

INFRASTRUCTURE PLANNING

**THE INFRASTRUCTURE PLANNING
(EXAMINATIONS PROCEDURE) RULES 2010**

THE ABLE MARINE ENERGY PARK DEVELOPMENT CONSENT ORDER

TR030001

**Written Summary of the Oral Case on behalf of the Harbour Master, Humber
put at the Specific Issue Hearings on Compulsory Acquisition
held on 16 & 17 October 2012**

(Rule 8 letter 31 May 2012 Annex C)

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Introduction

1. This is the Written Summary of the case put by Mrs Alison Gorlov of Winckworth Sherwood LLP at the Specific Issue Hearings on Compulsory Acquisition on 16 and 17 October 2012 on behalf of Captain P J Cowing in his capacity as Harbour Master, Humber (“the Harbour Master, Humber”), representing Associated British Ports (“ABP”) as the statutory harbour and conservancy authority and, in relation to pilotage, the competent harbour authority for the river Humber . As the land with which the Harbour Master, Humber is concerned is held by ABP in its capacity as conservancy authority, in this document all the functions represented by the Harbour Master are referred to as those of the Conservancy Authority.
2. This summary and the views expressed in it are separate and distinct from anything that may be received by the Examining Authority from ABP in its capacity as a port operator within the Humber.
3. References below to numbered articles of and Schedules to the Order are based on the draft Order dated 9 October 2012.

Construction of s. 122 Planning Act 2008

4. The Panel invited observations from the interested parties on the proper construction of s. 122 of the Planning Act 2008 (*purpose for which compulsory acquisition may be authorised*). We note that the Panel was particularly concerned with the concept of deliverability of the scheme.
5. In order for any Development Consent Order (“DCO”) to include powers of compulsory acquisition, the Secretary of State must be convinced first that the land in question is required for, or to facilitate or as incidental to, the development; and secondly that the applicant has made out a compelling case in the public interest for the land to be acquired compulsorily. It is not for the landowner to have to make a case against the grant of compulsory powers. Government Guidance¹ makes it clear that it also falls to the applicant to demonstrate that all reasonable alternatives to compulsory acquisition have been explored and that the compulsory purchase is proportionate.
6. The Applicant’s case for compulsory acquisition should be made in the Statement of Reasons accompanying the application.² At the hearings on 16 and 17 October the Applicant did not seek to expand on its Statement of Reasons. In light of the case advanced on behalf of the Harbour Master, Humber at the hearings and set out below, the Examining Authority is invited to conclude that neither the Statement of Reasons nor anything said by the Applicant at the hearings satisfies the “compelling case” test in relation to the land sought to be acquired in the riverbed and foreshore vested in ABP.

Grant of Underlease

7. A compelling case for powers of compulsory acquisition of (in ABP’s case) a 999 year leasehold interest cannot be made out if the Applicant’s development can be constructed and operated in a viable way with the Applicant being granted an underlease and the head lessee (ABP) is willing to commit to grant one at the appropriate time. Subject to the special treatment of the riverbed and foreshore in front of the ‘triangle land’ (see paragraphs 10 to 12 below), the Harbour Master, Humber confirmed an in principle agreement on behalf of the Conservancy Authority to the grant of such an underlease to the Applicant. He is willing to negotiate detailed terms comparable to leases to other statutory harbour authorities with port facilities in the Humber. In relation to deliverability

¹ ‘Guidance related to procedures for compulsory acquisition’ – Department for Communities and Local Government – February 2010

² The Infrastructure Planning (Applications: Prescribed Forms and Procedure) Regulations 2009, reg. 5(2)(h)).

of this scheme, therefore, the Harbour Master, Humber invites the Examining Authority to agree that the Applicant has not established that it is necessary and proportionate to acquire ABP's leasehold interest in plots 08001 and 09001 in order to deliver the AMEP scheme.

