

By Email and Post

Mr M Woods
Transport and Works Act Orders Unit
General Counsel's Office
Department for Transport
Zone 1/18
Great Minster House
33 Horseferry Road
London
SW1P 4DR

Solicitors and
Parliamentary Agents

Minerva House
5 Montague Close
London
SE1 9BB
DX: 156810 London Bridge 6
Switchboard 020 7593 5000
Direct Line 020 7593 5005
www.wslaw.co.uk

Our Ref: AMHG/10995/33
Your Ref: TWA 8/1/04

23 July 2013

Dear Sir,

Planning Act 2008

**Application for Able Marine Energy Park Development Consent Order
Harbour Master, Humber**

In our letter of 16 July we said we would write again about the prejudicial effect on the Harbour Master, Humber, and the interests he represents, of the compulsory acquisition of ABP's interest in the river bed and foreshore as proposed in the draft Order. This letter explains why that is and how particular problems may be resolved. We should make clear that in writing in this way we are seeking to demonstrate the practical effects of issues raised in the course of the examination stage. We also wish to assist the Secretary of State by drawing attention to practical solutions to these difficulties in the event that matters cannot be resolved by the grant by ABP of an underlease to the Applicant being made in advance of a decision on the application.

The interests represented by the Harbour Master, Humber are the functions, currently vested in ABP, of conservancy, navigation control, pilotage and similar functions of the statutory harbour authority for the river Humber. In this letter we will refer to ABP in that capacity as the conservancy authority, which is the description in Part 1 of Schedule 9 to the draft Order.

The separate points are not in order of importance.

Status quo

1. As the Secretary of State is aware, most of the river bed and foreshore of the river Humber is vested in the conservancy authority under a 999 year lease from the Crown, as successors in title to the Humber Conservancy Board, and before them the Humber Conservancy Commissioners. The Humber Conservancy Act 1868, by which the Commissioners were first constituted as a corporate body, provided for the grant of the lease. As a result, a proprietary interest in the river bed and foreshore within the conservancy jurisdiction has been an integral part of the conservancy undertaking since its inception. The measures actually taken to regulate activities that affect the river reflect this.
2. One aspect of this is that the holder of a works licence from the conservancy authority may be required to pay an annual fee, and, if he is an underlessee, also a rent. This will

allow for a contribution towards the conservancy authority's cost of maintaining the river to be recovered out of profits derived from the licensed rights and leasehold interest. This in turn reflects the terms of the conservancy authority's lease, which requires the conservancy authority to pay the Crown one third of the net profits it derives from its interest in the foreshore and river bed.

Limited scope of statutory controls

Problem

3. While the Humber Conservancy Acts 1852 to 1951, and other legislation, give the conservancy authority powers for the regulation of the river and the traffic in it, these 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. By way of example, if a licensed work in the river falls into disrepair, it is unlikely to be in breach of a licence condition, or in a state that enables the conservancy authority lawfully to carry out repairs, until it is in a serious condition. The operator might be at risk of a fine once that state has been reached, but would not have any contractual or other readily enforceable obligation to keep the works in good order such that the problem did not arise in the first place.

Solution

4. This problem is readily overcome at present by the conservancy authority granting leases of the land on which licensed works are to be placed. The normal requirements as between landlord and tenant allow for the tenants/operators of the works to be under contractual obligations—
 - (a) to maintain them in good condition,
 - (b) to allow inspections by the Harbour Master,
 - (c) regarding access across the foreshore to land adjoining the river so as not to interfere with other users,
 - (d) regarding uses of their land adjoining the river which might have an adverse effect on the river or other users.

Such obligations fill the statutory lacunae. They are also enforceable as between landlord and tenant more effectively, speedily and cheaply than can be done using the statutory route alone.

Financial implications – profit contribution to conservancy

Problem

5. On acquiring the conservancy authority's leasehold interest in the affected river bed and foreshore the Applicant would assume the obligation under the lease to pay one third of its net profits to the Crown. However, the cost of conservancy falling on the Applicant as respects the waters within its jurisdiction would be limited to conservancy for the purposes of its own port facility and would anyway be underwritten by the remaining two thirds of its net profits.
6. In the absence of some further provision none of that net profit would be available as a contribution towards the cost of general conservancy in those waters for the benefit of all river users. The conservancy authority would be left with that general obligation but without any of the cost being contributed to out of the profits being generated from the use of the river bed and foreshore.

