of Mr Fitzgerald and Mr Chris Geldard, ABP contends in addition that the application for powers to compulsorily acquire this land should be rejected also.
- 1.4 The current draft of the timetable for the Examination into the Applicant's proposals, provides for the holding of two Compulsory Acquisition hearings. The first such hearing relates to the authorisation of compulsory purchase powers in relation to the compensation site proposed on the north bank of the Humber, and is due to be held on the afternoon of Tuesday 9 October 2012. The second hearing is proposed to be held on Wednesday 10 October 2012, and will consider the authorisation of compulsory purchase powers in connection with the assembly of the MEP site.
- 1.5 We have already made representations to the ExA by letter dated 11 July 2012 concerning what we regard as the insufficient time allowed in the Examination Timetable for conduct of the Compulsory Acquisition hearing relating to construction of the MEP site.
- 1.6 In making these representations, ABP formally requests of the Authority that it be permitted to cross-examine the witnesses whose evidence is relied upon by the Applicant as justifying the case for compulsory acquisition of the ABP Land and the Network Rail Land.

2. Preliminary

- 2.1 It has long been recognised by both Parliament and the courts that forcibly to deprive a party of its property is no small matter. Such interference comprises a fundamental invasion of the rights of the individual, so that the exercise of compulsory purchase powers should not be authorised except where wholly justified.
- 2.2 It is for this reason that government guidance provides that an order providing for the compulsory acquisition of land or rights:

*“should only be made where there is a **compelling case in the public interest**. An acquiring authority should be sure that the purposes for which it is making a compulsory purchase order sufficiently justify interfering with the human rights of those with an interest in the land affected. Regard should be had, in particular, to the provisions of Article 1 of the First Protocol to the European Convention on Human Rights...”¹.*

In the context of nationally significant infrastructure projects (‘NSIPs’), the requirement that there be a ‘compelling public interest’ case in favour of compulsory purchase before such powers are authorised is now a specific requirement of legislation, by virtue of section 122(3) of the Planning Act 2008.

3. Case for Cross-Examination

- 3.1 It is not appropriate to repeat in these representations the substantive arguments as to why the exercise of compulsory purchase powers should not be authorised in respect of either the ABP Land or the Network Rail Land. Such arguments are set out in detail in the Written Representations of Mr Fitzgerald and Mr Geldard.
- 3.2 However, it is appropriate to make the following points in demonstrating why it is necessary that ABP be allowed to cross-examine those persons upon whose evidence the Applicant relies as justifying the case for authorisation of compulsory purchase powers:
- (a) Compulsory purchase is a complex area, raising complicated issues of fact and law. It is necessary that cross-examination be permitted in order for ABP (and potentially others) to be able to assist the Authority in its consideration of the matters arising. There are a number of issues which are important considerations in the context of the Applicant’s request for authorisation of compulsory purchase powers, regarding which ABP would wish to cross-examine, and in respect of which ABP considers that such cross-examination would assist the Panel. This is particularly so in view of the fact that Mr Upton, the lead Member of the Panel, did helpfully point out at the Preliminary Meeting that his own knowledge of this complex area of law was somewhat limited. The issues which ABP would wish to test, therefore, include the following:

