



Mr Norman Baker MP
Parliamentary Under Secretary of State for Transport
Department for Transport
Great Minster House
33 Horseferry Road
London
SW1P 4DR

Our reference BJG/0956072/O17704610.1/SAMF

Your reference

29 May 2013

Dear Minister,

Proposed Able Marine Energy Park, Killingholme, North Lincolnshire

We write on behalf of our client Associated British Ports in relation to the above.

You will, we are sure, have seen the letter that we sent to the Secretary of State, dated 16 May, regarding the above. In that letter, we drew the Secretary of State's attention to what we consider to be certain fundamental inconsistencies in the AMEP proposal as promoted and explained by Able at the NSIP hearings, and indeed supported by oral and written evidence, and the position that has now apparently been adopted by the applicant in the context of matters regarding compulsory purchase.

The reason for writing again so soon after our previous letter is that your Statement to Parliament delivered on 21 May, whilst indicating that you have decided to set the deadline for the decision to the 24 July 2013 *"in order to allow the applicant to negotiate terms of a lease of land that they require for the project with The Crown Estate who are the freehold owners of the land"* - something that we must say we had thought had already been dealt with by the applicant - it does not seem to take into account that central to the proposals of both the applicant and our client is the fact that the Humber Conservancy Authority enjoys the benefit of a long lease of the relevant development land from The Crown Estate. We thought that it might be helpful, therefore, if we further clarified our client's position bearing in mind the somewhat complex legal proprietary position that currently exists at the site of the applicant's proposed new off-shore wind construction facility at Killingholme.

As you are of course aware, a stretch of foreshore, mud flat and sea bed upon which Able wish to construct their new quay and across which our client wishes to construct the Immingham Western Deep Water Jetty is owned by The Crown Estate. In 1869, however, a 999 year lease over that foreshore and sea bed was granted to the Humber Conservancy Commissioners, the benefit of which has now passed to ABP in its capacity as the Humber Conservancy Authority, the powers and duties of which are administered by the Humber Harbour Master. In this context, we should perhaps add that the powers and duties of the Humber Harbour Master are exercised independently and are entirely separate from the commercial activities of the Ports of Immingham and Grimsby upon whose behalf we are writing.

Your Statement of the 21 May, perhaps understandably, makes no reference to the legal interest held by the Humber Conservancy Authority. This is, of course, a point entirely for the Authority, through the Harbour Master to raise with you should they so wish. The purpose of our letter, however, is to reiterate the concerns that we have already expressed to the Secretary of State and to ensure that the nature of and background to those concerns is fully understood. As the freehold owners of land immediately adjacent to the foreshore and sea bed held by The Crown Estate and the Harbour Master, our client has a direct interest in the ownership and proposed use of that part of the foreshore and sea bed across which our client's deep water pier and jetty will be constructed.

We have no doubt that the Examining Authority in their report to you will have provided a clear exposition of the case propounded by our client, as well as the case propounded by the other interested parties affected by Able's proposed compulsory acquisition, including the Harbour Master, during the hearings.

Your Statement, however, can probably fairly be interpreted as an encouragement to the Applicant to secure The Crown Estate's approval for the development of its freehold interest under section 135 of the 2008 Act. ABP is, therefore, anxious (and we would suggest quite reasonably), to ensure that the significant concerns that it expressed at the compulsory purchase hearings and the position which was, as far as we were aware, accepted by all parties, including the Applicant, is fully understood and will be taken into account by yourself. In summary, as we understand the position, the Humber Conservancy Authority through the Harbour Master, opposes the compulsory acquisition by Able of its leasehold title - for reasons that were very clearly detailed in evidence given at the hearing - but has made clear its willingness to grant an underlease just as it has done in the past in favour of other marine facility developers. In granting such an underlease, however, a clear conflict arises 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. To meet this conflict, the Authority clarified its position by indicating that it would be prepared to grant the underlease of the foreshore in front of the ABP freehold Triangle site to whichever party secures the necessary consents for development of their respective landholdings.

As we indicated in our letter to the Secretary of State of 16 May, however, from correspondence that has come to light it is now far from clear whether the Applicant does in fact still intend to negotiate an underlease with the Humber Conservancy Authority. For the applicant to proceed otherwise at this stage, would be a material departure from the evidence presented by Able at the hearing.

In our letter to the Secretary of State we did not trouble him with extracts from the hearing transcripts. In the context of our client's concerns as a result of your Statement, however, we have reconsidered the position with our client and we hope that the following extracts may assist your understanding of what we believe to be extremely significant issues that remain between our client, the Harbour Master and the Applicant – issues which, we should say, we had thought had been settled during the formal hearings before the Examining Authority. Indeed, if the Applicant has moved from that position or steps are being taken that contemplate a change in approach from that understood at the hearing, then our clients would be extremely concerned.

At the two Compulsory Purchase hearings, (16th and 17th October 2012), the Conservancy Authority's position was put succinctly by their solicitor, Mrs Alison Gorlov as follows:-

Mrs Gorlov *"The function of the Conservancy Authority is to maintain the conservancy of the river, the flow, the river regime, vessel management, vessel movements and similar things in relation to the River Humber for the benefit of all of the users of the Humber and as a result the Harbour Master is neutral as between who should have the advantage of whatever operations are going on within the river. It was only as we were formally noting the responses, second round, of the comments on the responses to the second round of written questions that we realised fully what that meant in relation to the foreshore and riverbed directly in front of the Triangle site. There is clearly a contest here between two prospective developers, Able on the one hand and ABP Immingham on the other. The Harbour Master finds himself in a slightly*

difficult position on this. He cannot be seen to take sides, he doesn't want to take sides..... He doesn't want to influence decisions nor be seen to influence them he doesn't want to do that in relation to Able any more than he would if this were a planning inquiry for ABP in relation to the Triangle and so what he has said in the letter of 12 October that is annexed to his comments is that he is unable to commit to granting, to agreeing that the Conservancy Authority should grant Able an underlease of so much of the foreshore and riverbed as is in front of the Triangle. Now that doesn't mean that at some point he wouldn't be perfectly willing to do it. What I think I can say today is that Captain Cowing is more than willing to co-operate at the end of the day with whoever ultimately is authorised to develop the Triangle but he feels quite unable, formally, to commit to any particular course of action with either of the warring parties. Basically he is not in a position, he reckons, to disturb the status quo."

