

C.RO PORTS KILLINGHOLME LIMITED ("C.RO")

C.GEN KILLINGHOLME LIMITED ("C.GEN")

EXAMINATION OF ABLE MARINE ENERGY PARK ("AMEP")

COMPULSORY ACQUISITION HEARING

FINAL NOTE

1. INTRODUCTION

1.1 This Final Note is based upon the previous Notes prepared by C.RO and C.GEN for the compulsory acquisition hearing ("CAH") on 16 - 17 October. A consolidated note has been provided to assist the Panel given that a number of the submissions made by C.RO and C.GEN are the same. Where there are particular distinctions to be drawn between C.RO and C.GEN, these are made clear¹. It seeks to annotate the previous Note with the additional evidence received during the CAH and/or to cross refer to certain sections of the previous Note. By so doing, a consolidated statement of C.RO and C.GEN's position is placed before the Panel. There is, on some matters, a paucity of further comment; this reflects, however, the paucity of the new material brought to the CAH by the applicant.

¹ The Panel is aware that C.RO and C.GEN are separate and distinct companies.

2. LEGAL AND POLICY FRAMEWORK

2.1 As noted by C.RO and C.GEN in their oral presentation, the starting point must be the *two-fold* test set out in section 122 of the Planning Act 2008. This provides, so far as material:

“An order granting development consent may include provision authorising the compulsory acquisition of land only if the decision-maker is satisfied that the conditions in sub-sections (2) and (3) are met.

(2) The condition is that the land –

(a) is required for the development to which the development consent relates

...

(3) The condition is that there is a compelling case in the public interest for the land to be acquired compulsorily.”

2.2 The relevant Guidance Note, “*Guidance related to procedures for compulsory acquisition*” issued by DCLG in February 2010² provides, so far as material, as follows:

“19. Promoters must ... be prepared to justify their proposals for the compulsory acquisition of any land (or rights over land) to the satisfaction of the decision maker and will need to be ready to defend such proposals throughout the examination of the application. The following guidance indicates certain factors to which the decision maker must have regard in deciding whether or not to

² It was suggested by Counsel for Able in argument that this Guidance had been revoked by the Localism Act 2011. That suggestion appears to be incorrect. DCLG is in the process of consulting on revised versions of the suite guidance documents of which this is one. Details on the consultation were contained in the DCLG consultation paper “Consultation on proposed changes to the suite of guidance documents for the major infrastructure planning regime” (April 2012). Paragraph 2.3 of that document refers to the suite of documents in existence and states that the Modal Provisions Guidance has had its statutory basis removed by the Localism Act. No such assertion is made in respect of the Compulsory Acquisitions Guidance. The relevant passages of the consultation document on Compulsory Acquisition will be considered below.

include provision authorising the compulsory acquisition of land in an order granting development consent...

...

[Concerning the section 122(2) condition]

24. *The first criterion is the land is required for the development of which the development consent relates. For this to be met, the promoter should be able to demonstrate to the satisfaction of the decision maker that the land in question is needed for the development for which consent is sought. The decision maker should be satisfied, in this regard, the land be acquired is no more than is reasonably required for the purposes of the development."*

...

[Concerning the section 122(3) condition]

27. *Compliance with one of the criteria in subsection (2) of section 122 is not, however, enough on its own. Under subsection (3), the decision maker must be satisfied that there is a compelling case in the public interest for the land to be acquired compulsorily.*
28. *For this condition to be met, the decision maker 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. This is reinforced by the condition in section 122(3).*

[Concerning the balance of public interest against private loss]

...

32. *There may be circumstances where the decision maker could reasonably justify granting development consent for a project while at the same time refusing to include in an order the provisions authorising the compulsory acquisition of the land or modifying these to reduce the area of land so affected. This could arise, for example, where the decision-maker is satisfied of the case for granting development consent but is not persuaded that all of the land which the promoter seeks to acquire compulsorily has been shown to be necessary for the purposes of the scheme. Or the decision maker may consider that the scheme itself should be modified in a way that affects the requirement for the land which would otherwise*

be subject to compulsory acquisition. Such scenarios could lead to a decision to remove all or some of the proposed compulsory purchase provisions from a development consent order.

