BIRCHAM DYSON BELL

The Secretary of State for Transport
Department for Transport
Great Minster House
Horseferry Road
London
SW1P 4DR

Your Ref

Our Ref
ADW/Y059258
Date
22 November 2012

Dear Sir

Planning Act 2008
Proposed Able Marine Energy Park, Planning Inspectorate application reference TR030001

We are in receipt of a copy of a letter sent to you on 20 November 2012 by Associated British Ports in relation to the application for the Able Marine Energy Park under the Planning Act 2008 (**the application**). We have also been invited to comment on the application by Mr Martin Woods of the DFT. We act for the applicant, Able Humber Ports Ltd, and wish to respond as best we can in the limited time available to the various points made in ABP's letter before you make a decision.

Timing of application

Associated British Ports (ABP) has applied to extend the examination of the application by 18 months, having deliberately waited until five days (in fact a mere three clear working days) before the end of the examination period to do so. This allows you very little time to make your decision and for any other parties to make considered representations that are able to be taken into account.

ABP first voiced its supposed dissatisfaction with the length of time allowed for the examination at the preliminary meeting on 24 May 2012 and through its advocate pursued its ongoing objection to the NSIP procedure adopted by Parliament in the Planning Act 2004 being applied to this proposal. It is to be noted however that ABP has deliberately waited until the last moment to seek to extend it. None of the reasons given by ABP in its application relate to any particular event which occurred at the hearing last week but again ABP deliberately gave no notice of their intention to apply for an extension.

As is well known to ABP, the Able team and the examining authority is currently engaged in the last days of the examination hearings and Able and other parties must prepare two sets of summaries of its arguments before the close of the inquiry at the end of this week. It is evident that the ABP request has been timed so as to cause maximum disruption to the examination process and to afford the examining panel, other parties, including Able, the least amount of opportunity fairly to respond fully.

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This is consistent with the behaviour of ABP before and during the examination process which has been to filibuster and obstruct the examination process.

Behaviour of ABP

Before the application was even submitted, ABP sought to bully Able not to take up its right to make an application for development consent under the NSIP procedure. In short, ABP has threatened to seek judicial review of another separate Able planning permission (which is subject to a resolution to grant but has yet to be finally granted) unless Able agrees not to exercise its right to make an application. Please see the attached letter sent to us on 22 July 2011, where ABP recognises that the Planning Act 2008 is a fast track process that it is now seeking to slow down. ABP's clearly expressed intendment was to frustrate the speedy and efficient process introduced by Parliament by denying Able the opportunity to make an NSIP application. Notwithstanding this ongoing threat from ABP to seek judicial review of its planning permission when granted (the grounds of the threatened judicial review are, in any event, spurious), Able has resisted ABP's intimidation and made this application for a consent under the NSIP procedure.

The application having been made by Able, ABP has not participated in the examination of it with anything close to cooperation with the applicant or the Examining Authority. Its approach has been geared towards trying to derail the examination process.

For example, it has repeatedly refused to make comments or participate fully in the written consultation process when invited to do so despite devoting a large amount of legal resources on this application, including leading and junior counsel, partners and other solicitors from at least two law firms. Despite acknowledging that the procedure is principally a written procedure, ABP has refused fully to participate in the written procedure and has on occasion refused to put comment in writing and sought to ambush the applicant and the examining panel by making oral representations often of a highly aggressive and unconstructive nature.

The Examining Authority invited parties to provide suggested amendments to the development consent order (DCO) in their summaries of case following the issue-specific hearing into the DCO on 12 July, but ABP declined to do so. Other parties did so and greatly assisted the applicant and the examination as a result.

ABP has purported to make much of the opportunity to comment on the drafts of various supplementary documents – environmental management and monitoring plans and a section 106 agreement in particular – but when the opportunity arose to provide written comments on them declined to do so. Instead, it took up inquiry time to make an entirely unsubstantiated allegation of bad faith against the applicant and this firm, based upon the fact that the applicant had entirely reasonably agreed to clauses in a section 106 agreement proposed by Natural England and replicating terms suggested and agreed by Natural England and the Environment Agency at Bathside Bay. Indeed, at times it appears that ABP's submissions by its counsel have strayed even beyond the bounds of reasonable restraint, such as when ABP's advocate invited the Panel to treat the applicant's application for NSIP consent as having been conducted in bad faith. We must assume that such conduct has been on instructions from ABP, and presumably as part of a strategy to wreck the process.

