

## MINUTES OF EVIDENCE

taken before

The Chairman of Committees, House of Lords

and

The Chairman of Ways and Means, House of Commons

on the

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ABLE MARINE ENERGY PARK DEVELOPMENT  
CONSENT ORDER 2014

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Thursday 3 April 2014

in Committee Room 3A

Present:

<b>Lord Sewel</b>	Chairman of Committees
<b>Lindsay Hoyle MP</b>	Chairman of Ways and Means

In attendance:

<b>Nicholas Beach</b>	Counsel, House of Lords
<b>Peter Brooksbank</b>	Counsel, House of Commons

**Ian McCulloch** (of Bircham, Dyson, Bell LLP) appeared as agent for Able Humber Ports Ltd, the applicant for the order (memorials 1A and 2A)

**Paul Irving** (of Winckworth Sherwood LLP) appeared as agent for Associated British Ports, the petitioner against the order (petitions 1 and 2)

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Petitioners	Agent
1. Associated British Ports [ <i>General Objection</i> ]	Paul Irving
2. Associated British Ports [ <i>Amendment</i> ]	Paul Irving

*Ordered at 10.35 am:* That the Parties be called in.

**LORD SEWEL:** Good morning, everybody. We will resume our hearing. Mr Irving, we would like to hear your arguments, please.

187. **PAUL IRVING:** Thank you very much. Mr McCulloch drew attention to the fact that the letter from the land agency included in the bundle did not have the plan attached to it. We have identified the plan now, and if I could ask that to be circulated so it can be added to your bundle, to go at Tab I I with the letter from the land agents. It relates to the triangle land, which is the land that we are talking about.

188. Could I begin, Sirs, by making a couple of points in response to issues raised at the end of yesterday's hearing? I would like to make it clear at the outset that ABP is not simply using SPP as a loophole to delay the process. The triangle land is the last vacant land with deepwater frontage available for development of the port, and its loss is of critical importance to ABP's statutory undertaking. The petition for amendment does not propose wrecking amendments but is an attempt to put forward a compromise that would allow the AMEP scheme to proceed and allow ABP to develop its own facility. As to why we have submitted a petition of general objection as well as a petition of amendment, a point raised by Mr McCulloch in paragraph 4 of his skeleton argument and mentioned in your letter, we are simply following the advice contained in the House of Lords petitioning guidance, which states on page 5 that, if you do not wish a special procedure order to go ahead, if it were not, "amended in the way that you suggest ... you must present two separate petitions, one Petition for Amendment and one Petition of General Objection". That is our position, and why a petition of general objection was submitted as well. However, we have repeatedly made the point that this is not our preferred option, which would be simply for the order to be amended in the way that we suggested in our petition for amendment.

189. Turning then to the memorials, I will begin with Mr McCulloch's first issue that the triangle land was not acquired for the purpose of ABP's statutory undertaking, and that therefore ABP has no locus to be heard at all. The first point to note in this context is that whether or not the triangle was acquired by ABP for the purpose of its statutory undertaking has already been considered both by the examination panel and by the Secretary of State. Both concluded that it was acquired for the purpose of ABP's statutory undertaking. ABP made submissions to support their reaching that conclusion, and they were not challenged. This was, of course, one of the matters relied on for the Secretary of State's decision that the order is subject to SPP. I make no further comment on whether it is open to you to challenge the decision of the Secretary of State that this was one of the grounds that made the order subject to SPP and would simply note that, if the decision were to be challenged at this stage, it would require compelling evidence to show that the decision was wrong, and no evidence has been provided for this.

190. Leaving that aside, there can be no reasonable doubt that this land was acquired for the purpose of the British Transport Docks Board's undertaking. We think that it is a little unreasonable to expect ABP to produce board minutes of some 40 years ago as evidence for its statutory predecessor's reasons for acquiring the land. We say that it must be a clear presumption that, if a statutory harbour undertaking acquires land, particularly land with a riverside frontage which was owned for port development, it is acquiring it for the purpose of its statutory undertaking. In fact, we go rather further than that and say that it could not have been lawfully acquired for the purpose of general development rather than its primary port functions. Mr McCulloch took you through the Transport Act 1962 in Tab 9, and argued that in the circumstances of this case Section 11 of that Act could have authorised the acquisition of land for general development purposes. With all due respect, we think that this must be incorrect—and I must turn back to Tab 9 here, because Section

11(4) states that the British Transport Docks Board can acquire land for development purposes only in the limited circumstances that this is “adjoining land” to land that it already owns, and can be developed with that land.