¹ Paragraph 17 Circular 06/2004

- (i) Viability of the AMEP, particularly having regard to the implications of a restriction being imposed on the DCO so as to limit the use of the quay to servicing the off-shore wind energy sector;
 - (ii) The extent to which the Applicant has identified other development configurations which would not require acquisition of the ABP Land;
 - (iii) The necessity of siting the pumping station on the ABP Land;
 - (iv) The justification for acquiring Land in the ownership of Network Rail having regard to the latter's aspiration to provide the Killingholme Loop for the benefit of all rail freight traffic on the South Humber;
 - (v) The extent to which a private commercial MEP/Port can make out a compelling case in the public interest.
- (b) Given that it is such a serious matter to interfere with the property rights of a private party, it is only right that ABP (as a party whose rights the Applicant seeks to interfere with) be afforded the opportunity adequately to test the Applicant's evidence which purports to justify such interference and ensuring that it has a fair chance to put its own case.
- (c) It is not reasonable to require that ABP be content with the scrutiny to which the Authority may subject the Applicant's evidence in this regard. Rather, given that it is ABP which will be deprived of its rights in property in the event that the DCO is granted, it is necessary and appropriate that ABP itself be afforded the opportunity to test that evidence.
- (d) The considerations set out above apply with particular force given that:
- (i) The ABP Land represents the only undeveloped property held by ABP at the nationally significant port of Immingham, of particular strategic importance because it benefits from direct access to the foreshore of the Humber;
 - (ii) ABP, being a statutory undertaker, holds the ABP Land for the purposes of its statutory undertaking; and
 - (iii) ABP is at the present time actively pursuing development of the ABP Land in a manner consistent with its statutory purpose, namely to provide additional capacity at Port of Immingham by delivery of the Western Deepwater Jetty.
- (e) As regards the Network Rail Land, ABP must be allowed to test the Applicant's evidence by cross-examination of its witnesses given that:
- (i) ABP is in the process of taking a lease of that part of the Network Rail Land necessary to construct the 'HIT Headshunt';
 - (ii) ABP has already invested heavily in terms of delivering the HIT Headshunt, a project of some £70 million, which will assist in securing a sustainable

solution for the delivery of renewable fuels to power station operators, both within the locality and further afield thereby also enabling UK Government to meet its legally binding renewable energy targets ;

- (iii) The HIT Headshunt would materially increase the efficiency/capacity of ABP's operations at the Port of Immingham;
- (iv) Compulsory acquisition of the Network Rail Land would materially compromise ABP's significant investment in biomass infrastructure; and
- (v) The Network Rail Land is vital to delivery of the strategically significant 'Killingholme Loop', which project would materially increase efficiency/capacity of ABP's and other commercial and industrial undertakers' operations at the Port of Immingham as well as securing the delivery of required additional rail capacity for other commercial operators within the South Humber region, such as the C.RO terminal and the proposed C.GEN power station.

4. Precedent

- 4.1 Cross examination was allowed by the IPC at the compulsory acquisition hearings held in 2011 to consider the application by Covanta Rookery South Ltd for a Development Consent Order in respect of the Resource Recovery Facility proposed at Rookery South, Stewartby.
- 4.2 In so permitting cross-examination, the IPC recognised the importance of allowing the applicant/objectors to test each others' case directly, in circumstances where authorisation of compulsory purchase powers was sought.
- 4.3 Indeed, such was the significance that was attached to issues of compulsory purchase that the period allowed for the compulsory purchase hearings in the context of the Covanta application was 5 days (27 June – 1 July 2011). This practical example adds to the weight of our representations concerning the amount of time allocated for consideration of these issues in relation to this application.

Osborne Clarke,
On behalf of –
Associated British Ports
27 July 2012.

Planning Act 2008

PROPOSED ABLE MARINE ENERGY PARK

PINS Reference: TRO30001

ABP: [REDACTED]

Submissions on behalf of Associated British Ports on the case for cross-examination at the Issue Specific hearings into –

- 1. HRA matters;**
- 2. Marine matters;**
- 3. Land/Highway Access;**
- 4. Rail Transport; and**
- 5. The draft Development Consent Order**

1. *Introduction*

- 1.1 These representations comprise the submissions of Associated British Ports ('ABP') regarding conduct of certain Issue Specific Hearings to be held by the Examining Authority ('the Authority') in connection with the application of Able UK ('the Applicant') for a development consent order ('DCO') in respect of a 'Marine Energy Park' ('MEP') at Killingholme.
- 1.2 The current draft of the timetable for the Examination into the Applicant's proposals, provides for the holding of the following Issue Specific Hearings:
 - a) Matters relating to the compensation site including HRA - 11 September;
 - b) HRA matters relating to the main development site - 12 September 2012;
 - c) Marine matters - 13 September 2012;
 - d) Land access and transport - 14 September 2012;
 - e) Draft development Consent Order - Tuesday 16 October.