As one further example, at the issue-specific hearing in September on ecological matters, having been given a time allocation of around 10 minutes ABP took up a significant amount of time of the morning session with an investigation of bat mitigation that was not on the agenda and had had no advance warning despite the directions from the Panel that the areas of oral questioning should be identified and justified beforehand.

When the applicant published supplementary information on 12 October and gave parties 28 days to respond, ABP declined to do so, preferring again to make its responses orally and without any advance warning at the hearing.

The Harbour Master for the River Humber is an employee of a subsidiary of ABP. Whilst the Harbour Master has personally acted independently of ABP Commercial, he considers himself obliged by ABP to delegate property matters to them in order to negotiate a lease with the applicant. Consequently, negotiations have been unduly delayed by ABP's property section simply failing or refusing to engage in negotiations. ABP Commercial should had have no involvement whatsoever in the conduct of affairs on behalf of the Harbour Master.

Quantity of written information

ABP complains of an 'uncontrollable mass of material' submitted by the applicant during the examination. This is a gross and unspecified mischaracterisation of information provided by the applicant. The applicant has adhered rigidly to the timetable for making representations and comments issued by the Examining Authority, which itself is typical of timetables for examining applications under the Planning Act 2008 regime to date. It has rarely submitted any material that has not been required to be submitted for one of the deadlines set by the Examining Authority. In contrast, ABP has submitted several documents at times of its own choosing.

The application has indeed involved a large amount of written material, but others have involved more. By the end of the application for the Hinkley Point C nuclear power station, nearly 2300 documents were before the panel and interested parties, compared with around 850 for this application. Parliament has seen fit to introduce an authorisation regime for nationally significant infrastructure projects with an emphasis on written material and with a short examination period, so this should not be unexpected. The examination of this application has adhered to the requirements of the regime and is comparable to other applications.

Answers to questions and Rule 17 letters

ABP singles out responses to questions put by the panel and to requests made under Rule 17 of the Infrastructure Planning (Examination) Rules 2010 as contributing to the mass of information, but these are recognised elements of the examination process and their quantity is not atypical of applications made so far.

Information provided in October

ABP complains that a large amount of information was published about the applicant's compensation proposals in October without enough time to consider it. The applicant did publish a suite of documents on 12 October (the deadline for responding to answers to the panel's second round of questions), and it launched a public consultation on them. In doing so it mirrored the Infrastructure

Planning (Environmental Impact Assessment) Regulations 2010 by (a) allowing the same amount of time to consider further environmental information required under those regulations, namely 28 days and (b) publicising the publication of the information in the same way as would be required under those regulations. If that is the expected length of time afforded by regulations for further environmental information to be considered, then it should be adequate for information voluntarily produced by the applicant. It also confirms that further information can properly be introduced during an examination.

Compensation proposals

ABP focuses on the applicant's proposals for compensation for causing harm to a Natura 2000 site. This should be put in context. The main subject-matter of the application is a quay, which is the nationally significant infrastructure project that triggers the Planning Act regime, and this has remained entirely unchanged and little questioned during the examination. It is to be noted that ABP has submitted little evidence in respect of the compensation issues.

The compensation proposals are part of the applicant's mitigation for its main development, and one of the main purposes of the examination of an application is to consider, and if necessary modify, the mitigation being offered by the applicant in order to reduce adverse impacts. If an application was not allowed to contain further mitigation and had to remain the same once it had been made, then the only reason to make representations on it and examine it would be to decide to approve or reject it as submitted with no other possibilities. This cannot be the correct approach.

As part of its proposals for compensation the applicant has indeed included land that is outside the application and is subject to a separate planning application, at Cherry Cobb Sands wet grassland. However, in the information provided on 12 October the applicant included an assessment of the environmental effects of using this land so that this was before the Examining Authority and interested parties. It is perfectly usual for main consents to require other consents before they can be implemented and this is not exceptional - indeed, that was the approach adopted by ABP itself in respect of Immingham Outer Harbour: planning consent for this application is expected in January 2013, well before a decision will be made on the main application.

In fact, according to the applicant's assessment, the revised compensation proposals, other than providing a better habitat for the principally affected bird species (the black-tailed godwit) than previously, have little additional environmental impact outside the footprint of land where they will be situated.