Solution

7. Provision could be made in the Order to secure a contribution from the proposed port facility to the conservancy authority. The simplest way of doing so would be by way of rent payable under a lease from the conservancy authority.

Financial implications – guarantees, etc.

Problems

8. The Secretary of State will have formed his own view of Able's financial ability to implement the Order, not only to construct the proposed development but also to maintain the works throughout their life. We will not repeat what was said on this subject during the examination stage except as regards what is now article 14 of the draft Order. This was introduced during the examination as article 12A in Revision 4 of the draft Order dated 9 October 2012, just before the Specific Hearing Issue dealing with the funding statement on 17 October 2012. Article 14 requires guarantees or other security to be in place in respect only of compensation liability and liabilities to construct and maintain Work No. 5 (the compensatory environmental habitat). These guarantees must be provided before the commencement of (a) the authorised development and (b) the exercise of compulsory acquisition powers. Article 14 gives rise to the following difficulties that are relevant to this letter.
 - (i) The Secretary of State will have noted that at the 17 October 2012 Specific Issue Hearing the Applicant refused requests to provide any particulars of the proposed guarantees or other forms of security and would not give any assurance or indication as to their availability. This means that the Secretary of State will have to make a decision on the application without knowing whether the Applicant will in fact be able to procure guarantees or other security, whether on adequate terms or at all.
 - (ii) The Secretary of State may consider that guarantees or other security are necessary to underpin the Applicant's ability to fund the project. If he does, it will follow that the Order cannot properly be made until the Applicant has demonstrated that it can provide guarantees or other security on adequate terms.
 - (iii) Even if guarantees are not considered essential to the making of the Order, the Secretary of State will be concerned by the potential impact, on landowners and others involved in the use and development of the river, that will result from an Order that comes into operation in advance of guarantees or other security being available.
 - (iv) No guarantees are offered in respect of the cost of constructing and maintaining the authorised works other than Work No. 5. As article 14 stands, therefore, the Applicant is not offering any financial security as respects the construction and maintenance of the major part of the authorised development, including the works that are of concern to the conservancy authority.
 - (v) It follows that there will be no security against the cost of necessary removal or remediation works if the bulk of the very substantial works are left partially constructed or are constructed but not properly maintained. Should either of those things happen it is the conservancy authority that would be responsible for carrying out all necessary removal and remediation. In the absence of financial security for its benefit, the full cost would have to be recouped from dues payers i.e. river users. It must be uncertain whether there might also be some Crown liability (see below).
 - (vi) If the Applicant were to acquire the conservancy authority's leasehold interest and subsequently default, the Crown would be left as the sole owner of the river bed

and foreshore. As an owner is responsible for nuisances arising on his land, the Crown Estate would also appear to be at financial risk in the event of removal or remediation being required. Short of voluntary payment or litigation, it is not clear to the Harbour Master how this liability might translate into an obligation to reimburse the conservancy authority's costs.

- (vii) Even if the scope of guarantees were extended, neither article 14 nor the Applicant provides any indication of the nature or adequacy of the guarantees on offer. Approval by the local planning authority does not provide any assurance. It must also be inappropriate so far as relating to compensation, where the appropriate parties to vet any guarantees are the affected landowners. That is what would happen in a commercial context.

Solutions

9. A lease allows for a level of due diligence and financial provision against default. Arrangements for lease guarantees and deposits or alternative forms of security are normal in commercial leases. Such arrangements can also cater for insolvency. The Secretary of State will appreciate that a right of recovery is no help if the person liable to pay is insolvent.
10. Provision in a lease would of course only operate to protect against tenant's default under the lease. The separate issue of the Applicant's financial ability generally (i.e. not just as a tenant) to construct, complete and maintain the proposed development could be addressed by the Applicant being required to provide the necessary guarantees or other security before the Order is made.
11. The Secretary of State could defer making the Order until the Applicant has provided evidence of having procured adequate guarantees or other security for performance. An alternative would be to make the Order but provide that it does not come into operation until such evidence has been provided to the Secretary of State's satisfaction.