Extent of compulsory acquisition – plots 02013, 10007, 11004, 12004 and 13004

8. The Applicant's letter to the Examining Authority dated 9 October 2012 confirmed that the Applicant no longer requires powers of compulsory acquisition in relation to the riverbed and foreshore land comprised in the above-numbered plots. For this reason, no submissions were made on behalf of the Harbour Master, Humber in relation to these plots. The letter states that the requisite amendments to the Land Plans and Book of Reference will be submitted to the Examining Authority by 26 October. The Harbour Master, Humber re-iterates the point made in paragraphs 11 and 12 of his Comments on Responses to the Second Round of Written Questions, that if the Secretary of State were not minded to accept the amended Land Plans, the Harbour Master, Humber would wish appropriate amendments to be made to the DCO to exclude this land. He understands the Examining Authority will wish to see such amendments in case these are needed and he will submit them in due course.

Underlease of Estuary land – plots 08001 and 09001

9. The land held as Conservancy Authority is vested in Associated British Ports, which is a statutory company with perpetual succession. (The indicator of its status is that it is registered with company number ZC000195, the Z prefix being reserved for statutory bodies.) As a result, the Conservancy Authority will continue as a statutory body with statutory duties and responsibilities until this is brought to an end by legislation. It is an accident of history that the Conservancy Authority forms part of Associated British Ports, as privatised successor to the British Transport Docks Board. The activities and responsibilities of the Harbour Master, Humber are independent of, and distinct from, those of the commercial operations of ABP.
10. This underpins the function of the Conservancy Authority, which is to maintain the conservancy of the river for the benefit of all users. The Harbour Master, Humber is neutral as between who should have the advantage of operating within and adjacent to the river. In this case, his neutrality results in the complication outlined in paragraph 10 of his Comments on Responses to the Second Round of Written Questions.
11. There is a clear conflict between the Applicant and ABP. The Harbour Master, Humber cannot take sides. If he were to commit to a particular course of action beneficial to one party over the other in relation to the river, that might influence the decision-maker in deciding land use.
12. For this reason, the Harbour Master, Humber is unable at this point to commit to agreeing with the Applicant an underlease of ABP's leasehold in the riverbed and foreshore in plot 09001 in front of the triangle land (plots 03020, 03021, 03022 and 02033), although he remains willing to co-operate fully with whoever is authorised in due course to develop this land. The Applicant has confirmed that it still wishes to pursue an alternative to compulsory purchase for the rest of plots 08001 and 09001. The terms agreed in relation to that land can apply to the rest of plot 09001 if it transpires that the Applicant does develop the triangle land.
13. The Harbour Master, Humber regrets that a combination of pressure of work and a degree of miscommunication has delayed the issue of draft underlease. Since the hearings he has seen his property manager's email exchanges with the Applicant and notes that when asked whether there were time constraints the Applicant did not say that there was any particular urgency. The two property negotiators therefore discussed

heads of terms without it being appreciated that a draft lease was urgently required. From the viewpoint of the Harbour Master, Humber, the resulting delay has been undesirable, given that it allows less time for agreement to be achieved. However, a draft lease should be issued to the Applicant at about the same time that this document is submitted. Upon terms being agreed, ABP as Conservancy Authority will enter into a legally binding commitment to grant the underlease once the works and capital dredge have been completed and the DCO is fully implemented.