Following that statement, the Chairman of the Panel, Mr Robert Upton tested Mrs Gorlov as to what terms the Harbour Master would look for in an underlease granted by the Harbour Master to Able and he also asked Mrs Gorlov to explain precisely why the Harbour Master objected to a compulsory purchase of its legal interest in the foreshore and sea bed. We will not trouble you with lengthy quotations from the transcript in that respect, which are instructive in that we are sure the Panel will have provided that information in detail in their report – although we are happy to do so if that would assist you or the Secretary of State.

During the course of an exchange between the advocate for Able and the Harbour Master's team, however, senior counsel for ABP, Mr Robert McCracken intervened as follows:-

Mr McCracken *"Can I make just one point and it is this? Whatever ABP Harbour Master proposes to do we would like an opportunity at arms' length to look at it before it's done because the stated position of ABP Harbour Master is to be as it were even-handed as between Able and ABP and it is quite important that we therefore have an opportunity to comment on any new lease that is proposed because there are scenarios that one can envisage whereby Able get hold of this and then use it for purposes other than those that are currently envisaged. I am not suggesting that would happen but it is important that we have an opportunity to make sure that whatever lease is ultimately, if an underlease is ultimately agreed, is one that does actually achieve what it is that Mrs Gorlov has said that the ABP Harbour Master wants to achieve, that is complete fairness as between Able and ABP."*

Drawing the debate to a close, at the end of this part of the hearing, the Panel Chairman Mr Robert Upton addressed counsel for Able, Mr Gregory Jones, as follows:-

Mr Upton: *"Is it correct Mr Jones that it is your client's preference to achieve this underlease rather than to proceed to request a compulsory acquisition?"*

Mr Jones *It has been because for a very long period of time it has been said that that is a fairly straightforward exercise. I hear what has been said today which is new, and prompted, I mean when you combine it.....*

Mr Upton *Sorry, what have you heard today that was new?*

Mr Jones *All of theMs Gorlov's concerns we have never had any discussions at all about it.....*

Mr Upton *But if this is the case then it is still your preference to seek an underlease?*

Mr Jones Yes.

Mr Upton *It is still the preference of the Harbour Master Humber and the Conservancy Authority to seek an underlease. They understand that if not that they will need to and you will need to discuss provisions which will go in the Order which would be associated with the compulsory acquisition of the lease. It does seem to me that actually everybody is saying that they would prefer to reach an agreement on an underlease....."*

Mrs Gorlov *.....can I just add that having amendments in the Order would be a novel way of dealing with this sort of an issue and one which I think we would probably all of us prefer to avoid.*

Mr Upton *I think what we have heard this morning Mrs Gorlov suggests that it is in everybody's interest actually to get into discussion about that underlease. I don't feel the need to take this very much further. I think you have made your position clear?*

Mr Jones *I have got nothing to add."*

We must apologise for the length of the extracts given above but we do feel it is important that you fully understand the evidence that was given at the hearing, supported and supplemented by written representations and the position that was as a consequence, agreed and understood, we believed, by all parties.

Indeed, to provide a complete picture, in the written summary of Able's case made at the compulsory acquisition hearings, Able stated that:-

"The applicant remains keen to enter into an agreement to lease all of the land from the Harbour Master. Since the terms of the lease part of the land would be the same as for all of it, the applicant is willing to consider this on the understanding that it would be extended to the whole area if the applicant was granted compulsory purchase powers over ABP's [land ownership]....."

The position, therefore, as at the end of the formal hearings was that the Harbour Master was prepared to enter into an agreement in respect of the foreshore and riverbed in front of ABP's Triangle site with either Able or ABP – whichever party secured the necessary consents for the development of the Triangle site. As we noted in our earlier letter to the Secretary of State, this did indeed seem to be an admirably pragmatic approach and for that reason, our client has deliberately not pursued this aspect of the project further.

If the position as seemingly agreed and understood by all parties including the Examining Authority following the CPO hearings has now changed – our client has been given no notice of such change and has not been given the opportunity to comment – neither presumably have any of the other parties who participated in the Compulsory Acquisition hearings. Our client is of course entirely content to rest with the evidence that was given at the hearing as stated above. If it is now contemplated by the Applicant that it wishes compulsorily to acquire the Harbour Master's interests - and we do not have any knowledge as to how the Humber Harbour Master nor indeed The Crown Estate will respond to your Statement – then we fail to see how, in law, any decision can be made on this point without re-opening the hearing for consideration of further evidence in light of the changed circumstances.

We do, of course, have no information as to how Able propose to proceed – and it may well be that they will open negotiations for an underlease with the Conservancy Authority. If on the other hand, they now intend to depart from that stated intention, for example by seeking a lease directly from The

Crown Estate - something incidentally that we do not believe the applicant can do bearing in mind the existence of the Conservancy Authority's 999 year lease - that would be a direct reversal of the position as stated by Able in evidence to you through the Examining Authority and would be a matter of extreme concern.

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

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