MINUTES OF EVIDENCE

taken before

The Chairman of Committees, House of Lords

and

The Chairman of Ways and Means, House of Commons

on the

ROOKERY SOUTH (RESOURCE RECOVERY FACILITY) ORDER 2011

Together with the text of letters between the Chairmen, the Department of Energy and Climate Change and two of the agents for the petitioners

Thursday 8 March 2012

in the Thatcher Room, Portcullis House

Present:

Lord Brabazon of Tara	Chairman of Committees
Lindsay Hoyle MP	Chairman of Ways and Means

In attendance:

Nicholas Beach	Counsel, House of Lords
Peter Brooksbank	Counsel, House of Commons

Alastair Lewis (of Sharpe Pritchard) appeared as agent for Central Bedfordshire Council and Bedford Borough Council (petitions 36-39)

Sue Clark (parish councillor) appeared as agent for 23 parish and town councils (petitions 1-34)

Alison Ogley (of Walker Morris Solicitors) appeared as agent for Waste Recycling Group Limited, WRG Waste Services Limited and Anti-Waste Limited (petition 35)

Paul Thompson (of Bircham Dyson Bell) appeared as agent for the Secretary of State for Energy and Climate Change

Alison Gorlov (of Winckworth Sherwood) appeared as agent for Covanta Rookery South Ltd (applicant)

petitioners	Agent
1. Ampthill Town Council [*General Objection*]	Sue Clark
2. Aspley Guise Parish Council [*General Objection*]	Sue Clark
3. Aspley Guise Parish Council [*Amendment*]	Sue Clark
4. Aspley Heath Parish Council [*General Objection*]	Sue Clark
5. Brogborough Parish Council [*General Objection*]	Sue Clark
6. Brogborough Parish Council [*Amendment*]	Sue Clark
7. Cranfield Parish Council [*General Objection*]	Sue Clark
8. Cranfield Parish Council [*Amendment*]	Sue Clark
9. Flitwick Town Council [*General Objection*]	Sue Clark
10. Harlington Parish Council [*General Objection*]	Sue Clark
11. Hockcliffe Parish Council [*General Objection*]	Sue Clark
12. Houghton Conquest Parish Council [*General Objection*]	Sue Clark
13. Houghton Regis Town Council [*General Objection*]	Sue Clark
14. Hulcote and Salford Parish Council [*General Objection*]	Sue Clark
15. Hulcote and Salford Parish Council [*Amendment*]	Sue Clark
16. Husborne Crawley Parish Council [*General Objection*]	Sue Clark
17. Husborne Crawley Parish Council [*Amendment*]	Sue Clark
18. Kempston Town Council [*General Objection*]	Sue Clark
19. Leighton-Linslade Town Council [*General Objection*]	Sue Clark
20. Lidlington Parish Council [*General Objection*]	Sue Clark
21. Lidlington Parish Council [*Amendment*]	Sue Clark
22. Marston Moreteyne Parish Council [*General Objection*]	Sue Clark
23. Marston Moreteyne Parish Council [*Amendment*]	Sue Clark

24. Millbrook Parish Meeting [*General Objection*]	Sue Clark
25. Millbrook Parish Meeting [*Amendment*]	Sue Clark
26. Ridgmont Parish Council [*General Objection*]	Sue Clark
27. Ridgmont Parish Council [*Amendment*]	Sue Clark
28. Stewartby Parish Council [*General Objection*]	Sue Clark
29. Stewartby Parish Council [*Amendment*]	Sue Clark
30. Toddington Parish Council [*General Objection*]	Sue Clark
31. Woburn Parish Council [*General Objection*]	Sue Clark
32. Woburn Sands Town Council [*General Objection*]	Sue Clark
33. Wootton Parish Council [*General Objection*]	Sue Clark
34. Wootton Parish Council [*Amendment*]	Sue Clark
35. Waste Recycling Group Limited, WRG Waste Services Limited and Anti Waste Limited [*Amendment*]	Alison Ogley of Walker Morris Solicitors
36. Central Bedfordshire Council [*General Objection*]	Alastair Lewis of Sharpe Pritchard
37. Central Bedfordshire Council [*Amendment*]	Alastair Lewis of Sharpe Pritchard
38. Bedford Borough Council [*General Objection*]	Alastair Lewis of Sharpe Pritchard
39. Bedford Borough Council [*Amendment*]	Alastair Lewis of Sharpe Pritchard
Memorialists	
The Secretary of State for Energy and Climate Change (represented by Paul Thompson of Bircham Dyson Bell	against petitions 1 to 39 inclusive
Covanta Rookery South Limited (represented by Alison Gorlov of Winckworth Sherwood	against petitions 1 to 39 inclusive

Ordered at 10.15 am: That the Parties be called in

1. **Lord Brabazon of Tara:** Good morning, ladies and gentlemen. First, I would like to introduce us. I am Lord Brabazon, Chairman of Committees in the House of Lords. On my left is Mr Lindsay Hoyle, Chairman of Ways and Means in the House of Commons. This is a joint operation between the two Houses. On my right are Peter Brooksbank and Nicholas Beach, our counsel, who will be able to ask questions themselves, if they wish, during the proceedings.