191. There is no such land adjoining the triangle, and therefore we say that it could not have been lawfully acquired for general development purposes. That is the effect of the proviso in subsection (4), which limits British Transport Docks Board’s compulsory acquisition powers for general development purposes. Nor, for that matter, could it have been acquired for general agricultural use—the use to which it has in fact been put ever since. Our point is that it was not acquired for that purpose, but it was used for agricultural purposes so as to not carry out development on it which could prevent future port development, which was the purpose for which it was acquired. We do not understand for what purpose other than that of its statutory undertaking it is being suggested that BTDB acquired, or could have acquired, the land.

192. The only argument put forward against this view is that ABP did not in fact develop the land for port uses for 47 years. On that, we would simply point out that it is common practice for statutory railway and harbour undertakers, given the geographical constraints on the land which they can properly use for the purpose of their undertaking, to acquire land on the basis that it should be reserved to be used for an undertaking as and when the need arises. They need to take a long-term view, and there are many examples of parcels of land throughout the country that have been acquired by statutory undertakers on the basis that they will be needed some time in future.

193. **LINDSAY HOYLE MP:** Could I just stop you there? What is a reasonable timescale, if 50 years is not?

194. **PAUL IRVING:** It could be any length of time. Some land has been held much longer than that.

195. **LINDSAY HOYLE MP:** No, I am asking what your view is. Have you got a view? Would you say 100 years, 20 years, 200 years?

196. **PAUL IRVING:** It could be 100 years, it could be 90 years; there is land of ABP that has been held for 90 years for future port use.

197. **LINDSAY HOYLE MP:** And may never be used.

198. **PAUL IRVING:** It may never be used if the relevant considerations do not apply. Another example is Dibden Bay in Southampton, which was acquired and retained and the first unsuccessful attempt was made to seek powers to develop it some 30 years after it was acquired. It is still retained for future port development some years after that. There is land adjoining the Hull docks which has been retained for port development for some 90 years; that was the land to which I was referring.

199. **LINDSAY HOYLE MP:** Just on that point so that I am clear, on land that has been held 90 years for future port expansion purposes, the fact is that, if nobody has applied, it would always be retained for that purpose. Presumably, if nobody has ever wanted that land we would never know whether it would be handed over or not, would we—if nobody has tested the need for that land for another purpose?

200. **PAUL IRVING:** I am not sure that I quite follow.

201. **LINDSAY HOYLE MP:** If it has been retained for 90 years and is for port expansion but nobody has ever applied to put a supermarket, a car factory, or whatever, it is a bit of a red herring, is it not?

202. **PAUL IRVING:** That in itself would suggest that it is still being held for that purpose.

203. **LINDSAY HOYLE MP:** If nobody wanted it for anything else, it is just being held because there is no other purpose for it.

204. **PAUL IRVING:** Going back to the question of for what purpose it was acquired—

205. **LINDSAY HOYLE MP:** I am not disagreeing with that. I am just saying that we should follow the example of land being held for 90 years, because if nobody has applied to do anything else other than it, of course it would be retained for that purpose.

206. **PAUL IRVING:** Yes.

207. **LINDSAY HOYLE MP:** Okay, that is fine.

208. **PAUL IRVING:** Yes, I would not argue with that. As we noted in our submission, the intention to retain for future use is consistent with its designation for port development with a local authority local plan. ABP has from time to time considered various proposals for redevelopment, but has not taken them forward until this most recent proposal for the Immingham Western Deepwater Jetty, which it first consulted on in 2010. But ABP has treated it throughout this period as land that it could use for port development, and we consider that there are no grounds on which it could reasonably be disputed. I therefore turn to the second issue of whether ABP's locus could or should be restricted. I think there are two issues here: first, the general point as to whether ABP's locus or right to be heard should be restricted to matters relating to compulsory acquisition of its land—and, secondly, if it should be, what this means for issues raised in ABP's petition. I will take those two separately.

209. On the first point, the general issue, our position remains as set out in the written submission. ABP's position is that it is open to a petitioner who has established locus standi to object to any provisions of the order that affect its interests. The scheme under the 1945 Act is framed to enable the order to be considered by Parliament in its entirety; where Parliament has intended that this position should be qualified or restricted, it has provided for this expressly. I think that Mr McCulloch referred yesterday to how this was



done by the Transport and Works Act. More recently, Parliament has amended the Act through the Growth and Infrastructure Act 2013 to restrict the scope of Parliament's consideration more generally. However, the Planning Act itself did not amend or restrict the statutory regime of the 1945 Act or the normal practice of Parliament, and we say that Section 128 of the Planning Act should not be interpreted as having done so by implication. The law applicable to SPP has been changed by the 2013 Act precisely to address that point, and the fact that Parliament felt it necessary to change the law in such a way as to narrow the scope of Parliament's consideration in relation to SPP itself emphasises the current position. We say that Section 128 sets out the circumstances in which the order was subject to SPP, rather than limiting Parliament's consideration of the SPP order. We think this is supported by the Explanatory Notes to the 2008 Act, of which there is an extract in Tab 18 of your bundle, which explains Section 128 as specifying the, "circumstances in which an order granting development consent that authorises the compulsory purchase of land belonging to a local authority or statutory undertakers is to be subject to special Parliamentary procedure". *Erskine May*, at page 958, comments on locus standi in the context of Private Bills, and we say that the principle applies equally in the case of SPP. "Generally speaking it may be said that petitioners are not entitled to locus standi unless it is proved their property or interests are directly and specifically affected by the Bill.