14. The grant of an underlease allows for the Applicant to be legally obliged to comply with provisions that the Harbour Master, Humber regards as essential for the proper performance and protection of his statutory functions. These provisions are additional to the protection for those functions included in the draft DCO and are described in detail below. If the Applicant does not agree these terms in an underlease, the Harbour Master, Humber will seek equivalent protective provision in the DCO to give the same level of directly enforceable protection for his functions as would flow from the underlease.
15. It will in any event be appropriate for the Harbour Master, Humber to identify such additional protection in the DCO to cover the possible eventuality that the Secretary of State's decision concerning the triangle land enables the Harbour Master, Humber to grant an underlease for the foreshore and riverbed in front of that land but terms cannot be agreed between the parties.
16. As stated above, it is for the Applicant to make the compelling case for compulsory powers rather than for the Harbour Master, Humber to establish why such powers should not be granted. However, the Harbour Master, Humber has a number of practical reasons to resist the compulsory acquisition of the Conservancy Authority's property interests and grant an underlease instead.
17. Section 9 of the Humber Conservancy Act 1899 and section 6 of the Humber Conservancy Act 1905 prohibit the carrying out of works in the river without a licence by the Conservancy Authority. Section 9 also prohibits dredging in the river without such a licence. In the draft DCO these provisions will effectively be replaced by Part 1 of Schedule 9 to the draft DCO. This includes (paragraph 3) provision that the works cannot commence until the Harbour Master, Humber has approved the detailed design of tidal works, including subsequent alterations. Paragraph 5 provides that construction of tidal works must be in accordance with approved plans and to the reasonable satisfaction of the Harbour Master, Humber (who also has a power to inspect them); paragraph 6 deals with approval of discharges into the river; and paragraph 13 provides powers in respect of abandoned or decayed works. Paragraph 13 gives the Harbour Master, Humber power to remedy the situation by serving notice on the Able Harbour Authority and, if necessary, carrying out the works himself and recovering the costs. Paragraph 23 requires the Able Harbour Authority to notify the Harbour Master, Humber of any transfer of the benefit of the DCO or grant of lease. These are all useful protections, but do not provide every necessary tool that is available to a landowner (and hence can be deployed via an Underlease).
18. The Harbour Master, Humber has identified particular regulatory controls that are important for managing his functions and which flow from ownership of the land concerned. The Panel will note that these are standard provisions in any agreement between landlord and tenant, but are particularly appropriate in the context of the Conservancy Authority's statutory functions including control of river regime and responsibilities to all users of the river. They are all provisions that the Conservancy Authority normally includes in underleases to statutory and other operators of developments similar to that proposed by the Applicant. The nature of the provisions is as follows:
 - The requirement to maintain any works in the river in good repair;

- The requirement to maintain insurance;
 - The ability for the landlord to approve alterations (this would allow the Harbour Master, Humber to take account of matters that are not directly referable to tidal works in the river but which nevertheless have a bearing on his functions);
 - That any assignment is subject to the Harbour Master, Humber's consent (thus enabling him to do due diligence and providing a clear level of control, which would not be achieved by article 12A of the draft DCO, which appears to be defective);
 - Provision for re-entry on non-payment of rent after a specified period;
 - It was not mentioned at the hearing, but the Examining Authority will appreciate, that any underlease should be for a term of years consistent with those of other operators holding similar underleases along the river.
19. Whereas the DCO, to give one example, would merely provide for remediation of decayed works after the event, a covenant to keep the works in good repair is a continuing obligation which would enable action to be taken where there is disrepair falling short of hazardous decay. The Harbour Master may also have a direct interest in more day to day repairs. For example, the good repair of e.g. mooring bollards may be required in order to ensure that vessels remain safely moored alongside the berth. Another example would be that the fabric of the quayside and its surroundings are maintained in a safe and tidy condition so that pilots, who are under the control of the Harbour Master, Humber, may have safe access to and from the vessels they are required to pilot. These provisions are necessary for the proper protection of the Conservancy Authority and an underlease is the most convenient way of doing so. It is also, of course, consistent with the way that the activities of other port operators along the river are successfully managed by the Conservancy Authority.
20. The leasehold route also automatically caters for the eventuality that the Able Harbour Authority established by the DCO does not endure for as long as the Conservancy Authority. The Humber Conservancy Commissioners were originally incorporated by Act of 1852 and, as the Commissioners' most recent successor, Associated British Ports holds a 999 year lease of the riverbed and foreshore from the Crown Estate of which 856 years remain unexpired. Whilst there must be a possibility that the Conservancy Authority may not endure until the expiry of its lease, it is fair to anticipate that it may outlive the Able Harbour Authority. It is entirely appropriate for the Harbour Master, Humber to look ahead in this way. The Conservancy Authority is not the only conservancy authority in this country that is already several hundred years old. In the event that the Able Harbour Authority ceases to exist for any reason, it is only right for the land it occupies in the river to revert to the Conservancy Authority, as would happen automatically under an underlease. If, however, the land were compulsorily acquired and the Able Harbour Authority ceased to exist, there would be a gap in the Conservancy Authority's title and a corresponding gap in its control over future users of the site.
21. The Harbour Master, Humber is a willing lessor, subject only to his neutrality in relation to part of plot 09001. In full knowledge of this complication, the Applicant confirmed to the Panel through counsel that it remains a willing underlessee and, from Mr Walker to Mrs Gorlov on the morning of 17 October, that none of the standard terms referred to in paragraph 18 were likely to be "show-stoppers". Although the consent of the Crown Estate is required to any underlease, there is no reason to believe the Crown Estate would withhold its consent. The fact that the Crown Estate has reached agreement with the Applicant in relation to its land on the north side of the river tends to suggest that it would not be concerned. It also has a history of providing consent to other, similar arrangements with other port operators on the river.