2. This hearing is taking place because the Rookery South (Resource Recovery Facility) Order 2011 triggered certain conditions in its parent Act making it subject to special parliamentary procedure. Under this procedure, petitions have been presented against the order, and they in turn have been objected to by both the Minister and the applicant for the order.

3. We are not here today to give a view on the substance of the Rookery South Order. The purpose of this hearing is a very narrow one, laid down by the Act governing this particular type of parliamentary procedure. It requires us to consider the petitions and the objections and decide some very specific questions: firstly, whether each petition is "proper to be received", in other words, whether all of the rules governing petitions have been correctly observed; secondly, whether each petition asking for amendments to be made to the order would be more accurately classified as a petition against the order as a whole; and, lastly, whether each petitioner is sufficiently affected by the order, or the relevant provisions of the order, to be entitled to argue his or her case before a Joint Committee. Once we have heard the evidence from the parties, we will answer those questions for each petition and report our decisions to both Houses.

4. We propose to begin the proceedings by hearing oral evidence from the agent for petitions 36 to 39, Alastair Lewis of Sharpe Pritchard. We will endeavour to save our questions until the end of Mr Lewis's evidence, although if we feel the moment might be lost we shall interrupt as necessary.

5. When we have completed our questions we shall hear from the memorialists. I believe you have agreed between you that Paul Thompson of Bircham Dyson Bell, representing the Secretary of State for Energy and Climate Change, will give evidence first. We will then ask our questions of Mr Thompson. Alison Gorlov of Winckworth Sherwood, representing the applicants, Covanta Rookery South Limited, will then give her evidence. Mrs Gorlov will then be questioned by us.

6. There are no formal rules that govern the right of reply in hearings such as these, and, while we intend to take a reasonably relaxed view, we do not wish to have endless arguments tossed back and forth. I expect that we will allow petitioners to

question matters of factual disagreement or to make very brief comments following the memorialists' evidence, but we will make our decisions on that as we proceed.

7. We will then hear from Mrs Sue Clark, the agent for petitioners 1 to 34, followed by Mr Paul Thompson and Mrs Alison Gorlov speaking to those petitions.

8. Lastly, we will hear from Alison Ogley of Walker Morris, representing petitioner 35, followed, again, by Mr Thompson and Mrs Gorlov. At that point we will deliberate on the evidence in private.

9. I invite Mr Alastair Lewis to address hearing on petitions 36 to 39.

10. ***Alastair Lewis***: Good morning. May I first confirm that you have a bundle of documents that I submitted earlier this week? It is the one with the comb binding.

11. **Lord Brabazon of Tara:** That one?

12. ***Alastair Lewis***: That is the one. That bundle contains a summary of the submissions that I intend to make today, and I shall be expanding those orally now.

13. Sirs, my submissions today will focus on two discrete areas: firstly, whether the petitions in general are proper to be received, as you mentioned; and, secondly, the issue of locus standi. I will address the question of whether the scope of Parliament's consideration of the order should be narrowed in the light of these points. Separately, I will address the points made in the Secretary of State's written submissions received last Friday.

14. Throughout my submissions I would ask that you keep the following general principles in mind. As acknowledged in the Secretary of State's submissions, the test that must be met by decision makers when deciding whether land, or interests in land, should be subject to compulsory acquisition is that there must be a compelling case in the public interest for the compulsory acquisition. This principle is embodied in section 122(3) of the Planning Act itself, which you have in my bundle at tab 2.

15. In meeting this test, the decision maker will need to be persuaded that there is compelling evidence that the public benefits that would be derived from the compulsory acquisition will outweigh the private loss suffered by those whose land is to be acquired. Parliament has always taken the view that land should be taken compulsorily only where there is clear evidence that the public benefit will outweigh the private loss. These are not my words; they are taken from DCLG's own guidance on the Planning Act, which is at tab 3 of my bundle, paragraph 28, page 9.

16. It is for the Joint Committee to carry out that balancing exercise when it hears the evidence—not you, of course, as you have said. My submissions will try to convince you that the councils are entitled to be heard not just about the loss of their land and the direct impact it has on them, but also on the evidence that they wish to

produce, constrained by the limits of their petition, about the public benefits of the scheme and whether they outweigh the loss. I shall also try to convince you that they have a more general locus of local authorities injuriously affected by the order.

17. Dealing now with the issue of whether the petitions are proper to be received, the responsibilities of you as the two Chairmen are set out in section 3 of the Statutory Orders (Special Procedure) Act 1945 and in Standing Orders 242 in the Commons and 208 in the Lords. Tab 5 of my bundle contains section 3 of the 1945 Act, and I would ask you to turn to it. Section 3(3) provides that "if the Chairmen are satisfied with respect" to any petition referred to them "that the provisions of this Act"—the 1945 Act—"and of Standing Orders have been complied with in respect thereof, they shall certify that the petition is proper to be received and is a petition for amendment or a petition of general objection as the case may be".

