BIRCHAM DYSON BELL

Mr Robert Upton
Lead Member of the Examining Authority
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Your Ref
TR030001
Our Ref
DCJ/ADW/Y059258
Date
31 January 2013

Dear Mr Upton,

We write on behalf of Able Humber Ports Limited ('Able') in response to the costs application submitted by Mr David Hickling on behalf of Mr Stephen Kirkwood (the costs applicant) to the Examining Authority on 12 December 2012.

Able submits that the costs application is without merit and should be dismissed on two grounds.

Firstly, the costs application is misdirected. The basis of the applicant's claim is that the need to respond to the revised proposals in relation to the Cherry Cobb Sands compensation site ("the Site") caused unnecessary expenses to be incurred.

We respectfully submit that the additional cost of addressing the revised application was not wasted. The amended proposals have been taken forward for consideration by the Examining Authority; therefore the cost involved in responding to them was not unnecessary. If there is a basis for a costs application to be made, which we submit is not the case, it is confined to any costs incurred in reviewing the original proposals to the Site that became no longer relevant in relation to the amended proposals, rather than any work attributable solely to the amended proposals.

Secondly, we submit that each of the arguments raised by the costs applicant to demonstrate that Able acted unreasonably are not demonstrated by the facts. We will address each argument on which the applicant relies in turn.

1. The submission of amended proposals for the Cherry Cobb Sands site mid-way through the examination process.

The costs applicant states that the submission of amended proposals with regard to the above matter created additional work, which was not anticipated at the beginning of the examination period, and as

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such is an example of unreasonable behaviour by Able. They argue that the circumstances illustrated in paragraph B3 of the IPC policy guidance[1] ("the IPC Policy") apply.

We submit that it is not unreasonable to amend proposals in the light of their examination *per* se, but that it would be unreasonable to do so at a demonstrably later stage than when the necessity for the changes became apparent. Such a situation is not the case here. Able responded promptly to the changing circumstances and provided a clear explanation of the revised stance and position with regard to the Cherry Cobbs Sands site during the examination period.

Paragraph A28 of the IPC Policy makes clear that "parties should be willing to accept the possibility that a view taken in the past can no longer be supported and act accordingly at the earliest opportunity, even at the risk of an application for costs being made, where, for example, a particular matter(s) addressed in the NSIP application or supporting material or submissions or, the submissions and evidence of any party, is withdrawn and no longer pursued". Able was therefore complying with good practice in withdrawing the initial proposals relating to the site and providing amended proposals at the earliest opportunity.

Paragraph B3 of the IPC Policy notes that it is unreasonable for a party to introduce fresh or substantial evidence at a "late stage". The submission of the amended proposals was not at a late stage but were submitted as soon as possible within the examination process.

2. The applicant submits Able "should have realised" that the initial proposals with regard to the compensation site at Cherry Cobb Sands would not function as predicted in the original submission.

The proposals relating to the Site were developed by suitably qualified professions acting for Able, were given appropriate consideration as part of the Environmental Impact Assessment process and were thus subject to assessment and scrutiny carried out by independent technical experts. They were also supported in principle by Natural England at the time of submission, as is evidenced in their letter to the Infrastructure Planning Commission dated 5 January 2012. Indeed, it was on the basis of that understanding that Able made its application. Able could not have realised the proposals would not function as predicted prior to the submissions made by parties during the examination period. As such the applicant's argument is without merit.

3. The applicant submits Able failed to substantiate various parts of its submission, including the operation of the Regulated Tidal Exchange (RTE) scheme proposed at Cherry Cobbs Sands; the nature and extent of land contamination within the RTE area; and the true extent of likely flooding from drains backed up as a result of the RTE (and wet grassland) schemes.

Again, we respectfully submit that technical expertise was sought and the appropriate parties consulted. This is evidenced by the following documents: EX28.3, 'Final Compensation Proposals';

[1] Infrastructure Planning Commission Policy on the Award of Costs in Relation to Examinations of Nationally Significant Infrastructure Project Applications

EX31.5A, 'Factual Report on Geo-Environmental Ground Investigation, Cherry Cobb Sands (FINAL)' and Annex 36.1 of the ES, 'Flood Risk Assessment'.

4. **The applicant submits Able demonstrated a resistance to or lack of cooperation with any other party in providing information. Specifically in respect of land within the RTE area known to be contaminated**.

Throughout the Examination period Able sort to co-operate constructively with all parties. It cannot be disputed that Able provided a large quantity of information about its application during the examination, and it voluntarily initiated a public consultation on its revised compensation site proposals with a length and notice provisions equivalent to that required for further environmental information under the Infrastructure Planning (Environmental Impact Assessment) Regulations 2009**.** It therefore properly discharged its obligations to inform interested parties about its proposals and allow them to comment.

There are therefore no procedural or substantive grounds on which this application for costs should succeed. The applicant has failed to demonstrate that Able behaved unreasonably during the formal examination process; on the contrary, Able has simply responded in a manner that would be expected of a reasonable Applicant for a Development Consent Order, given the comments of various interested parties that only emerged during the examination process. Consequently, the costs applicant has not incurred any additional, unnecessary, and unforeseen expenses. We invite the Examining Authority to dismiss the application.

Yours sincerely

Bircham Dyson Bell LLP