

Planning Act 2008 and the Infrastructure Planning (Examination Procedure) Rules 2010

Proposed Able Marine Energy Park, Killingholme

Associated British Ports (10015525)

Summary of Oral Representations by Associated British Ports at Compulsory Purchase Hearing

16th and 17th October 2012

Extent of ABP Land subject to Compulsory Acquisition

1. The Development Consent Order application ('the Application') submitted by Able UK ('the Applicant') seeks authorisation for the exercise of compulsory purchase powers. In particular, the Application seeks that the Applicant be authorised to acquire land to which Associated British Ports ('ABP') currently has title.
2. The extent of this land ('the ABP Land') was identified in a letter sent to the ExA by Osborne Clarke dated 11 October 2012. For the purposes of the Book of Reference, the ABP Land comprises:

Plot 03020	(registered freehold title HS360474)
Plot 03021	(registered freehold title HS360474)
Plot 03022	(possessory title HS363120 – unopposed)
Plot 03023	(possessory title HS363120 – unopposed)
3. For the purposes of this summary of the submissions made on behalf of ABP at the Compulsory Purchase Hearing ('the CP Hearing'), these plots are referred to collectively as 'the Triangle'.
4. In addition, ABP opposes the compulsory acquisition of, inter alia, plots 03016, 03014 and 03009. These plots together comprise land over which ABP enjoys access rights serving the Triangle. For the purposes of this summary of the submissions made on behalf of ABP at the Compulsory Purchase Hearing ('the CP Hearing'), these plots are referred to collectively as 'the Access'.

Acquisition of 'Triangle'

5. During the course of the CP Hearing, ABP confirmed that its predecessor, British Transport Docks Board, had purchased the Triangle, with the benefit of the Access, in March 1967.
6. The Triangle was already zoned for port development at the time of its acquisition in March 1967. It was purchased by ABP¹ for strategic purposes, the intention being that the Triangle would be used for the future development of the Port of Immingham.
7. Since its acquisition the Triangle has at all times been zoned/allocated for port development and has, since purchase, been held for the purposes of carrying on ABP's statutory undertaking. This fact was not disputed by any party at the CP Hearing.
8. During the course of the CP Hearing the ExA queried whether any documentation relating to the acquisition of the Triangle was available. Such documentation, namely a copy of the original conveyance which demonstrates that the Triangle was purchased by ABP's predecessor body, the British Transport Docks Board, in the exercise of its statutory functions under the Transport Act 1962, is appended to this Summary.

Inclusion of Triangle in AMEP

9. The Triangle is currently included in the indicative layout for AMEP. The layout identifies the Applicant's intention as being to utilise the Triangle as a location for a pumping station and associated drainage channel and landscaping, together with overspill storage.
10. The ExA sought clarification from the Applicant as to whether that part of AMEP which comprises the Quay could be constructed in the event that the Triangle was excluded from the development site. The Applicant (Messrs Cram & Walker giving evidence) indicated that they did not know if this was possible or not.

The Tests for Compulsory Acquisition

11. The Applicant has failed to demonstrate:
 - (i) that the land is required for the development;
 - (ii) is required to facilitate or is incidental to the development; or
 - (iii) is replacement land (PA 2008, s122(2))
12. Further, the Applicant has failed to demonstrate a compelling case in support of the proposed compulsory acquisition of the ABP Land (PA 2008, s122 (3)).

Feasible Alternatives

13. As was pointed out to the Applicant during the CP Hearing, the Environmental Statement submitted in support of the Applications² expressly identified two alternative locations for the siting of the Pumping Station, which avoided the need for the compulsory acquisition of the Triangle. Both options were identified as feasible, but were discounted in favour of the use of

¹ ABP through its predecessors

² ES Annex 13.1

the Triangle on the basis that the latter comprised "*the lowest level of capital and operating expenditure*" - reasons which do not satisfy the PA 2008 tests, (Ref para 5.1.3, Annex 4.4 to the original ES).

14. Paragraph 20 of the "Guidance Related to Procedures for Compulsory Acquisition" provides that –

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

15. The Applicant, (Mr Cram giving evidence), was unable to provide any explanation to the ExA as to why the Applicant had determined to pursue the compulsory acquisition of the Triangle in circumstances where feasible alternative solutions identified by the applicant did not entail the compulsory acquisition of ABP land.

Funding

16. At the outset of the CP Hearing, counsel for the Applicant indicated that it was necessary only for the Applicant to demonstrate that it had sufficient resourcing to fund the acquisition of the land subject to compulsory purchase. Counsel for C.Gen/C.Ro and counsel for ABP referred the ExA to paragraph 33 of the extant guidance on compulsory purchase in the context of the Planning Act 2008, which states in terms that -

*"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 implications of both **acquiring the land and implementing the project** for which the land is required." (emphasis added)*

17. ABP queried the dearth of information in the funding statements provided by the Applicant, being the initial statement dated 29 November 2011 and the further funding statement provided in September 2012 in answer to the Planning Inspectorate's second set of questions.
18. ABP noted that there is currently no schedule before the ExA setting out the relationship between the various companies/holding companies promoting the Application and identified by the Applicant as capable of providing surety/funding for the compulsory acquisition and construction of the proposed development. On behalf of the Applicant, Mr Stephenson identified 5 different companies, being the Applicant itself (Able Humber Ports Ltd and other companies in the Elba Group. All of these companies are registered in Jersey.
19. ABP sought clarification regarding the status of these companies. The Applicant confirmed:
- (i) No accounts had been published in respect of any of these companies; and
 - (ii) It was not prepared to identify the shareholders of any these companies.
20. ABP raised the issue of the Applicant's indication that it had sought to rely on funding from the Regional Growth Fund. The Applicant refused to disclose documentation relating to the application for such funding,