18. In my submission it follows that the question of whether a petition is proper to be received can be decided only on the basis of: firstly, whether the provisions of the 1945 Act have been complied with in respect of the petition; and, secondly, whether the Standing Orders have been complied with in respect of the petition.

19. The provisions of the 1945 Act that have to be complied with in respect of the petitions are all procedural. They are set out in sections 3(1), 3(2)(a) and 3(2)(b), and all of them have been complied with by the petitioners. I do not think there has been any complaint that they have not.

20. While we are on section 3, I would like you to flag up what section 3(4A) says. A petition is not proper to be received if the order is a transport and works order and the proposals in the order have been approved by Parliament in accordance with section 9 of the Transport and Works Act 1992. This provision is obviously not directly relevant to these proceedings because we are not dealing with a TWA order, but I will come back to it later in my submissions.

21. I turn now to the Standing Orders and whether they have been complied with. They are all contained in Standing Order 240 in the Commons and 206 in the House of Lords, which are in the Secretary of State's bundle. Again, all of the procedural requirements of those Standing Orders have been complied with by the petitioners, and I do not think there is any argument to the contrary. Of course, there are separate Standing Orders relating to locus standi, and I will deal with those later.

22. On the face of it, subject to locus, I submit that you are obliged, in accordance with section 3(3) of the 1945 Act, to certify that the petitions are proper to be received, because of the word "shall" contained in section 3(3); in other words, the issues that have been raised on this matter by the Secretary of State and Covanta in their memorials and submissions, namely the scope of the parliamentary procedure and how it may be affected by the relevant provisions of the Planning Act 2008, are irrelevant.

23. Further support is given to that argument in a number of ways. First, it is worthwhile reverting again to section 3(4A) of the 1945 Act, which is in tab 5 of my bundle. That provision was inserted by the Transport and Works Act 1992. Like the Planning Act, the 1992 Act introduced a whole new regime for the authorisation of infrastructure projects. Section 9 of the 1992 Act provides that, in the case of certain nationally significant infrastructure projects, a Transport and Works Act order must be approved by both Houses. In those cases section 3(4A) restricts the scope of your role as regards the way in which petitions are to be considered at this stage of the process. Had the policy intention behind the Planning Act been, as the Secretary of State suggests, to restrict your role in some way, surely section 3 of the 1945 Act would have been amended in a similar way, for example by including a subsection that said something like: "The Chairmen shall not certify that a petition is proper to be received if it does not relate to, and only to, the acquisition of special land."

24. Second, Parliament's own guidance makes it clear that your role is not to decide on the ambit of the relevant provision of the Planning Act but to decide, firstly, issues of locus, and, secondly, whether a petition for amendment shall be treated as a petition of general objection.

25. Tab 4 in my bundle contains the House of Lords guide to petitioning against a special procedure order. On page 9 under the heading "Memorials—challenging your right to be heard", it says in the second sentence: "There are two grounds for objection to a petition: (1) that a petition which is presented as a petition for amendment is really a petition of general objection; or (2) that the petitioner does not have locus standi"; in other words, that the petitioner will not be specially, directly and injuriously affected by its provisions, and that you have said yourself this morning, my Lord.

26. There is no mention of the underlying legislation, in this case the Planning Act, let alone whether it might restrict the ambit of the Joint Committee's consideration, or in some way provide you with powers that extend beyond what section 3 of the 1945 Act actually says. If I may say so, the guidance is clear and correct in that regard, and of course the petitioners, and no doubt others from whom you will hear later, have followed it in putting together their petitions.

27. Thirdly, if the promoters' argument were to be accepted, namely that Parliament was constrained in being able to consider only the very detailed issue about whether or not special land should be acquired and, further—as the promoters appear to be arguing—that only the impact on the owner of the land should be taken into consideration, I submit it would mean that there could never be petitions of general objection, which surely cannot have been Parliament's intention.

28. Fourthly, I would ask you to look at what the DCLG says about the matter in the Planning Act guidance at tab 3, to which I have already referred. On page 19, in paragraph 9 of annex 1 to the DCLG guidance, it says: "[Section 128] is concerned

with orders authorising the compulsory acquisition of land owned by a local authority, or which has been acquired by a statutory undertaker (other than a local authority) for the purposes of its undertaking. In the event that such an authority or undertaker makes (and does not withdraw) a representation to the IPC concerning the compulsory acquisition, the order would be subject to special parliamentary procedure." It does not say the order would be subject to SPP but Parliament would be constrained to consider only whether the special land should be acquired, and even then Parliament can consider only the actual detrimental effect on the landowner of the loss of his land.

29. If my submissions do not convince you that it is not for you to decide whether the scope of Parliament's consideration of an SPP order should be limited, I ought to provide some argument as to why we say the Planning Act does not in any event provide for any such restriction. The relevant provision is section 128, which you have in the Secretary of State's bundle. If it is the same as mine, it is in a light-blue ring binder. Section 128 is in tab 4. I will wait for you to dig that out, because it is such an important provision. Subsection (2) is the key provision: "An order granting development consent is subject to special parliamentary procedure, to the extent that the order authorises the compulsory acquisition of land to which this section applies, if the condition in subsection (3) is met." I emphasise: "an order granting development consent is subject to special parliamentary procedure".

