

By Email and Post

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Your Ref: TWA 8/1/04

Dear Mr Woods,

Planning Act 2008
Application for Able Marine Energy Park Development Consent Order
Harbour Master, Humber

The Secretary of State will recall that the principal concern with this proposed DCO on the part of the conservancy authority and its Harbour Master has been the proposal for the compulsory acquisition of both the freehold and the conservancy authority's leasehold interest in the river bed, in particular for the site of the proposed harbour. For the detailed reasons explained most recently in our letter of 23 July 2013, such acquisition gives rise to two connected but distinct issues. These in turn demonstrate why paragraph 43 of the 'minded to make' letter of 28 August 2013 is in error and that, contrary to that paragraph, the issue under section 127(2)(b) of the 2008 Act of a certificate relating to the conservancy authority's interest in the river bed cannot be justified. We say this for the following reasons.

Acquisition of conservancy authority's interest in the river bed

1. The first issue is the loss of an interest in the river bed. The absence of any owning interest by the conservancy authority will impair the exercise of its statutory functions and those of the Harbour Master. The statutory conservancy functions were established under the Humber Conservancy Acts with 999-year leasehold ownership of the river bed as an integral and supportive part of the conservancy 'package'. The statutory functions have developed over the ensuing 150 years but are fundamentally the same. Accordingly, the justification for the conservancy authority's continuing to have an owning interest in the river bed remains unaltered.
2. In essence this justification is that the statutory functions are only part of the regulatory regime. As we said on 23 July, the statutory powers mainly allow for a degree of anticipation of potentially harmful activities, prevention before the event and an ability to clean up afterwards. They do not allow for a full range of effective continuing controls over the activities themselves for the protection of the river. The effect of Able acquiring the conservancy authority's leasehold interest in the river bed to be occupied by the harbour will therefore reduce the degree to which the conservancy authority and the

Harbour Master can operate the regulatory controls to which the harbour ought properly to be subject.

Financial implications of default

3. A certificate under section 127(b) can only be issued if the statutory undertaker's land in question can be purchased "without serious detriment to the carrying on of the undertaking". The second issue demonstrates why Able's proposed acquisition of the river bed does not pass this test. It also provides a clear example of the very problems anticipated by the Harbour Master were the statutory functions to be reduced as outlined in paragraph 2.
4. The concern is that Able has not demonstrated that it has sufficient financial worth to construct, operate and maintain the authorised development. This increases the risk that the works might never be completed or that they might at some point be neglected or abandoned. In that event – see paragraph 12 of our letter of 23 July – the works could be left ownerless with no funds to pay for them to be made safe and maintained in a safe condition or removed. The burden would fall on the conservancy authority, effectively on the users of the river whose conservancy dues provide the conservancy authority's income.
5. Until recently this risk might have been considered theoretical, but this year the Harbour has been grappling with just such a case. On 7 February 2013 Neptune Renewable Energy Ltd., the operator of the Neptune Proteus device, went into liquidation leaving the constructed wave-energy turbine in the river and, with no prospect of its being used, requiring removal as a hazard to navigation. There were no funds in the insolvent company to pay removal costs of the order of £100,000. Question then arose as to whether the conservancy authority would have to fund removal out of the Harbour Master's conservancy budget. In the event these costs were largely met out of a bond provided by Neptune to (in this case) the Crown Estate at the time Neptune was granted the rights it required in one of the few areas of the river that are outside the conservancy authority's leasehold. As the bond will not cover the removal costs in full, the conservancy authority might yet be called upon to contribute.
6. A rescue exercise of this order can be very expensive, is a significant drain on resources, serious and could have a serious impact on budgets and the level of conservancy dues charged to all river users. The Neptune Proteus device was a relatively small facility. If the same happened to one of the larger facilities on the river – and the Able marine structure would, if constructed, represent by far the largest marine structure in the river – the impact on the conservancy authority could be overwhelming and might even threaten the viability of the Humber for some users.
7. As mentioned above, the Neptune Proteus device was constructed on land, outside the conservancy authority's leasehold, belonging to the Crown Estate. This presented the conservancy authority with the difficult position of carrying ultimate responsibility for removing the obstruction in the river while at the same time lacking the ownership control required to secure necessary protections at the outset. If the DCO were to authorise the compulsory acquisition of the conservancy authority's 999 year leasehold of the land required by Able, the same danger of being left to shoulder significant liabilities could arise in the present case.
8. Matters would be aggravated if the DCO did not require the provision of appropriate financial protections. The Harbour Master believes this case amply demonstrates the need for any powers granted to Able to be made contingent on their demonstrating the necessary financial underpinning. Crucially, there must be suitable guarantees or other financial security (such as a bond) in respect of the completion and maintenance in good repair of all elements of the authorised development that are physically within or reclaimed from the river.

