Osborne Clarke

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/O18389634.1/SAMF

Your reference

9 August 2013

Dear Minister,

Proposed Able Marine Energy Park, Killingholme, North Lincolnshire (AMEP)

We write with regard to the above on behalf of our client Associated British Ports.

We are, of course, aware of your announcement of 26 July delaying your decision on the AMEP proposal for a further month. That announcement has, however, raised a number of concerns which we would ask you to address. In so writing to you, however, we should make clear at the outset that our client does not object to the principal of the AMEP development. It does, however, object to the application of a consenting process that it considers to have been incorrectly and inadequately engaged – entirely contrary to the fundamental principles upon which the Planning Act NSIP concept was originally predicated.

As you will be aware, when the Planning Act 2008 came into force, section 107 of the Act placed a duty upon the Secretary of State, when amending the timetable for decisions, "*to notify each interested party of what has been done and of the reasons for doing it*" - formerly s 107 (7) (a) of the Act.

That obligation was to an extent duplicated by the duty also lying upon you to - "*lay before Parliament a report explaining what has been done*" - s107 (7) (b) of the Act.

The Localism Act 2011 has, of course, now removed the duplication so that the only statutory duty now placed upon the Secretary of State, should it be necessary to extend the period for determination of an NSIP decision is, in accordance with the newly amended section 107, to make a statement to the relevant House of Parliament.

Whilst an eminently sensible removal of duplication, the difficulty that our client faces – and we suspect we are not alone – is that whilst your original notification dated 21 May delaying your decision on the AMEP proposals provided full reasons, your latest notification does not. This means that with both Houses of Parliament no longer in session, none of the parties that participated in the examination of the AMEP proposals will learn of the reasons for this further extension until you make your statement to Parliament and the earliest that such a statement could be made is we believe the 13 September when the House of Commons returns, the House of Lords not returning until the 8 October. It, therefore, follows that if you are able to issue your decision on 28 August – and we appreciate that nothing is certain – the reasons for the further extension will not actually be made known until, at the earliest, some two weeks after the issue of your decision. On that basis, and in the

interests of transparency, which is after all one of the fundamentals of the new NSIP process, we would urge you to make public your reasons for agreeing this further delay at the earliest opportunity.

In the context of this request, your earlier letter announcing the first extension stated that the reason for the delayed decision was - *"to allow the applicant to negotiate terms of the lease of land that they require for the project with The Crown Estate who are the freehold owners of the land. This is to ensure compliance with Section 135 of the Planning Act 2008 and The Crown Estate's statutory duties."*

It may be that the reason for this further extension is that The Crown Estate have not yet given their consent under section 135 of the Act. My client of course is not party to the negotiations between the applicant and The Crown Estate, but if that is indeed the case then we would suggest, entirely in the interest of transparency, that all of the interested parties should be so informed.

If on the other hand, however, there are additional reasons for your decision, then, as we have noted above, bearing in mind the timescale that now faces you in the light of the fact that neither House of Parliament is in session at present, we do believe that those additional reasons should be published.

In so urging you to publish those reasons, however, we would at the same time draw your attention to the following:-

1. ***Proprietary Interests*** – Without in any way wishing to duplicate information already before you, you will recall that we did write to you on behalf of our client on the 29 May drawing your attention to the fact that although your original decision to delay your determination was based on the need for the applicant to secure the consent of The Crown Estate under section 135 of the Act, the land over which that consent was to be secured was already subject to a lease granted by The Crown Estate to the Humber Conservancy Commissioners, the benefit of which has now passed to ABP in its capacity as The Humber Conservancy Authority.

   As we pointed out very clearly in our earlier letter, at the NSIP hearing evidence was given on behalf of the Conservancy Authority by the Humber Harbour Master, Captain Philip Cowing represented by his legal advisor, Mrs Alison Gorlov of Winckworth Sherwood. Following the close of the CPO hearing and on the basis of the evidence given to the Panel, it was the understanding of all of the parties that the Harbour Master was prepared to enter into an Agreement in respect of the foreshore and riverbed in front of our client's "Triangle Site" with either Able or ABP – depending on which party secured the necessary consents for the development of the "Triangle Site". As we made very clear in both our letter to you of the 29 May and indeed our earlier letter to the Secretary of State of the 16 May, on the basis of that compromise proposed by the Humber Conservancy Authority, which was agreed and accepted by the advocate for Able, Mr Gregory Jones, our client did not offer any further evidence as to its position regarding the river bed, the riparian rights that it enjoys over that area of land and indeed its opposition to any compulsory acquisition of the Conservancy Authority's lease.