[Concerning resource implications of the proposed scheme]

33. *As stated above, 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 indications of both acquiring the land and implementing the project for which the land is required. It may be that the project is not intended to be independently financially viable, or that the details cannot be finalised until there is certainty about the assembly of the necessary land. In such instances, the promoter should provide an indication of how any potential shortfalls are intended to be met. This should include the degree to which other bodies (public or private sector) have agreed to make financial contributions or to underwrite the scheme, and on what basis such contributions or underwriting is to be made.”*

2.3 In April 2012 a consultation document was published by the DCLG concerning proposed revised guidance on procedures for compulsory acquisition orders in DCOs. The consultation period closed in July 2012. Much of the text is identical to that contained in the extant guidance. It is to be noted, that paragraphs 18 and 19 of the guidance is in the following terms:

*“18. The promoter should be able to demonstrate to the satisfaction of the Secretary of State that all reasonable alternatives to compulsory acquisition (**including modifications to the scheme**) have been explored and that the proposed interference with rights of those with an interest in the land is for a legitimate purpose **and is necessary** and proportionate.*

19. *The promoter **must have a clear idea of how it intends to use the land** which is proposing to acquire, and should be able to demonstrate that there is a reasonable prospect of the requisite funds becoming available. Otherwise, it will*

be difficult to show conclusively that the compulsory purchase of land meets the conditions in section 122 ... and is therefore justified in the public interest at that time." (emphasis added)

Summary of the relevant tests for compulsory acquisition

- 2.4 The following observations and responses to issues raised by the Panel are made about the legal and policy framework.
- 2.4.1 The statutory word within the condition in section 122(2) is that the land is "required". When considering the related, but slightly different, provisions of section 226 of the Town and Country Planning Act 1990, the Court of Appeal in *Sharkey –v- The Secretary of State for the Environment* (1992) 63 P&CR 332 held that requirement, whilst not meaning "indispensable", meant "necessary in the circumstances of the case". What can therefore be certain is that neither commercial desirability nor commercial convenience are sufficient; the test is that the land is needed.
- 2.4.2 It is for the promoter of the scheme to justify in detail why the land sought to be compulsorily acquired is *necessary* for the scheme.
- 2.4.3 The amount of land to be acquired must be no more than is reasonably required for the purposes of the development.
- 2.4.4 Unless and until the test of necessity is met, the issue of a compelling case in the public interest does not even arise.
- 2.4.5 If it does arise, it arises as a separate condition. The necessity of acquiring the land is not, of itself, sufficient.

2.4.6 In the event that either of the statutory conditions are not met, the Panel has power to refuse the compulsory acquisition of land even if it is satisfied that the scheme overall should be granted development consent. It should further be noted that the consultation draft Guidance makes plain that the promoter needs to have a clear idea as to how the land is to be used.

3. SECTION 122(2): THE NEED FOR THE ACQUISITION OF THE RAILWAY

Able's purported justification in the documents before the Panel

3.1 At paragraph 5.12 in the Statement of Reasons (December 2011) submitted with its application for AMEP, Able states that the Railway is to be acquired "*in order to allow the site to be operated as a whole*". The Statement of Reasons then goes on to assert that the remainder of the track (i.e. that extending beyond the north-western boundary of its site) is also required "*so that the railway can be treated as a single unit*"³. These assertions are the full extent of the justification in the Statement of Reasons.

3.2 In Response to the Panel's first set of questions (June 2012), Able asserted in answer to question 46 that:

"Network Rail has stated that if the line remains within the network and on its current alignment, grade separated crossings will be required to cross it. This is not reasonably practicable for the intended purpose of the site and is not essential for the site specific conditions, viz a freight only line where speed restrictions can be imposed without detriment to operations."

³ It is acknowledged that Able is no longer seeking powers of compulsory purchase over this part of the Railway.

3.3 In Response to the Relevant Representations (June 2012), Able asserted, so far as material, that:

“30.8 The Applicant considers that the alternative of retaining Network Rail infrastructure through the site would be a significant encumbrance to the efficient and cost-effective operation of the development; Network Rail has advised the applicant that in this event, there would need to be "a solution that bridges the existing Rail Network line". This is not a reasonably practicable solution for the end use of the site as a port.