30. The condition in subsection (3) has been met, and I hope that is acknowledged by all parties; if not, we would not be here at all. The words on which the promoters base their arguments are "to the extent that the order authorises the compulsory acquisition of land to which this section applies". They say that those words restrict Parliament's powers to consider only the effect of the acquisition of the special land.

31. I submit that is a misinterpretation of the provision. All that subsection (2) does is provide a key to opening the door to SPP. The words simply mean that, if special land is liable to acquisition under the order, and the subsection (3) condition is met, the whole order is subject to SPP—nothing more. Had it been intended that Parliament's role should be restricted, I submit the drafting would have said so categorically. Not only that; the draftsman would have done exactly what the draftsman of the Transport and Works Act did, and included a specific restriction on your powers along the lines of those contained in section 3(4A) of the 1945 Act.

32. To back up my argument on this, I turn to precedent. As you know, opposed SPP orders are rare. The last one was in 1999 and it was the City of Stoke-on-Trent Tunstall Northern Bypass Order. Like a number of other orders that have been subject to SPP, the Stoke order was referred to SPP because it was subject to the Acquisition of Land Act 1981. The relevant provision of that Act is section 19, which I have as tab 5 in my bundle. It begins: "In so far as a compulsory purchase order authorises the purchase of any land forming part of a common, open space [et cetera], the order

shall be subject to [SPP], unless the Secretary of State is satisfied …", and it goes on with further detail. The key words are "in so far as a compulsory purchase order authorises the purchase of any land". As far as I know, those introductory words have never taken on any meaning other than the one I have submitted should be taken as regards the Planning Act, namely that they are key to opening the SPP door. I submit that the words "in so far as a compulsory purchase order authorises" are to be given the same meaning as "to the extent that the order authorises the compulsory acquisition of", which are the words used in section 128 of the Planning Act.

33. The "key to the door" interpretation was accepted by the promoters of the Stoke order—I can vouch for that because I acted for the promoters of that order—and it was not challenged. This can be shown by referring to some of the documents that arose in the promotion of that order: first, the objectors' matrix, which is at tab 6 in the bundle. That is the A3 document. As you will see, there were a number of petitioners and the objections ranged far wider than the impact of the acquisition of public open space and the suitability of the replacement land offered. Notwithstanding that, the promoters did not challenge the petitioners by memorialising, as the current promoters have.

34. It might be said that in that case the promoters were being unduly charitable to the petitioners and should have memorialised, meaning that the case should be given little weight in your consideration, but let us not forget what Standing Order 242(2) in the House of Commons says. For that we go back to tab 6 of the promoters' bundle. That says: "Where no memorials are deposited by the promoter, then [you] still have the power to certify that a petition is not proper to be received." This is an important provision. It is not there for the sake for it. If the two Chairmen in the Stoke case had thought the petitions were not proper to be received because they were outside the scope of the Acquisition of Land Act, they could, and perhaps should, have done so. No such certification was given in the Stoke case.

35. Secondly, I turn to the extracts from the transcripts of the Joint Committee that you have in tab 7 of my bundle, the salient points of which I will now summarise. I refer first to Day Four, pages 58 and 59, where counsel for the promoter, Mr Clarkson, indicates to the Committee that he has witnesses who could cover every possible aspect.

36. On Day Five, pages 8 and 15, there is a lengthy exchange between Mr Clarkson and members of the Joint Committee. In the penultimate paragraph on page 8, Mr Clarkson says: "It is not the function of the Committee to decide whether or not the section 19 exchange land certificate should have been given, but it is entitled of course to take open space issues into account along with other issues in the overall balancing exercise."

37. On pages 9 and 10, Mr Clarkson argues that the planning and highways issues raised by the petitioners should not be given any weight, and that the Committee

should focus on the replacement open space. Mr Clarkson does not say that the Joint Committee is in any way constrained by law, for example by section 19 of the 1981 Act, to consider only the open space issue. He simply submits that no weight should be given to other issues.

38. There follows an argument between Mr Clarkson and one of the members of the Committee about whether or not it would be proper to give weight to certain planning matters. On page 13, after the first heading, the Chairman announces that the Committee will hear the case of the promoters and is particularly interested in the question of replacement land. He says that by the end of the day, or the morning after they had started hearing the promoters' evidence, the Committee might be in a position to narrow its field of inquiry. Mr Clarkson then lists the witnesses he would wish to call, and they were certainly not restricted to the issue of replacement open space.

39. First thing next morning on Day Six, the Chairman said that he had deliberately allowed the first strategic witness to argue wider than he should have, but that in doing so the Committee could, as a result, feel that it required no further evidence on a number of matters that had already come before it, and therefore could concentrate on what in its view was the main matter that remained outstanding. Then he asked the promoters to concentrate their presentation on the lack of overall equality of advantage as between the exchange land and the lost order land. Mr Clarkson then said he would have to change his approach. He did not call the highways witness next, as he had planned, and moved on to the open space witness instead.