- with such reserved additional dates as may be appropriate.
- 1.3 ABP has submitted Written Representations in respect of the matters to be considered at these various hearings. 'HRA matters' are addressed in the representations prepared by Mr Phil Rowell, Peter Whitehead and Mr Andrew Baker, 'marine matters' in the work of Mr Peter Whitehead, and issues relating to land access and transport in the documents prepared by Mr Simon Tucker and Mr Chris Geldard. Mr Rowell also deals with issues arising in connection with the draft DCO.
- 1.4 In making these representations, ABP formally requests that it be permitted to cross-examine those witnesses whose evidence is relied upon by the Applicant in relation to the Issue Specific Hearings identified above.

1.5 In making this request, ABP recognises that in general, evidence in relation to a project is normally provided to the Authority in writing and questioning is conducted by the Panel. In the circumstances of this project, however, and in the light of the written representations that have already been submitted by ABP in response to the Applicant's environmental statement and recent submitted supplementary environmental information, ABP considers that questioning by its representatives is necessary in order both to ensure the adequate testing of any representations before the Authority and to ensure that ABP has a fair chance to put its case.

2. Preliminary

2.1 Construction of the MEP would include the creation of a new quay on the south bank of the Humber Estuary.

2.2 By way of general context, the following considerations are relevant, namely:

- (a) The development site includes land designated as a Special Area of Conservation ('SAC') and comprises part of the Natura 2000 Network;
- (b) The development site is located immediately adjacent to existing port facilities at the Port of Immingham, which comprise the largest UK port by tonnage handled;
- (c) The Port of Immingham generates in excess of 25% of UK rail freight traffic
- (d) The road network serving the existing port facilities at Immingham is congested and has been identified by the Highways Agency as being in need of significant improvement

2.3 It is also important to note the sensitivity of the context in which the development is proposed, both in ecological and in economic terms. The decision by the Authority as to whether to permit cross-examination at the Issue Specific Hearings should be taken having regard to the very significant national and international interests in preserving the Natura 2000 Network and in optimising the efficient operation of the transport network with particular regard to the interaction with and implications for the Port of Immingham.

3. Need for Cross-Examination

3.1 It is not necessary to repeat in detail the substance of the various matters raised in the Written Representations submitted by ABP in the context of these submissions. Bearing in mind, however, the need to ensure adequate testing of any representations and the need to ensure that a person has a fair chance to put its case, we make the following points for the Authority's assistance, in relation to the particular Issue Specific Hearings at which we seek permission to cross-examine the Applicant's witnesses -

4. HRA – Proposed Development Site and Proposed Compensation Site.

4.1 Consideration of the application for the DCO involves the Authority undertaking a Habitats Regulations Assessment ('HRA') in accordance with the Conservation of Habitats and Species Regulations 2010 ('the 2010 Regulations'). Having regard to the acknowledgment by the Applicant that the proposal would have an adverse effect on European Nature Conservation Sites, the Secretary of State can only grant the DCO if satisfied that there are no alternative

solutions available and there are imperative reasons of overriding public interest justifying such a grant. Any substantive failure to comply with the 2010 Regulations would render any grant of a DCO unlawful.

- 4.2 As the Authority will be aware from the Written Representations submitted, it is ABP's position that the assessment undertaken by the Applicant, both in the 'shadow' HRA ('the sHRA') and in the Environmental Statement ('ES') is deficient. ABP submits that cross-examination of the Applicant's witnesses would assist the Authority in understanding the extent and significance of these deficiencies, particularly as regards the following issues:
- (a) Deficiencies as regards survey work undertaken in respect of protected species;
 - (b) Impact on Black Tailed Godwit population of loss of feeding ground proximate to roosting site at North Killingholme Haven Pits;
 - (c) The approach adopted in assessing the adequacy of the compensation site;
 - (d) Absence of data to support conclusion as to 'non-significance' of impact on sub-tidal habitats.
- 4.4 In relation to the proposed compensation site, ABP believes that cross-examination will be of considerable assistance to the Authority so as to ensure that the case being put forward by the Applicant as to the adequacy of the compensation site has been properly tested.
- 4.5 ABP would add that it is considered that the issues that will be considered at the two HRA hearings will concern important matters of EU law in which ABP has a genuine interest not only in the context of the AMEP proposals specifically, but also because adequate testing of evidence will help to secure a level playing field in terms of EU law compliance.