Western Deepwater Jetty

21. The intention of ABP to use the Triangle in connection with the construction of a finger pier, known as the Western Deepwater Jetty ('WDJ') was publicised in the consultation draft of the Port Masterplan ('CDMP'), published in April 2010.
22. The publication of the CDMP pre-dated any statement of the Applicant relating to any intention to bring forward AMEP and compulsorily acquire the Triangle. Indeed, when Able UK (the management company handling all of Able's property interests in the UK) responded to the consultation exercise in June 2010, it provided a detailed submission which made no reference whatsoever to the WDJ or its own intentions for the area.
23. At the CP Hearing, on behalf of ABP Mr Fitzgerald explained the significance of the Triangle to operations at the Port of Immingham ('Immingham'). In particular, Mr Fitzgerald made the following observations:
 - (i) Immingham had a long history of serving the energy generation needs of the region and the nation
 - (ii) Recent developments in government policy and energy markets meant that the importation of large volumes of Biomass was an immediate priority for Immingham.
 - (iii) The need to serve this new demand for Biomass, whilst also continuing to serve the needs of power stations in the Aire and Trent Valleys for coal, meant that the construction of Humber International Terminal 3 ('HIT 3') was an urgent priority.
 - (iv) The construction of HIT3 would necessitate the dismantling of the Immingham Gas Jetty.
 - (v) The relocation of the Liquid Bulk traffic currently using the Gas Jetty was itself therefore an immediate priority.
 - (vi) Whilst it had previously been thought that this traffic might be re-located to the Immingham Oil Terminal on the eastern side of the port, the consultation exercise undertaken in respect of the CDMP had confirmed that this traffic should be relocated to the western side of the port, where it would be in close proximity to the existing gas caverns.
 - (vii) The WDJ was the only option to where re-location on the western side of the port was possible.
 - (viii) The WDJ would also enable the importation of refined aviation fuels for onward transport through the nationally significant Government Pipeline Storage System ('GPSS') distribution pipeline network. The Triangle is uniquely suited to afford this opportunity, being situated adjacent to the GPSS terminal currently serving the Oil Pipeline Agency's facility on the south bank of the Humber.
 - (ix) To this end ABP had already signed a Memorandum of Understanding with an existing Liquid Bulks customer to develop the Triangle to enable this interface with the GPSS.
 - (x) Accordingly, and for all these reasons it was necessary that ABP remain able to bring forward the WDJ (by use of the Triangle), in order to maintain/continue its operations at Immingham serving regional/national energy needs.
24. As regards the status of ABP's intentions for the WDJ, Mr Fitzgerald confirmed that the Port Masterplan had been adopted on Thursday 11th October 2012.
25. Mr Fitzgerald indicated that it is currently anticipated that the WDJ will be progressed by means of a Harbour Revision Order ('HRO'). ABP plans to submit a scoping opinion by the end of 2012, and anticipates securing consent in early 2014. It is anticipated that the construction period for the WDJ will run to only 18 months.

26. The fact that ABP is currently engaged in bringing forward a project of national importance in terms of its implications for security of energy supply, which project depends on its being able to use its strategic landholding at the Triangle, means that the Applicant cannot demonstrate a compelling case in the public interest in support of the proposed compulsory acquisition.

Killingholme Loop

27. ABP supports the objection of Network Rail to the proposed compulsory acquisition of its interest by the Applicant.

28. ABP, in common with others on the South Bank of the Humber, wishes to see the Killingholme Loop come forward to enable efficient onward transport of goods by rail from Immingham. The significance and importance of the Loop has been explained in detail by Network Rail. The project enjoys support not only of Network Rail, but also North Lincolnshire Council³

29. During the course of the CP Hearing counsel for the Applicant repeatedly indicated that the proposed AMEP development would remain viable even in the event that the rail line remained in Network Rail's ownership.

30. In these circumstances, it is manifestly not in the public interest for the Network Rail Land to be the subject of compulsory acquisition. Rather, if granted, the DCO should require that bridges be built into the design of the scheme so as to enable its operation without interference with the rail line, and so not prove an obstacle to delivery of the Killingholme Loop.

Section 127 Certification

31. As regards the application by the Applicant for a certificate pursuant to section 127 of the Planning Act 2008, ABP notes the following:

- (i) It does not appear to be in dispute that the Triangle comprises operational land held by a statutory undertaker for the purposes of its undertaking. The evidence given by Mr Fitzgerald in respect of this issue was not subject to any challenge during his two hour cross-examination by the Applicant.
- (ii) The Applicant does not suggest that there is any alternative land which ABP might use in place of the Triangle, for development as a liquid bulks terminal serviced by a finger pier and jetty for the purposes of the import, export and intermediate storage of liquid bulks to/from seagoing vessels, as proposed by ABP. Indeed counsel for the Applicant expressly confirmed at the CP Hearing that it was no part of the Applicant's case that such land existed.
- (iii) Given its existing plans to bring forward the WDJ, there can be no dispute that the compulsory acquisition of the Triangle would constitute a serious detriment to ABP's undertaking.

³ See paragraph 4.4.2 of the LIR of North Lincolnshire Council. The Council's support for the project was reiterated by Mr Walker on behalf of the Council at the LIR Hearing on 22 October 2012.