40. The point of reciting all these exchanges is that the promoters of the Stoke order took what I would consider to be the correct approach, which as far as I am aware has been taken on other SPP orders under the 1981 Act including the Okehampton Bypass Order, about which you may be hearing later, namely to be prepared to bring forward whatever evidence the Joint Committee wanted to hear in relation to the order as a whole, not just limited to the discrete issue that triggered the SPP process in the first place.

41. At no stage in the proceedings did the Committee demur from this view. They were advised by a senior clerk and, as can be seen from their exchanges, particularly those between Mr Clarkson and Miss McIntosh, there was clearly a possibility that counsel could have been required to go into detailed evidence about the planning permission for the road itself rather than the open space issue, had the Committee decided they wished to hear it.

42. To demonstrate that the Committee did consider matters other than exchange open space, one need look only at the Committee's special report, which is in tab 8. I apologise that the very page in that document to which I wanted to refer somehow

was not copied in the bundles I sent in on Wednesday. I have sent separately the pages that I want you to see, and I hope you have them.

43. **Lord Brabazon of Tara:** Yes.

44. ***Alastair Lewis***: Paragraphs 22 and 23 on page 7 demonstrate that planning issues, in particular the planning process followed by the council, were raised and considered. What I am saying here is that the precedent demonstrates again that the underlying legislation placed no constraint on the remit of Parliament, and that it is for the Committee to decide whether they wish to hear evidence on those issues on which petitioners have established a locus. You are constrained by section 3 of the 1945 Act.

45. I turn now to locus standi. Locus is of course a matter that does fall within your competence, by virtue of Standing Order 208(3) in the Lords. I will deal with locus by reference to *Erskine May*, the relevant Standing Orders and some locus cases. Dealing first with *Erskine May*, I refer to page 958 of the 24th and most recent edition. You will find the relevant part of *Erskine May* helpfully in tab 7 of the Secretary of State's blue bundle. Under the heading "Entitlement to locus standi—general principles", it says: "Generally speaking, it may be said that petitioners are not entitled to locus standi unless it is proved that their property or interests are directly and specially affected by the Bill. As a corollary, it has been accepted as an established principle that the owners of land proposed to be compulsorily taken should always be heard against both the preamble and the clauses of a Bill." Of course, the land of my clients, the unitary councils, is subject to being taken under the Rookery South Order.

46. When one reads this, it is difficult to describe the challenge of the promoters to the councils' locus generally as anything other than impertinent. The councils I represent fall squarely within the principle. Their land is subject to compulsory acquisition under the order. Not only that; it is because their land is subject to compulsory acquisition that we are here at all. It is, frankly, a ludicrous challenge.

47. At this point I would like to address head on the promoters' assertion that the councils do not object to their land being taken. The promoters have presumably not read paragraphs 1, 3(a) and 4 of the petition of general objection of Bedford Borough Council, which I use as an example. Furthermore, even if it were true that the councils did not specifically explain that they objected to their land being taken, there is a precedent that says that, in order to establish locus, a landowner does not need to state expressly that he objects to his land being taken at all. The precedent is the Halifax Corporation Water Works and Improvement Bill 1868, which is in tab 9 of my bundle.

48. Furthermore, as it stands, section 128 of the Planning Act does not even require an objection to have been made about the acquisition of land in the first place during the Infrastructure Planning Commission proceedings. I say "as it stands" because the

Localism Act contains amendments to section 128 that, when commenced, will amend section 128 so as to make clear that SPP will be triggered only if the landowner actually objected to the acquisition of his land in the Planning Act process.

49. What also comes out from the principle I read out from *Erskine May* is the ability for the petitioner to challenge not just the taking of the land but the whole order itself.
This ties in with my arguments already made about the scope of Parliament's remit. As *Erskine May* makes clear, those whose land is acquired are not just entitled to be heard against the clauses of a Bill—for example, the specific clauses that authorise the compulsory acquisition—but also the preamble; in other words, the whole Bill, or in this case the whole order.

50. Footnote 28 on page 958 of *Erskine May* refers to the case of the London and North Western Railway Bill 1868, which is known as "the post case". I shall explain that later. The report of that case is in our bundle at tab 10. I would like you to take that up, if you would, sirs. I take you to page 63 and the final few paragraphs of the case in the right-hand column. Mr Merryweather says: "Am I to understand that your decision goes to this extent: if a landowner had a post"—hence "the post case"—"in a field at Preston, and we take it, he can be heard against all parts of a Bill, one of which may be for stopping up a footway at Willesden?" The Chairman of the Court of Referees replies: "If he is a landowner, we have no powers to limit him."

51. Mr Rickards then says: "The landowner's post is his castle, and it admits him to the whole extent of his petition and no further." In the case before you today the councils' land that is liable to acquisition under the order is their castle. I would emphasise, picking up what Mr Rickards says and the practice of both Houses, that the councils do not intend to throw every single aspect of the order open to consideration by the Joint Committee. Their petitions are limited to a few areas.

52. That brings me to my final point on land take, which in a sense is the statutory embodiment of the principles behind the London and North Western Railway Bill "post" case, which I ask you to keep in mind at the beginning. Where compulsory purchase of land is proposed, one principle set out in Government policy for many years always applies and is embodied in the case of development consent orders, which Rookery South is, in section 122(3) of the Planning Act itself. It says that there must be a compelling case in the public interest for the compulsory acquisition.