5. *Marine Matters:*

- 5.1 The marine issues arising in connection with the proposed MEP are complicated, involving complex bathymetrical and geo-morphological analysis. In circumstances where the subject matter of evidence is so specialist, as in this context, it is submitted by way of general observation that cross-examination of the parties' witnesses would assist the Authority in gaining a clearer understanding of the matters at issue. ABP would wish to cross-examine regarding deficiencies in the hydrodynamic modelling undertaken pursuant to the ES, including:
- (a) Inadequate calibration as to sediment and tidal distribution;
 - (b) Failure adequately to assess potential accretion at Immingham Outer Harbour;
 - (c) Adequacy of the assessment of impact on fisheries;
 - (d) Deficient assessment of impacts resulting from disposal of dredged materials.
- 5.2 As will be evident from the Written Representations of Mr Whitehead, ABP considers that the work undertaken by the Applicant in respect of these complex issues is seriously deficient. If the Panel agrees that the work undertaken by the Applicant is deficient, as ABP considers it to be, then that is of great concern given the importance of the existing facilities at the Port of Immingham, not only to ABP but the UK economy.

5.3 In the context of this Issue Specific Hearing, we would query whether the allocation of just one day for the testing of evidence which is critical to the project is adequate. We would suggest that 2 to 3 days would be more appropriate.

6. *Land Access & Transport*

6.1 Mr Geldard and Mr Tucker have identified numerous deficiencies and omissions in the work undertaken by the Applicant's consultants. These are particularly significant given that both the road and rail access to the MEP development site is constricted. Indeed the state of existing road and rail infrastructure at South Humber is such that, having regard to traffic already generated by the Port of Immingham and other operators such as C.RO Ports, even limited additional traffic generated by the proposed development could potentially cause material detriment to the nationally significant port operations in this area.

6.2 As the Panel will have already noted from the Written Representations provided, much of the analysis of the road/rail data is of a technical nature. Cross-examination of the Applicant's witnesses would assist the Authority in reaching informed conclusions as to these important matters. Issues in respect of which ABP would wish to cross-examine include:

- (a) The traffic modelling undertaken on behalf of the Applicant, and in particular:
 - (i) Traffic generation assumptions;
 - (ii) Growth assumptions for the Port of Immingham;
 - (iii) the extent to which it has regard to HGV movements;
 - (iv) its assumption as to a two lane approach at the Rosper/Humber Road junction;
 - (v) Safety and capacity assessments of the junction arrangements
- (b) The robustness and adequacy of the modelling undertaken having regard to the Applicant's stated intention that the proposed facility will ultimately operate as a general cargo port,
- (c) The compatibility of the Applicant's proposals with delivery of the strategically significant Killingholme Loop
- (d) The basis of the Applicant's contention that its operations will not generate in excess of two train paths.

7. *The draft Development Consent Order*

7.1 The Issue Specific Hearing on the draft DCO is scheduled as one of the final sessions on Tuesday 16 October. It is understood that various amendments are likely to be made to the draft Order as a result of representations made by a number of interested parties, including ABP.

7.2 The Authority will accept, it is hoped, that the controls and protections imposed by the Order will be critical for ABP as the adjacent statutory port operator. Although it is acknowledged that it probably premature at this stage formally to request the opportunity to cross-examine a representative of the Applicant at that hearing, ABP trusts that it will be

of assistance to the Authority if its concerns in this respect are at least recorded at this stage. Further representations in this respect may be made at a later stage once the revised form of the draft DCO has been seen and considered by ABP.

Osborne Clarke,
on behalf of -
Associated British Ports
27 July 2012.