

To Robert Fox for TO response.



Osborne
Clarke



Rt. Hon Patrick McLoughlin MP
Secretary of State for Transport
Department for Transport
Great Minster House
33 Horseferry Road
London
SW1P 4DR



Our reference BJJ/0956072/O17600504.1/SAMF

Your reference

16 May 2013

Dear Secretary of State,

Proposed Able Marine Energy Park, Killingholme, North Lincolnshire

We act for Associated British Ports in relation to the above project. We are conscious, of course, that in terms of the NSIP application process, proceedings have now closed, the Examining Authority has completed its report and recommendations and the application is now before you for your consideration. We are also very conscious that as a result, no further evidence can be put before you in relation to the project – nor indeed can the project nor methodology be varied from that described and in places tested during the course of the examination.

This letter does not, therefore, go to the provision of new evidence. It is written because we feel it necessary to confirm our client's position on the record, in the light of certain departures effected by Able in relation to its proposals as they were originally presented by Able, as the applicant, at the examination. Our client's concerns in this particular instance relate specifically first, to the applicant's proposed compulsory purchase of our client's land (known as the "Triangle") which our client holds as part of its statutory port undertaking and indeed is taking forward as port expansion land and second, the applicant's proposed compulsory acquisition of the foreshore and seabed directly fronting our client's land, owned by The Crown Estate and subject to a 999 year granted to the Humber Harbour Master across which our client wishes to construct a new finger pier and jetty to serve its intended bulk liquids facility.

Our reason for writing to you at this stage in the process is that during the compulsory purchase hearing generally and particularly in the context of the short hearing held under section 127 of the Planning Act 2008, the evidence given by our client was very clear and direct to the effect that ABP, as a statutory undertaker and port operator, strongly opposed the compulsory acquisition of its land for the reasons which we presume are now before you as detailed in the Panel's report.

The position with regard to the foreshore and seabed was less straightforward. In my client's written evidence to the Examining Authority, given by Mr John Fitzgerald the Port Director of the Ports of Immingham and Grimsby, he said the following –

"ABP objects to Able's proposals:

- (a) To acquire compulsorily an area of land ("the ABP Land") in which ABP holds an interest for the purpose of its undertaking, which lies to the west of the Port of Immingham and comprises -
 - (i) a triangular shaped piece of land with two narrow strips of land abutting it (together the "Triangle"), all in the freehold ownership of ABP;
 - (ii) that area of foreshore and bed of the estuary which lies adjacent to the Triangle ("the Foreshore") over which ABP [as Humber Harbour Master] enjoys the benefit of a 999 year lease granted by the Crown Estate;
 - (iii) a strip of land over which ABP has the benefit of a right of way for the purposes of providing access to the Triangle (the "Right of Way")

all of which has been identified and held for port expansion use and for port development for the Immingham West Deep Water Jetty"

Our client's position in relation to Able's proposed compulsory acquisition of its land remained unchanged throughout the examination process - and remains unchanged today. As you will be aware from the evidence provided, our client strongly opposes that proposal.

Our client's understanding of the position adopted by the Humber Harbour Master was that he opposed the compulsory acquisition of his leasehold title, but in the light of the clear conflict between Able's proposals to construct a quay across the foreshore mudflats and ABP's need to cross part of the same foreshore with its jetty, was prepared to negotiate an underlease of that particular part of the foreshore with whichever party secured the necessary consents for the development of the Triangle Site. An admirably pragmatic approach.

This position was, as far as we understood, accepted by all parties including the applicant and as a consequence, our client did not take up the Examination's time by providing further evidence detailing its objection to the proposed compulsory acquisition of the foreshore and seabed. In fact, all our client's counsel asked, in the light of Able's counsel's agreement to the position as stated, was to be kept informed as to negotiations with Able in relation to an underlease. We will not trouble you with the transcript of the proceedings in this respect but can provide it should that assist.

It was in this context that we recently asked the solicitors acting for the Harbour Master to confirm that negotiations with Able in relation to an underlease for the foreshore are still on-going. The reply from the Harbour Master, however, has been somewhat pre-empted by a letter sent to the Harbour Master dated 5 April by Mr Neil Etherington on behalf of Peter Stephenson, the Chief Executive of Able, and we believe copied to you by letter dated 12 April 2013.

Our client has already written to you in relation to that correspondence and clearly we need not comment on the generality further. We do note, however, that in his letter to the Harbour Master, Mr Etherington states as follows -

"Our current position is that whilst we were open to the principle of an underlease from you for the full extent of the riverbed land that we need, given the lack of separation of property interests, we have lost any confidence that it would be possible to reach reasonable terms for a lease and that there is therefore no point in attempting to do so".

We have no idea how, or even if, the Harbour Master has responded to that letter. We would point out, however, that despite repeated and unmerited assertions to the contrary by Mr Stephenson, the role of the Humber Master is, and clearly has to be, entirely separate from that of our client ABP, the operator of the Ports of Immingham and Grimsby. Further, you, Secretary of State, will understand the significance of such a *volte face* by an applicant in the context of the NSIP process - a process which

has been promulgated by Government as being transparent and fair. The reality is that if our client had not been passed copies of the correspondence with the Harbour Master as part of the correspondence sent to you, all of which it seems to us was simply designed to be critical of our client, we would still be working under the fundamentally mistaken belief that the evidence given by Able at the compulsory acquisition hearing could be believed and relied upon. This is patently not the case.

Now is not the time to take this matter further. Our client is conscious, however, that you will have taken account of that correspondence from Able. For our part, we do believe it necessary to place on the record on behalf of our client, our serious concern that the applicant has seemingly been able, without notice to the interested parties, to change its stance entirely in relation to its position, given in evidence and we had believed given in good faith, in relation – in this instance – to the compulsory acquisition of land.

We fail to see how the Planning Act 2008, viewed in the context of the Human Rights Act, let alone the Convention, can accommodate a process that allows an applicant to give evidence at a formal statutory examination – an examination which in this context it should not be forgotten contemplates the compulsory removal of proprietary rights of ownership - and then only a few months later allows the applicant to renege totally from its evidential position, without even notifying the parties affected.

For the record, our client Associated British Ports stands by the evidence it gave, both orally and in writing, as part of the examination process. It remains totally opposed to the proposed compulsory acquisition of both the land in its ownership, which it holds as statutory port undertaker and the proposed compulsory acquisition of the foreshore and seabed in the ownership of the Crown Estate.

Yours faithfully

A handwritten signature in blue ink that reads "Osborne Clarke". The signature is fluid and cursive, with a long horizontal flourish extending to the right.

Osborne Clarke

T +44 20 7105 7130

F +44 20 7105 7131

E Brian.Greenwood@osborneclarke.com