22. If and to the extent that the Harbour Master, Humber must depend on the DCO rather than an underlease, he will seek an equivalent level of protection in the DCO as he would expect from an underlease. It would also be possible for the DCO to provide for the reversion of the relevant land to the Harbour Master, Humber.

Section 127 hearing

23. Plots 08001 and 09001 are held for no other purpose than the carrying out of the Conservancy Authority's statutory undertaking. The Harbour Master, Humber resists a certificate under s. 127 of the Planning Act 2008 (*statutory undertakers' land*).
24. The Examining Authority will appreciate from the submissions above that it is apparent that compulsory acquisition of the land is not required for the purposes of this DCO. Strictly, therefore, the conditions in s.127 ought not to be in point.
25. However, for the purposes of these submissions, and without prejudice to the Harbour Master, Humber's position, he will explain why the conditions in which it would be appropriate to issue a certificate are not satisfied in his case. The two conditions set out in s. 127(3)(a) and (b) are that the nature and situation of the land must be such that it can be purchased and not replaced without serious detriment to the carrying on of the undertaking or can be replaced by other land without serious detriment to the undertaking.
26. In relation to the second limb, there is no replacement land. In relation to the first, there would be a clear and serious detriment to the Conservancy Authority in the lack of control over the land that would flow from compulsory acquisition. By way of example, the Harbour Master, Humber employs, and is responsible for, the health and safety of pilots operating in the river and will remain so even if the ownership and control of the land concerned passes to someone else. His undertaking would be compromised if he were unable to ensure the safety of the works themselves for his pilots and other river users and also, for example, were a vessel to break free from the quay because of a damaged, but not as yet "decayed", bollard.
27. Further, without provision for the reversion of the land in the event of the Able Harbour Authority ceasing to exist, there would be a serious detriment in having a gap in the Conservancy Authority's interests along the river for which it is responsible. Although the reversion could conceivably be dealt with in the DCO, it would be a novel provision and something that all concerned would wish to avoid.

The Funding Statement

28. The Harbour Master, Humber is plainly interested in the ability of the Applicant to fund the construction, maintenance and operation of the development. He is concerned that the company structure in which the Able Marine Energy Park would sit remains opaque, inaccessible and undisclosed by the Applicant. It became clear at the hearing on 17 October that the Applicant is merely a management company employed on a short term contract by a Jersey registered company whose accounts are not published and whose shareholders are unknown. There is no documentary evidence to substantiate the Applicant's funding case. As the Panel indicated to the Applicant's Chairman, he cannot expect the Examining Authority to take his assurances about the Elba Group's ability to fund the scheme purely on trust. In any normal commercial context, the Harbour Master, Humber, would need to have performance guarantees and carry out a full due diligence to establish financial soundness. This would apply to transaction with values well below this multi-million pound scheme. The Harbour Master, Humber submits that on the funding and financial evidence so far provided the Examining Authority, and the Secretary of State, have no option but to reject the application whatever its merits.

Winckworth Sherwood LLP
26 October 2012