53. The DCLG guidance relating to procedures for compulsory acquisition under the Planning Act, to which the Infrastructure Planning Commission must have regard, says: "For this condition to be met"—that is the "compelling case" test—"the decision maker will need to be persuaded that there is compelling evidence that the public benefits that would be derived from the compulsory acquisition will outweigh the private loss that would be suffered by those whose land is to be acquired."

54. Parliament has always taken the view that land should be taken compulsorily only where there is clear evidence that the public benefit will outweigh the private loss. I would submit, firstly—I think the Secretary of State accepts this—that the "compelling case" test applies to Parliament as the decision maker in SPP cases. If I am wrong about that, I am sure I will be corrected. Secondly, I submit that the familiar guidance that I have just read out must mean that the person whose land is taken is entitled to bring evidence to the decision maker that, in the round, the public benefits of the whole scheme do not outweigh the private loss to him. How are the councils supposed to do this if, as proposed by the promoters, they are not able to bring evidence about the scheme but are restricted to a case that demonstrates only the disadvantages of losing their property rights? If you were to decide today that their case should be so limited, I believe you would be in danger of reversing preciously guarded principles that go back to "the post case".

55. In addition to the landowners' locus, I submit that the councils as local authorities have the local authority locus under Standing Order 96 in the House of Commons and Standing Order 118 in the House of Lords. It says: "It shall be competent to the Court of Referees, if it thinks fit, to admit the petitioners, being the local authority of any area, the whole or any part of which is alleged in the petition to be injuriously affected by a Bill, or any provision thereof, or being any of the inhabitants of any such area, to be heard against the Bill, or any provisions thereof."

56. If you are minded to agree with my primary submission that the Joint Committee is entitled to consider the whole order, in my submission it is clear that the councils fall within the ambit of Standing Order 96. As the plans show, the works proposed would be located in the area of the two councils I represent.

57. It would be highly unusual, if not unprecedented in recent times, if a local authority in whose area works are proposed were not to be allowed locus. There have been very few challenges in recent years to the locus of local authorities under Standing Order 96. While I accept that the lack of a challenge does not itself set a precedent, I submit it indicates that in cases where, as here, works are authorised within the administrative area of a local authority, it is highly unlikely that the local authority would be challenged. I have not found a single instance of a challenge to a local authority's locus in such cases going back to 1920.

58. The cases where the locus of local authorities has been successfully challenged all relate to instances where no works are proposed in the area of the local authority. The most recent example is the case of the Kings Cross Railway Bill in Session 1988-89. There the London Boroughs of Newham, Tower Hamlets and Waltham Forest petitioned on the basis that the channel tunnel rail link should not terminate at Kings Cross but at Stratford. No works were proposed in their areas. Perhaps unsurprisingly, their locus was disallowed.

59. The councils I represent have set out in their petitions how they are injuriously affected by the order. If you agree with me that the scope of Parliament's inquiry is not limited to special land issues, I submit that the councils should be allowed locus under the local authority as well as the landowner head.

60. In your consideration I draw your attention also to the London County Council case in tab 11 of my bundle and the right-hand column on page 95, which says: "The Court does not require that the petitioners should prove that they will be injuriously affected. That is for the Committee on the Bill. What the Court requires"—I submit that you are in the place of the court—"is that the allegation that they may be injuriously affected should be a reasonable one." I submit that is what the petitions of the two councils do.

61. I now move on to the submissions of the Secretary of State and the councils' response to them. The summary of the Secretary of State's position on the petitions is contained in paragraph 7 of his response, which is before tab 1 in the blue bundle. It is the explanatory note on behalf of the Secretary of State for Energy and Climate Change. Do not worry; I am not going to go through every paragraph. In the summary in paragraph 7(a) it is said there is no clear precedent for determining whether the petitioners should have their petitions referred to a Joint Committee in this case, but such precedent as there is demonstrates that the petitions should be referred to the Joint Committee, and that there should be no limitation in the scope of the Joint Committee's consideration of the type suggested by the promoters.

62. In paragraph 7(b) it says that the decision to refer is governed by the Standing Orders. I submit that it is, in fact, governed by section 3 of the 1945 Act as well. I repeat that, if satisfied, you shall certify that the petitions are proper to be received, so it is wrong to characterise your powers as purely discretionary. That discretion must be exercised properly within the ambit of the Act and standing orders.

63. In paragraph 7(g) it is said that none of the petitions provides any argument for concluding that there is not a compelling case in the public interest to justify the acquisition of the special land. That is not the case as regards the councils' petitions.