210. As a corollary, it is accepted as an established principle that the owners of the land proposed to be compulsorily taken should always be heard against both the preamble and the clauses of the Bill." ABP falls within this principle, and a landowner can challenge not just the taking of the land but the whole order. As the quoted passage makes clear, those whose land is required are entitled to be heard not just against the clauses of the Bill but against the preamble.

211. The principle that a person whose land is to be taken can present evidence that the public benefit of the acquisition does not outweigh the detriment to, in this case, its own statutory undertaking, has traditionally been asserted by Parliament. That principle can be properly respected only if ABP can challenge all aspects of the order which affect its statutory interests. We appreciate that on the Rookery South order, the special report of the two Chairmen took a different interpretation of the Act, but they did nevertheless decide that it should be a matter left to the Committee to decide. We would certainly support the view that this is matter that should be left to the Committee.

212. Turning to the second issue, if our view is not accepted, the question then arises of what this actually means in terms of the petitions—in other words, if we have to adopt a narrow view of the locus of the petitioner. Mr McCulloch has helpfully set out in his note which parts of the petition he thinks should fall away if the narrow view is accepted, that ABP can be heard only on matters relating to the acquisition of its land. First, he says that ABP cannot object to the compulsory acquisition or interference with the foreshore fronting on the triangle, since it owns this land in a different capacity. We accept and have made it clear throughout that ABP leases the foreshore in a different capacity. However, we say that the triangle land, and ABP as petitioner, enjoy riparian rights over the foreshore—that is, the right of a landowner to get access from the water to the land. This is a legal property right. Mr McCulloch did not question the existence of these rights or that ABP should have the right to object to its loss, but he did, I think, suggest that they would be acquired through the acquisition of the triangle itself rather than through the compulsory acquisition of the foreshore. That may be in practice what happens, but the fact remains that the order would authorise the extinction of these rights through the compulsory acquisition of the foreshore, and that is what would happen if for any reason they chose not to acquire the triangle but to leave it landlocked. ABP must be entitled to object, therefore, to the

exercise of compulsory purchase powers over the foreshore. The point is that, whatever way the purchase of its riparian rights happens, ABP's petition can and should relate to the rights that it enjoys to obtain access to the triangle from the water as well as the acquisition of the triangle itself, even on a narrow interpretation of the scope of its locus.

213. Secondly, I note that Mr McCulloch suggests that paragraphs 24 to 26 of the petitions, which relate to Able's funding, are not matters on which ABP can be heard. We do not understand this point, since the ability to finance a project relates very much to the justification for the compulsory purchase of land. That is stated in all the relevant guidance in relation to compulsory purchase. If I may, I will just read a sentence from an extract from the government circular 06/2004, which is the circular dealing with compulsory purchase. In paragraph 19, it says: "If an acquiring authority does not have a clear idea of how it intends to use the land which it is proposing to acquire, and cannot show that all the necessary resources are likely to be available to achieve that end within a reasonable time-scale, it will be difficult to show conclusively that the compulsory acquisition of the land included in the order is justified in the public interest". Issues of funding have always been recognised as a relevant part of the justification for compulsory purchase of land, and we say that this is therefore a matter which the petitioner could properly address, even on a narrow view of our locus.

214. Thirdly, Mr McCulloch referred to the paragraphs dealing with the Killingholme branch railway. While we maintain that the use of this railway could greatly benefit the development of the triangle, particularly if enhanced through the Killingholme loop proposals, which we explained in the petition, we accept that ABP has no property interest in this railway, and on a narrow view of the scope of the petition—that is, that it must relate to the acquisition of ABP's land—this would fall outside it. However, we think that this underlines why a wider view should be taken of the permissible scope of a petition.

215. The object of Section 128 is to protect statutory undertakers' ability to use their land. They should therefore be able to challenge or object to matters that affect the use of the land, even if they do not directly relate to its acquisition.

216. Turning briefly to the final two points made in the memorials, it is suggested that you should have regard in making your decision to the policy underlying the repeal of Section 128 and the protection that Section 128 gives to statutory undertakers' land. We would simply reiterate that this is not relevant to your considerations, which must be on the basis of the law preceding that change and the policy that underlines that law—that is, the need to give special protection to undertakings of statutory undertakers and the enjoyment of land required for that purpose.