...

30.15 The AMEP proposals have been broadly consulted upon in accordance with the statutory requirements... And the applicant contends that the public interest is best served by the development of AMEP as a coherent single port site with a private rail siding.

30.16 Whilst therefore Network Rail has confirmed the applicant that it is no longer prepared to sell its land and infrastructure to the applicant, the case for retaining it as part of their operational network, as currently expressed, does not seem either compelling or to be in the public interest."

3.4 In Comments on the Written Representations (August 2012), Able stated, so far as material, as follows:

“29.5 AMEP will, if consented, provide a diverse manufacturing cluster for the burgeoning offshore wind turbine (OWT) sector and as such the development will see the relatively frequent movement of large products and components around the site and therefore access across the existing railway line that bisects it. These rail crossings are needed to move outgoing products and incoming raw materials to and from the new quay(s). For example, the site will require significant quantities of steel plate that could be supplied by TATA Steelworks at Scunthorpe and be transported by rail.

...

29.7 The rationale [for the acquisition] is to ensure the effective and safe management of the railway line that enables AMEP tenants to operate

effectively, retaining the benefit of the line whilst being able to cross it at regular intervals. In this regard it is crucial to understand that the nature of the manufacturing site proposed means that it produces very large and heavy units that need to be moved using specialist equipment that operate on flat ground. Private ownership of the line would enable proportionate arrangements regarding crossing points that reflect rail use and the (effective if not actual) speed limit. Thus, in private ownership level crossings can be used instead of the grade separated crossings necessary on Network Rail track that they say are necessary should the line remain under their direct management."

3.5 In their Second Set of Questions, the Panel enquired:

"... If the Killingholme Branch remains within the National Rail network is the development of the Marine Energy Park on the scale and extent proposed a viable proposition?"

3.6 In Response (September 2012), Able indicated that they had a strong preference for at-grade crossings (level crossings) and that they would suffer operational and financial disadvantages in the event that grade separated crossings (bridges) were required to be provided. Nevertheless, Able stated, so far as material, that:

"6.3 The Applicant has never asserted that the development of AMEP is only viable if the Killingholme Branch is removed from the public rail network. Rather the applicant has made clear that "retaining Network Rail infrastructure through the site would be a significant encumbrance to the efficient and cost-effective operation of the development... The Applicant has further stated that bridge crossings of the railway are "not reasonably practicable for the end use of the site as a port".

6.4 In determining what alternatives are reasonably practicable, the applicant has considered what is possible and then made an assessment of what should be considered reasonable on a cost/benefit basis....

...

*6.10 In conclusion therefore, **AMEP remains viable with whatever crossings are required**, but the construction of bridge crossings would give rise to: –*

- a. *Significant abnormal costs that are, given the evidence available to the Applicant, not reasonable. This, in turn, would be reflected in less competitive offers to prospective tenants.*
- b. *The footprint occupied by the bridge approaches would be significant, provide a constraint to traffic movement across the site and reduce the external storage areas available. Again, this would result in a less attractive site to prospective tenants."*

(emphasis added)

Able's Additional Material provided at the CAH

3.7 With respect to the Railway, Able added nothing of substance at the hearing. Indeed, there was an implicit concession that there was no case being advanced that the railway land extending beyond the Able site and through the C.RO site (and adjacent to the C.GEN site), the so-called "spur", was actually that required for the purposes of the Able project. During the hearing (at the morning session of 17 October), Able announced that it would no longer seek powers of compulsory acquisition over this spur.

3.8 As to the requirement for remaining railway land, namely that running to and then through the Able site, on analysis of the evidence provided at the CAH, nothing more was actually said. Instead, Able's contribution consisted of comments, generally negative, upon the alternatives. The tone of Able's case was that it was for those opposing the compulsory acquisition to demonstrate that there are appropriate alternatives. Indeed, such an approach was already manifested in Able's Response to the Relevant Representations (June 2012) where it stated in paragraph 30.16 that:

"Whilst therefore Network Rail has confirmed to the applicant that it is no longer prepared to sell its land and infrastructure to the applicant, the case for retaining it as

part of their operational network, as currently expressed, does not seem either compelling or to be in the public interest."