64. Paragraph 7(h) raises what I suggest is a rather desperate point on European law, to which I will return later.

65. In paragraph 18(d) of the statement, reference is made to some exceptions to the general rule that landowners whose land is liable to be taken compulsorily have locus. I am not sure whether the Secretary of State is saying that any of the exceptions referred to apply in this case, but I should make it clear that in my submission none of them does. The Manchester case, which is included in the Secretary of State's bundle, turns on very specific facts that are not relevant here. Unlike the Rookery South Order, the Manchester Bill was a multi-purpose measure that extended the boundaries of Manchester Corporation in one part of the Bill and,

in another unrelated part, gave powers to take streets outside its area and in the area of the petitioning urban district councils for the purpose of its water undertaking. The urban district councils petitioned against the water provisions on the basis of landowners but also tried on the idea of petitioning against the boundary extension provisions, even though none of them was being swallowed up by Manchester—yet—on the basis that the corporation should, before extending, lower its gas bills. It is difficult to imagine a case being so unjustifiable as that, and I am not surprised that locus was disallowed. It is of no relevance here, where the councils can clearly show a direct impact on their areas by the whole order.

66. In paragraph 21(c) there is an analysis of the words "to the extent that", which we have already considered. I reiterate that, firstly, the question of the meaning of those words is not one that should properly concern you; and, secondly, if I am wrong about that, the words should be given the "key to the door" interpretation that I have put forward, which hinges on my argument that the only support for the promoters' case rests on attributing a meaning to those words that they simply do not bear and that Parliament has not enacted, even though it could have, for example by a Transport and Works Act-type amendment.

67. The first point made in paragraph 21(c)(i) is not disputed, namely that the whole order is subject to SPP. That is an important point to remember. Next, in 21(c)(ii) the Secretary of State says that, if the words are to be given any meaning, they must relate to the subject matter of the order that is to be treated as relevant for special parliamentary procedure purposes. That is where we do not agree and cannot accept the view of the Secretary of State. If the words are to be given any meaning, we say it is simply that, if any provision of a development consent order authorises the compulsory acquisition of special land, the whole order is subject to SPP.

68. Paragraph 21(c)(iii) says, if I have understood it correctly, that the words "to the extent that" can have been intended only to limit the right of petitioners to be heard. As I have already said, the petitioners' view, which I understand has been the traditional one—it certainly was in the Stoke case—is that those words, or similar words in the case of the Acquisition of Land Act, simply mean that, if special land is to be acquired and the relevant condition in subsection (3) is met, the order is subject to SPP and nothing more. If your powers were intended to be so limited, the Planning Act would have amended section 3.

69. Paragraph 21(d)(iv) goes on to say that this makes sense, as special land is the trigger, but we would say that the relevant words of the Planning Act bear a simpler and more straightforward meaning, as I have described.

70. Paragraph 21(e) says that the 1945 Act is silent on the subject of the application of locus standi rules and principles. I would say that ignores the alteration made to section 3 of the 1945 Act by the Transport and Works Act, which does restrict petitioners' rights in some circumstances. Paragraph 21 of the Secretary of State's

submissions is silent on the issue of why the 1945 Act was not amended in the same way by the Planning Act.

71. In paragraph 23 the Secretary of State concedes that the approach that he submits should be taken would represent a new development in the treatment of locus standi. He then cites three justifications for the approach. The first is that the powers bestowed on you are no bar to this. I have set out in my submissions how I believe your powers are restricted, in that you must certify that the petitions are proper to be received if the Act and Standing Orders are complied with as regards the petitioners.

72. The second is that Planning Act SPPs are somehow different because they grant development consent as well as authorise compulsory acquisition. I fail to see the relevance of this point. Before it was removed by the Transport Act 1981, section 14(6) of the Harbours Act 1964 required all harbour revision orders to be subject to SPP. Harbour revision orders can authorise not just the acquisition of land but also the construction of works and many other matters. The works would have attracted permitted development rights, so this is not a novel concept. Private and hybrid Bills that authorise the construction of works, including Crossrail of course, do not just grant powers of compulsory acquisition but also powers to construct works, and they carry with them deemed planning permission. The locus rules apply equally to them. So, Parliament is used to deciding questions of locus where there is a mixture of powers, and the London and North Western Railway "post" case describes how locus should be dealt with in such cases. The whole order is potentially thrown open to consideration in landowner cases.

73. In essence, the Secretary of State is trying to argue for a limitation that Parliament did not enact. It could have, as it did for the Transport and Works Act procedure.
There is no justification for trying to bring about what in the Secretary of State's view might have been needed to be done but was not, and not even when the chance to do so arose when the Localism Bill was going through Parliament.

74. The third justification put forward for this novel approach to locus is that, if you were to agree with the Secretary of State, it would not set a precedent that would prevent petitioners in the future from objecting to the acquisition of their special land. But I submit that it would prevent the type of objection made by some petitioners, for example that in relation to the Stoke order, most of which did, in fact, relate to the open space to some extent, but many of which ranged wider than that.

75. Paragraph 26 of the submissions sets out the general reasons for objecting to the locus of each petitioner. If I have understood it correctly, 26(d) suggests that the councils' petitions do not relate to the acquisition of special land. That is not correct, as I have stated already. Similarly, 26(e) suggests that the petitions do not disclose grounds of complaint or demonstrate that the petitioners are directly and specially

affected by the acquisition and use of the special land. Again, that is not the case as far as the councils are concerned: for example, see paragraph 4 of Bedford Borough Council's general petition. I refer you again to the Halifax case, which states that a landowner does not need to state his objection to his land being acquired anyway.