Effect of delay

The requested period for an extension of 18 months is a wildly disproportionate one, involving a 300% increase in the length of the examination period. However, a delay of any significant length for this project would severely damage the prospects of it being realised, which would have consequent negative effects on economic growth and employment, the UK's provision of renewable energy and its meeting of EU energy targets. This request is consistent with the strategy employed by ABP from day one to seek to frustrate the operation of the NSIP regime to development proposal on the Humber which are promoted by parties other than ABP (see ABP's letter attached hereto).

BIRCHAM DYSON BELL

Conclusion

ABP's request to extend the examination of the application by 18 months is an ill-timed and ill-founded attempt to derail a legitimate process as part of what the leader of the Local Authority described at one of the hearings as 'naked self-interest and protectionism'. In contrast, the establishment of this much-needed facility, along with ABP's own proposals at Hull and others, would create an attractive cluster of renewable energy-related industry on the Humber that would benefit all parties. We urge that ABP's request be refused.

Please direct any correspondence on this matter to Angus Walker at the address below, or anguswalker@bdb-law.co.uk.

Yours faithfully

Bircham Dyson Bell LLP

Cc The Examining Authority

COPY

Osborne Clarke

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EXECUTIVE MANAGEMENT
RECEIVED
25 JUL 2011

[redacted]

Attn: R. Owen Esq

Our reference BJG/0967516/O12304162.1/SAMF

22 July 2011

Dear Sir

Able UK Ltd – Land of Skitter Road, East Halton, Killingholme

We write on behalf of our client Associated British Ports (ABP) in relation to the proposals currently being promoted by your client Able, on the south bank of the Humber.

As you will be aware, on behalf of ABP, we have written on a number of occasions to the local planning authority North Lincolnshire Council, and indeed the Secretary of State, in connection with your client's proposal for a port related/commercial storage development (Phase 2) at Killingholme. We understand that the planning authority has in fact interpreted those representations simply as being objections submitted on behalf of a "commercial competitor". This is not in fact the case, as we have pointed out to the Council's officers on a number of occasions.

Our client does, however, object to the manner in which your client is attempting to secure planning permission for this phase of its proposals in that, as you are fully aware from our previous correspondence, we believe that your client's application currently before the Council - pending we believe, completion of a legal agreement - is defective in law on a number of material grounds, one being the failure by your client to undertake a cumulative environmental assessment of all of its South bank phased development proposals. As you know, and as you have no doubt advised your client, should the planning authority issue a planning permission for this phase of the development as currently proposed, then such a decision will clearly be susceptible to judicial review.

You will also be aware, of course, that we have similarly written on behalf of ABP to both your client and the IPC in relation to its Phase 3 proposals, namely the new port/Marine Energy Park development. In relation to this proposal, our client objects to what it sees as a clear attempt to circumvent due planning and environmental process, by promoting the new port as a "nationally significant infrastructure project" through the IPC, effectively "fast tracking" on a political level, as opposed to promoting the development as is required of the rest of the industry, through the enabling provisions of the Harbours Act and the Marine and Coastal Access Act. In the light of the above, you will understand that our client has had little choice, if a level playing field is to be maintained within the industry, but to draw these patent defects in process to the relevant authorities.

That said, our client has no wish to delay your client's proposals by testing the points that we have raised through the courts and through the IPC. Such disputes can be to the advantage of neither party, nor to the credit of the industry. On the other hand, however, our client is unable simply to

stand by and allow your client to avoid due legal process - to the disadvantage and detriment of other operators in the ports industry.

In the light of the above, therefore, we are instructed by our client to ask you to put before your client the following proposal. We assume that your client's Phase 2 application will shortly be issued - upon which time will begin to run for judicial review. Our client is prepared to agree not to challenge that consent, despite its concerns, if your client will undertake not to submit its pending application for a new port to the IPC and instead process those proposals through the Harbours Act and MCA legislative framework.

We should say that in terms of inconvenience, cost and timing we believe that the implications for your client should be relatively minimal in that all of the work that your client has currently undertaken for the IPC will be relevant for an application for a Harbour Empowerment Order.

This offer is made in good faith - and to that end, is copied to the Chief Executive of North Lincolnshire Council. Notwithstanding our clear view that the your client's Phase 2 application is defective in law, we are very aware of the support given to this proposal by the Council and in view of this, we are prepared not to challenge the Council's decision if we can be certain that a level playing field and adherence to due practice is guaranteed for the related new port/MEP proposal.

We look forward to receiving your client's response in due course, but clearly our client's offer is to an extent time limited by the timing of the issue of planning permission for the Phase 2 planning permission and the submission of the Phase 3 new port development to the IPC.

Yours faithfully

[redacted]

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