3.9 Such an approach, in common with the approach adopted at the CAH, is entirely to misunderstand the statutory test. **It is for Able to justify** their need for compulsory acquisition, not for others to justify their right to retain the ownership of their own land.

3.10 Indeed, the high watermark of Able's case was contained in the startling suggestion from Counsel for Able that the position adopted by Network Rail was unreasonable and "*They [Network Rail] may feel constrained to operate in that way – so compulsory acquisition would provide them with freedom*"⁴. This is patently a wholly inappropriate basis upon which to found a case of necessity for compulsory acquisition.

C.RO and C.GEN's final response on need

3.11 As to the Statement of Reasons, this is entirely deficient as a justification for the acquisition. It is wholly unclear what is meant by either of the assertions set out in paragraph 3.1 above. No explanation is provided as to why the site cannot be operated as a whole without the acquisition of the Railway⁵. The Railway is already a single unit.

3.12 It is also to be noted that there is no suggestion that Able need to acquire the Railway in

⁴ The passage in quotation marks is taken directly from C.RO's solicitor's contemporaneous note of the proceedings.

⁵ The Panel will be aware that C.RO operates its port estate as a single site across the Railway, with two fixed level crossings. Every freight unit movement at the site of the circa 600,000 freight units per annum handled at the port must cross the Railway at one or other of these crossings. It is clear that such an arrangement is both feasible and manageable, both here and at other locations in the country. The onus is on the operator to manage their operations accordingly.

order to operate it as such.

- 3.13 This is the full extent of the justification provided in the Statement of Reasons.
- 3.14 As to the written representations provided by Able and set out as appropriate above, they make plain that the acquisition of the Railway is a matter of desirability and convenience, *not a matter of necessity*. The highlighted passage in the Response to the Panels Second Set of Questions - “**AMEP remains viable with whatever crossings are required**” indicates clearly that there is no necessity to acquire the Railway. The fundamental statutory requirement that the acquisition be necessary cannot, even on Able’s own representations, be made out.
- 3.15 It was suggested by Able that it was not correct to equate the fact that the Able project would not become unviable with bridges with the fact that there was no necessity to acquire the Railway so as to avoid the need to construct bridges.
- 3.16 In response to that suggestion there are two possible scenarios for the Panel to consider. The first is the simple proposition that it is for Able to demonstrate necessity. If they are still able to bring forward a viable project, it is in fact difficult to see how they could demonstrate necessity. Put another way, without the acquisition of the Railway land they are still able to bring forward a viable project. How, the Panel is entitled to ask, can it be said in those circumstances that it is *necessary* to acquire that land?
- 3.17 The second scenario is based upon Able’s suggestion that the flexibility, commercial attractiveness and timescale for delivery would be adversely affected by the need to erect bridges. Even if it be correct, which C.RO and C.GEN do not accept, that such considerations could bear on the test of necessity (not, as submitted above, convenience or desirability), the Panel cannot simply accept the bald assertion from Able. Not a

shred of evidence was produced by Able in support of their suggestions as to flexibility, commercial attractiveness and timescale for delivery. Decisions as important as empowering a person to compulsorily acquire the land of another person cannot be based upon blithe assertions that the matter is "obvious". This, however, was the totality of Able's case on the matter⁶.

3.18 Furthermore, insofar as Able's representations provide any justification for the acquisition, the relevant justification appears to be the need to move very large and heavy units across the Railway using specialist equipment that operates on flat ground. However, even after the hearing, no details of the operations have been provided; this is perhaps unsurprising as no known layout for the final form of AMEP has been provided. No detail of the location of units which might generate such transits of the Railway is available and there is no basis, from the wholly inchoate materials available, on which it could possibly be concluded that there is a requirement for the development for the Railway to be compulsorily acquired.

