Misinterpretation of APFP 5(2)(h)

The Applicant's funding clarification [REP5-005, page 50] in response to REP4-047 is just a repetition of sentences from the Funding Statement.

Once the padding has been stripped out, the Applicant's response reduces to:

1) The Applicant has sufficient funds for the Compulsory Acquisition provision within the DCO, specifically funds related to compensating for acquired land or interests.
2) The Applicant will work with a variety of financial institutions and advisors in order to secure funding [£820m] and has extensive experience of financing major capital projects.

This is not compliant with APFP 5(2)(h).

1) Infrastructure Planning (APFP) Regulation 5(2)(h)

To be clear, APFP 5(2)(h)[1] has no interest in an applicant's ability to fund compulsory acquisition:

5.—(2) The application must be accompanied by—
(h) if the proposed order would authorise the compulsory acquisition of land or an interest in land or right over land, a statement of reasons and a statement to indicate how an order that contains the authorisation of compulsory acquisition is proposed to be funded;

It does *not* say:

(h) if the proposed order would authorise the compulsory acquisition of land or an interest in land or right over land, a statement of reasons and a statement to indicate how the compulsory acquisition is proposed to be funded;

This regulation provides a degree of protection against a developer getting its hands on compulsory-acquisition land, then running out of money and abandoning its project.

[1] Please disregard the Applicant's reference (twice) to Section 5(2)(h) of the Planning Act 2008. Funding is the subject of Regulation 5(2)(h) of the Infrastructure Planning (Applications: Prescribed Forms and Procedure) Regulations 2009, which can be found here.

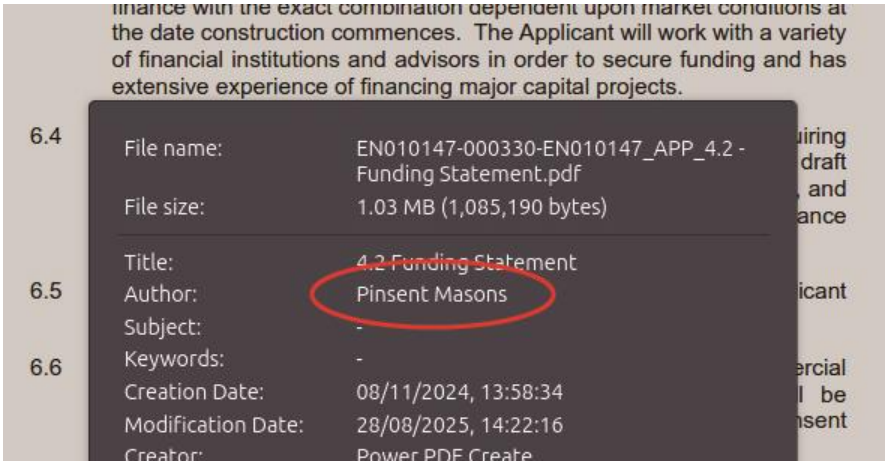
2) Credibility of the Funding Submissions

The ExA might be struggling to reconcile the Applicant's track record with its declared intention to secure £820m for funding this development.

The Applicant acknowledges that its previous solar farm developments [what most of us call 'planning permission'] were sold to prospective constructors/investors. To claim that PVDP has "extensive experience of funding major capital projects" is simply dishonest.

The Funding Statement [APP-022] seeks to persuade us that the Applicant has a more appealing business model these days. At the very least, where is the letter of support from "EY" [APP-022, 6.1] or one its other funding institutions/advisors?[2]

Currently, the ExA has no idea how (or if) this DCO will be funded or by whom.



3) Funding Clarification at CAH1

At CAH1 the Applicant was pressed for detail on the funding of this solar farm. Mr Phillips (Pinsent Masons) introduced himself as having been responsible for previous solar DCOs.

3a) Mr Phillips justified the absence of funding detail by drawing the ExA's attention to the Planning Act Guidance for DCO compulsory acquisition. He recited from paragraph 17. This confirmed his interpretation that the guidance asks for "only an indication at this stage." The Funding Statement confines itself to abstract terms such as 'equity' and 'debt finance.'

However, his recitation stopped short of the final – and pivotal – sentence of paragraph 17.

> This should include the degree to which other bodies (public or private sector) have agreed to make financial contributions or to underwrite the scheme, and on what basis such contributions or underwriting is to be made.

Selective quoting neutered the intended guidance of paragraph 17 [CAH1 pt2, 00:04:25].

[2] For example, East Yorkshire, facing a similar credibility gap, appended a letter of ambiguous support from its parent company.

3b) Mr Phillips reassured the ExA that, in the unlikely event that the Applicant wished to sell its DCO, there is a fail-safe article in the DCO to secure a power of veto for the Secretary of State. This is central to the checks and balances built into the DCO [CAH1 pt2, 00:13:30].

Article 34 prohibits the transfer of the DCO from the 'undertaker' (SolarFive) to a 'transferee' unless this has the express approval of the SoS [CR2-009, page 26].

Article 34 is a legal mirage.
As Mr Phillips' previous clients have demonstrated (and Companies House records confirm), circumventing Article 34 is trivial if you use a Special Purpose Vehicle. By awarding the DCO to the SPV rather than to the underlying Applicant, Article 34 is not invoked. The owner simply sells the SPV containing the DCO. The purchaser of the Special Vehicle drives off with the DCO still safely secured in the passenger seat.
Mr Phillips reported that he has acted for these solar project transfers [CAH1 pt2, 00:13:00].

Interested Person's Opinion

Article 34 is legal window-dressing and should be deleted. If the SoS wishes to have the option of exercising a power of veto over DCO transfers, the ExA should invite a reputable legal firm to craft the language for an Article 34 that secures this protection.

The burden on the ExAs would be greatly eased if the Planning Inspectorate took steps to discourage proposals from applicants that are equivocal about their project intentions. The Policy Statements and Regulations did not anticipate rogue applicants seeking to obtain planning permission for resale. Currently, the only protection is APFP 5(2)(h).