217. On the second point, that it was inappropriate to reconsider issues already considered by the Secretary of State, as already explained, the purpose of SPP is to allow reconsideration by Parliament of an earlier decision made by the Secretary of State, in so far as it is necessary to do so to protect the relevant issue protected by the special parliamentary procedure process.

218. We would stress that ABP has deliberately not revived all the objections that it pursued at the hearing on the DCO—for instance, the objections that were made to the order on environmental grounds—but has restricted itself to those that relate to the purpose of the protection of its statutory undertaking. That was all I intended to say by way of submission, and I am very happy to take questions.

219. **LORD SEWEL:** Thank you very much indeed. Do you have any questions?

220. **LINDSAY HOYLE MP:** No.

221. **LORD SEWEL:** Mr McCulloch, do you briefly want to respond to anything that Mr Irving said—and perhaps I could underline briefly.

222. **IAN MCCULLOCH:** It would be wrong for me just to try to repeat what I argued yesterday, but I would like to make two or three brief comments. On the issue of whether the amendments can reasonably be described as wrecking amendments, Mr Irving submits that these are really to facilitate a compromise. I think the compromise that may be contemplated here is one for a different scheme, in reality—not the scheme that is effectively being authorised by this order but a different, scaled-down version of it in some way, which would have serious implications in respect of the habitats directive and environmental impact assessment.

223. It being an open question at this stage how different the position would be with a compromised scheme, Able's position is that these amendments are not merely to achieve some satisfactory result for both parties; they endanger the scheme that has been authorised by the Secretary of State.

224. On the question of funding, I think it is reasonable to say that this was an issue which ABP pursued at the earlier stages of this order, and the Secretary of State was effectively satisfied on the matter.

225. ABP took measures to satisfy him, providing, for example, for the parent company to provide a guarantee; there is an article in the development consent order about the local authority being satisfied about financial guarantees. So we feel that that matter has already been dealt with and considered properly by the Secretary of State in determining that these powers of compulsory purchase should be granted.

226. Lastly, if I may, on the question of riparian rights, which pertain to the land that is being acquired compulsorily, Mr Irving argues that these are necessary for ABP as a port operator. In either event, what mystifies us is what interest ABP can have in these rights to the access to the waterway if the triangle is being acquired compulsorily.

227. In that case, any rights that pertain to that land go with that land as part of its compulsory purchase. Mr Irving suggests that they become extinguished, but I do not accept that. I believe that the rights would inure to the ownership of the triangle land, whoever is the owner. If Able is acquiring that land, those rights go with that land to the owner.

228. I offer that as my understanding of the position, although, of course, all these matters may require further legal analysis. I do not think that I have anything else to say by way of response.

229. **LORD SEWEL:** Thank you Mr McCulloch. Do you want to have a last shot, Mr Irving?

230. **PAUL IRVING:** Just by way of explanation to Mr McCulloch's final point, as I obviously did not explain the point clearly when I made it in my submission, my point was simply here that the order authorises compulsory acquisition of the triangle land. It also authorises compulsory acquisition of the foreshore.

231. If Able exercises the compulsory purchase powers to acquire the triangle land, it will acquire the riparian rights with that land. But it is perfectly possible for Able to decide not to acquire the triangle land, in which case it will be necessary for it to extinguish those riparian rights that exist over the foreshore.

232. Therefore we have to object to the compulsory acquisition of the foreshore itself. That was the point that I wished to make.

233. **LORD SEWEL:** Okay. Right, well thank you very much. We will now have to go into private session to deliberate on the points that we have heard. It might be useful for you to wait outside

234. I think that we will reach a decision on whether we can make a decision today fairly quickly, and let you know that. If we do reach a decision today, we will also let you

know. We may have to give it further consideration, so if you would like to withdraw, I would be grateful.

The Hearing adjourned from 11.03 am until 11.26 am.

235. **LORD SEWEL:** We have come to a decision. I will read it out. We find that the petitions are proper to be received, and that petition 1 is a petition of general objection and petition 2 is a petition for amendment.

236. We remain of the view that Section 128 of the Planning Act should be construed narrowly. However, we accept, as we did in Rookery South, that the lack of legislative consistency muddies the waters and that therefore we should not direct a Joint Committee to opt for one interpretation or another, but we strongly recommend that the Joint Committee adopt the narrow approach by focusing on the issues of compulsory purchase of special land.

237. In addition, we are of the view that it may well be in the interests of all the parties that they resolve any outstanding issues among themselves timeously. That is the decision. We adjourn the Committee. Thank you very much.

Public session adjourned at 11.28 am.