Alternatives

3.19 As already noted, Able's presentation at the CAH was concentrated upon the absence of alternatives. In fact however, their presentation demonstrated the opposite. It emerged that a draft agreement had been arrived at with Network Rail which was in one option, based upon a scheme in which two bridges and a single level crossing were to be provided. This draft agreement was examined in detail at the CAH. Whilst it was

⁶ And the totality of the Basil Fawltly quote is "Can we get you on Mastermind? Next contestant Sybil Fawltly from Torquay; specialist subject: the bleedin' obvious".

unclear at the conclusion of the CAH as to whether or not Able regarded that as sufficiently commercially attractive, it seems to constitute, at the least, an acceptance by Able that it can operate the site satisfactorily with only one, possibly two, level crossings and one additional bridge.

3.20 The very existence of this draft agreement, and the obvious fact that negotiations with Network Rail are ongoing, makes plain that there is no need for compulsory acquisition of the railway land. Instead, a scheme derived by agreement will adequately provide for the crossing of the Railway. This is what Able actually require, not the railway land itself.

3.21 The other option provided for in the draft heads of terms is for Network Rail to lease the railway land to Able. The circumstances in which such a lease might be entered into - a practical alternative route for the Killingholme Loop and consent from all interested parties including C.RO and C.GEN - may take some considerable time to achieve. The existence, however, of a potential negotiated alternative to compulsory acquisition once again makes plain that there is no necessity for the compulsory acquisition.

Conclusion on section 122(2) test

3.22 In conclusion, the test as formulated by Counsel for C.GEN/C.RO, stands: Do Able need to acquire the Railway in order to cross it? The answer, plainly, is “No”.

4. COMPELLING CASE IN THE PUBLIC INTEREST

Absence of justification for acquisition of the Railway

- 4.1 C.RO and C.GEN's primary case is that at no point - even after the CAH hearings - has it been clear why Able needs to acquire the Railway at all. Indeed, as suggested above, materials submitted by Able itself make plain that there is no necessity to acquire. In the event, however, that the Panel takes a different view, Able will still need to establish a compelling case in the public interest for the acquisition.
- 4.2 Should it become necessary to consider that issue, the nature of the justification for the acquisition must be considered and weighed up against the harm that would be done by the acquisition. C.GEN is seeking consent to construct and operate a powerplant which will serve the national economic interest (and which is itself an NSIP). C.RO operate a port facility which serves the national economic interest (and which would itself be an NSIP if it came forward today). As such, the practical effect of the acquisition on C.RO and C.GEN's operations is a matter of the public interest which must be weighed in the balance.
- 4.3 C.RO and C.GEN could not agree to the removal of the Railway from the national network - or a grant of lease to Able - without understanding how this would be achieved in a way that is not detrimental to their rights. That in turn demands a rationale for the acquisition.

C.RO's project, their need for the Railway and practical concerns

- 4.4 Full details of C.RO's port operation, its need for the Railway, and its practical concerns were set out in C.RO's initial Note provided for the CAH, supplemented in small measure by the evidence of Mr Gates. Save in respect of the Applicant's half-hearted and ill-founded suggestion that C.RO may not be entitled to the contractual

benefit of the connection agreements, none of those matters was challenged at the CAH. Therefore, the Panel is respectfully referred to that previous Note.

C.GEN's project, their need for the Railway and practical concerns

4.5 Full details of C.GEN's project, itself an NSIP, were set out in C.GEN's initial Note provided for the CAH. None of those matters having been challenged, the Panel is respectfully referred to that Note.

5. FUNDING

5.1 We have set out above the requirements of the guidance that the applicant, at the point of application, provide a Funding Statement setting out how it is proposed to fund both the project and the compulsory acquisitions it seeks. Such a statement must contain "*as much information as possible.*"

5.2 C.RO and C.GEN made their submissions at the Panel hearing as to the inadequacy of even some of the basic information which has been provided and the lack of any evidence on other matters. It was plain that the Panel was fully aware of such concerns, which are likely to be developed in detail by others. C.RO and C.GEN will therefore confine themselves to reminding the Panel of those concerns and the possible route, employed for the Rookery South Resource Recovery Facility DCO and associated s106 agreement at the insistence of the then Infrastructure Planning Commission to deal with circumstances very similar to those here, which might serve to provide sufficient comfort.

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