Insolvency

Problem

12. In the event of insolvency the conservancy authority and the Crown can expect the financial implications noted above. The works (if they exist) will be left ownerless. Due to the Applicant's corporate structure it must be unlikely that there will be reasonable assets within the UK that might be available to creditors, other than the Marine Energy Park itself.

Solution

13. A lease on normal commercial terms will include provision allowing for termination by the landlord on insolvency occurring. If the lease is an underlease granted by the conservancy authority that will enable restoration of the current status quo so far as concerns a proprietary interest by the conservancy authority.

Assignment/sub/lease

14. Article 13 allows for the transfer or lease of all or part of the benefit of the Order including, it appears, interests in land. The Secretary of State's consent would be required. It seems clear that this would not supersede any right of the Crown to approve a disposal of a leasehold interest. Notwithstanding the need for consents, however, the ability to dispose of an interest in the river bed and foreshore could compound the difficulties caused by the Applicant's acquisition of the interest itself.

Extent of Applicant's property interest

Problem

15. The draft Order would give the Applicant powers of compulsory acquisition over the river bed and foreshore in front of plots nos. 08001 and 09001, the land referred to as 'the Triangle'. The Secretary of State will have seen the argument concerning the effect of compulsory purchase on any development of the Triangle by ABP. That is a major issue for the development of port facilities on the Humber which will ultimately be decided by the Secretary of State. The conservancy authority and the Harbour Master, Humber, must be – and are – entirely neutral as to whether and by whom the Triangle should be developed. It follows that they cannot pre-empt any decision of the Secretary of State.
16. For this reason the conservancy authority is unable to grant the Applicant an underlease of the river bed and foreshore in front of the Triangle until such time as a decision is made that the land is not to be available in connection with a separate use of the Triangle; or alternatively until otherwise directed by the Secretary of State.

Solution

17. The Secretary of State's decision on the application may decide the question of water access to the Triangle. This would enable the conservancy authority's grant of an underlease to reflect that decision. A possibility is for the Order to provide for a grant to be deferred pending decision on any other relevant application.

Next steps

18. As indicated in our letter of 16 July, we believe the pending negotiations on the grant of an underlease should reach a successful conclusion. However, if the Secretary of State were unhappy about deferring the period for making a decision on the application it would be competent for the Order to achieve the solutions outlined above. This could be done by the Order, for example–
 - (a) limiting the interests to be acquired in the relevant areas of river bed and foreshore to a new underlease from the conservancy authority,
 - (b) providing that the underlease is to include provisions–
 - (i) of the sort described in paragraph 4 above;
 - (ii) providing for a commercial rent (which will address the need for a conservancy contribution mentioned in paragraphs 5 to 7 above);
 - (iii) requiring the provision by the Applicant of guarantees or other security against performance of its obligations under the underlease, such guarantees or security being in both cases acceptable to the conservancy authority;
 - (iv) including provision for termination and re-entry on tenant default;
 - (v) preventing underletting or assignment in whole or in part without the conservancy authority's consent, not to be unreasonably withheld but which may be given subject to conditions for the protection of the functions and interests of the conservancy authority and the Harbour Master, Humber; and

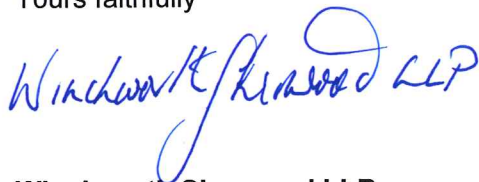
- (c) making whatever decision the Secretary of State considers appropriate regarding the underletting or potential underletting, of the river bed and foreshore in front of the Triangle.

As regards (c) above, the Secretary of State will recall the Harbour Master's suggestion at the Compulsory Acquisition Hearing on 17 October 2012 that the conservancy authority could agree to grant the Applicant an underlease of this land, The agreement would be conditional on the operation of the underlease not conflicting with the use or development of the Triangle as decided upon by the Secretary of State.

In the event that the terms of the underlease could not be agreed the Order could provide for them to be settled by arbitration, consistent with dispute resolution generally as proposed in the Order.

We hope this may assist the Secretary of State on making a decision. A copy has gone to Bircham Dyson Bell for the Applicant.

Yours faithfully



Winckworth Sherwood LLP

DT 020 7593 5005
DF 020 7593 5199
agorlov@wslaw.co.uk