9. The Neptune case highlights the problem of freehold ownership. A lease, as agreed to in principle by both Able and the Harbour Master, would have provided for such security as a condition imposed on the lessee. This is one of the reasons why the refusal of Able to really engage in trying to conclude an underlease, and the clear reliance and expectation of ABP that it would be granted CPO rights if it did not agree a lease, was such a problem for the Harbour Master.
10. Further, a lease on normal commercial terms would provide for termination on the lessee's insolvency, leaving the conservancy authority freedom to step in as landlord and re-let the facility, so ensuring continuity. If an insolvent operator owns the freehold, the land vests in the liquidator or other person responsible for winding up the insolvent operator. The time taken to wind up the operator and dispose of property interests will inevitably be far longer and in the interim the Harbour Master cannot be guaranteed sufficient control to manage a potential hazard to navigation.

Certificate under section 127 of the 2008 Act

11. In relation to the Secretary of State's certificate under section 127(2)(b) of the 2008 Act, the 'minded to make' letter of 28 August 2013 correctly refers to the applicable test as whether the acquisition will cause serious detriment to the carrying on of the statutory undertaking. The Harbour Master's evidence was that it would. No contradictory evidence was offered and none is referred to in the Panel's recommendations on which the Secretary of State relies.
12. The Secretary of State's support comes from the Panel's recommendations. Paragraph 43 of the 28 August letter cites the Panel's conclusion that "the fact that the Harbour Master Humber is prepared in principle to grant an under-lease to the applicant in relation to land required for constructing the new quay indicates that the Harbour Master Humber's land can be occupied by the applicant without hindering the undertaking." The Secretary of State agrees with this and therefore says that acquisition will not cause serious detriment. The reasoning here is patently flawed.
13. The Harbour Master has taken certain issues concerning the extent of turning circles and similar harbour management and navigational matters. Subject to that, he made clear that if the powers were to be granted he would not have a difficulty with the presence of the proposed development per se. So, yes, the Harbour Master did indeed indicate that the river bed could be *occupied* by the authorised development without in itself hindering his operation (although he did point out that its proximity to other facilities posed potential traffic management problems).
14. However, to conclude from this (as the Panel and the Secretary of State have both done) that non-detrimental *occupation* means that acquisition leading to outright *ownership* would also not be detrimental simply does not follow and flies in the face of the Harbour Master's evidence. The whole thrust of the Harbour Master's evidence on this point was that the detriment to the undertaking was the result of *acquisition*, and hence the offer to negotiate an underlease. The Panel and the Secretary of State have simply ignored without comment the distinction between river bed occupation (which can be made to work acceptably) and outright river bed ownership (which carries significant disadvantages – see above).
15. It follows that the Secretary of State's 'minded to' decision to issue a section 127 certificate in respect of the river bed vested in the conservancy authority is flawed.

The purpose of this letter is to draw attention to aspects of the 28 August letter that are flawed and which, if reflected in a final decision, would be vulnerable to challenge.

The Secretary of State is aware that the Harbour Master has other concerns about the DCO. Despite some welcome amendments in the 28 August iteration of the draft DCO, concerns remain and the Harbour Master may pursue them further. He also has some points on the amended draft DCO about which we will write separately.

We are sending a copy of this letter to Bircham Dyson Bell.

Yours faithfully,

Winckworth Sherwood LLP

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