   If during the course of the last few months, however, as part of the negotiations that are taking place between The Crown Estate and the applicant, the applicant has now changed its position so that it no longer accepts the entirely equitable proposal put forward by the Harbour Master to the Panel at the NSIP hearing, then subject of course to the way in which you intend to proceed in the light of the applicant's fundamental change in position, our client will have no choice but to ask for the hearing to be re-opened so that the evidence that was to an extent curtailed by the Panel at the hearing can actually be placed before you and tested.

2. ***Evidence before the Hearing*** – You may be aware from correspondence and representations made by other interested parties that the evidence given by the applicant in relation to the AMEP project to a very large extent was allowed to "evolve" during the course of the NSIP hearings. Indeed, it was allowed to evolve to such an extent that by the end of the hearings, the environmental statement and supporting documentation originally submitted by the applicant had been fundamentally amended. This process of reconsideration and revision continued throughout the hearing despite objections from a number of interested parties including our client ABP.

In the closing submissions submitted on behalf of Associated British Ports (23 November 2012, at paras. 6 to 8), the concern was expressed that the AMEP application –

> *"has been promoted in a manner than runs contrary to both the spirit and the letter of the Planning Act 2008… This has created an almost impossible situation for the Panel."* (Para 6)
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> *"The procedure of the 2008 Act is predicated on the basis that an application for a Development Consent Order will be "front loaded". Indeed, the procedure is based on an applicant subjecting development proposals to a detailed process of consultation and amendment prior to submission. It is only if an applicant has complied with these "front loading" requirements that an examination under the 2008 Act can provide a fair and effective assessment of the development proposed. (Para. 7)*
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> *There has been a fundamental failure on the part of the applicant, such that the essence of the statutory procedure has been absent. This has resulted in substantial prejudice not only to ABP, but to other organisations interested in the applicant and also to the general public. The examination has been fundamentally deficient. It has neither been fair nor effective."* (Para 8)

ABP's closing statement continues to the effect that the applicant –

> *"Only has itself to blame for this circumstance. Rather than devote the necessary time and resources to preparation and refinement of proposals at the appropriate stage of the process (i.e. prior to submission) it sought consent for development which the examination has revealed to be fundamentally flawed. Faced with the inadequacy of its proposals the applicant has then sought to use the examination as a vehicle to redesign its development and in so doing, has time and again introduced important changes to the project."* (Para 10)

You will be aware that in our letter of the 20 November, we did ask on behalf of our client that the examination be extended for a period of 18 months to enable the applicant's proposals *"to be properly re-formulated and subjected to the necessary consultation and examination."* In support of that application and as detailed in our closing submission, we drew your attention to the fact that in our view the application had:-

(i) Employed an incorrect consenting procedure (Para 14(a));

(ii) Submitted an environmental statement that was manifestly inadequate (Para 14(b));

(iii) Failed to provide an assessment of AMEP as a general cargo port (Para 14(c));

(iv) Not been subjected, despite a formal request to ….. a specific hearing to address the relationship between the proposed development and the environmental statement which purported to assess it (Para 14(d)); and

In the light of the above, we pointed out that in consequence *"of the deficiencies of the ES, the applicant has sought to make good the position by producing what it termed 'Supplementary Environmental Information' (SEI) which it insisted was not part of the ES. This SEI was drip-fed progressively through the examination almost to its very end, and was provided in such substantial volumes that analysis of it was not possible within the timeframe of the examination for the public to absorb it, reflect on it and comment."*

We will not trouble you with the other points noted in the closing submissions. They are before you. We would place on the record, however, our client's concern that since the close of the examination the applicant has, we understand,

(i) continued to amend and change the project as originally submitted to the effect that it has sought planning permission in relation to its proposed compensation package from East Riding of Yorkshire Council – a Council which had no involvement with the AMEP project and did not attend any of the hearings and which was, therefore, being asked to grant consent for a critical part of a project about which it knew nothing;

(ii) been negotiating environmental/conservation agreements with Natural England which have not been made available to the other interested parties;

(iii) proposed the "realignment" of its mitigation proposals for AMEP in the light of a consent apparently given for a related Logistics Park development on the south bank of the Humber adjacent to the proposed AMEP site without giving notice of this potential amendment to the project to the interested parties; and

(iv) placed before the local planning authority a proposal for site preparation for AMEP even though no decision on the NSIP proposal has yet been made by yourself.

In the light of the above, we fail to see how, at this stage in the process, you can be confident that any recommendation made by the Panel and any decision now to be made by yourself can be based on the evidence that was placed before the Panel at the NSIP hearings some eight months ago. On that basis, we query whether you are actually in a position to issue a decision without re-opening the hearing for post-examination consultation on all of the new material that has been produced since the close of the original examination, at the same time allowing the interested parties to comment fully on what should now be viewed as a substantially amended application and environmental statement. We would suggest that this could be best achieved by requesting the applicant to submit an amended environmental statement, incorporating all of the supplemental environmental information produced during the course of the examination, together with other changes and additional information introduced after the close of the examination.

Yours faithfully

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