76. In 26(f) of the submissions, complaint is made that the petitioners challenge the merits and application of national policy, which the petitioner has no right through SPP to do. The councils do not challenge the merits of national policy, but they do challenge its application. There is nothing wrong with that. It is only right that a Joint Committee should be able to consider whether national policy has been applied properly.

77. Paragraph 27(c) alleges that the councils have made points in their petitioners from which they resiled in the IPC process, and a number of statements of common ground are included in the Secretary of State's bundle. Even if this were true, it is not a matter for you. All you have to do, with respect, is decide whether there is a prima facie case that the petitioners are directly and specially affected. The two councils clearly are, because their land is proposed to be taken and they have the discretionary local authority locus.

78. Paragraph 28 sets out a number of further general points. It is said in (b) that previous locus decisions are of some vintage and you can determine the matter from first principles. I disagree. The role of precedent in locus cases has always been important and is reflected by the fact that *Erskine May* cites so many cases in recent editions. "The post case" is of particular importance to the councils. I submit that the precedent is a vintage precisely because it is a good precedent, which is why it has never been challenged successfully. I also suggest that the scarcity of challenges against landowners and local authorities, the only one in recent years being Kings Cross, which I mentioned, suggests that promoters accept they have very little chance of success.

79. In paragraph 28(c) the Secretary of State expresses the fear that the whole case will be reopened and that evidence has already been given at great length to the IPC. Firstly, I point out that the councils have deliberately restricted the number of points made in their petitions. Secondly, as mentioned just now, it matters not that the evidence has been heard on a previous occasion. By the very nature of special parliamentary procedure, there has to have been a detailed inquiry first. Section 2 of the 1945 Act requires that special parliamentary procedures cannot take place unless there has been a detailed inquiry in the first place. It is always a repeat exercise to a certain extent.

80. In paragraph 31 it is alleged that the allegations in the petition are too vague, which is refuted. The petitioners set out their concerns in some detail. Paragraph 31 also suggests that the councils do not object to the acquisition of their land in the IPC proceedings. That is simply not true either. I have brought an extract from the IPC's

decision letter, which you have not seen. It categorically demonstrates that it was raised and dealt with by the IPC. In any event, if that were the case it would be irrelevant for the purpose of the decision you have to make today. There is nothing in the 1945 Act or Standing Orders that prevents a petitioner raising points not raised in the inquiry, in the same way that there is nothing to prevent a person petitioning against an SPP order if he did not object to the original inquiry.

81. In paragraph 32(a) it is suggested that the rule that a landowner has automatic locus might not apply to SPP orders. It is simply not understood how that radical assertion can be made based on the points that I have mentioned and the precedents. Furthermore, it would be absurd to suggest that, in a case where an order is subject to SPP only because special land is acquired, the owner of that special land should not be able to petition against the order on the grounds that the land is acquired. What would be the point of making such orders subject to SPP in the first place if that were the case?

82. Paragraphs 33 to 35 challenge whether in general terms the petitioners are generally and specially affected. It is conceded by the Secretary of State that possibly the councils may be so affected because their land is subject to acquisition. We put it higher than that, as I have explained, and then only in relation to the special land. You have heard my arguments on that.

83. General points are made about the councils not liking the project and wanting to see it disallowed, as if that should somehow preclude them from objecting. I agree that, in the absence of any grounds to show that one is specially and directly affected, one should not be allowed locus simply because one does not like what the order proposes, but that is not the case here. The interests of the councils are specially and directly affected, not just because they are landowners but also because as local authorities they are injuriously affected by the order, as explained in their petitions.

84. Paragraphs 38 to 40 focus on standing orders 96 and 118, which give you discretion to allow locus to local authorities. The Secretary of State says that the councils must demonstrate that the interests they represent are directly and specially affected. In fact the wording is “injuriously affected”. The councils would assert that it is perfectly proper for them to object to those aspects of the order that have been raised in the petition, not only as part of their argument as to whether the overriding public interest test is met in relation to compulsory acquisition, but also because they raise issues that are of direct relevance to their inhabitants.

85. Paragraphs 45 to 50 raise the issue of European law. The nub of the submission is that the European directive referred to requires an appeal procedure to be made available to the applicant for a licence. The Secretary of State says that, if the Joint Committee were to disallow the order, there would be no appeal and, therefore, the directive would not be complied with. When drafting the Planning Act, presumably the Government considered these points. SPP provisions were deliberately put in the

Act, yet nothing was done in the legislation to deal with the issue now raised by the Secretary of State, for example by amending section 3 of the 1945 Act, as the Transport and Works Act did, by restricting your powers or, indeed, the powers of the Joint Committee. What on earth would be the point of making provision for special parliamentary procedure to take place if the Joint Committee is effectively precluded from making a decision against which the applicant cannot appeal? I would submit that the SPP process was included despite the directive, because special land is, well, so special.

86. Further to that, I would assert that, as the Secretary of State concedes, an adverse decision is not the end of the road for the applicant, even where the Joint Committee do not allow the order to proceed. The applicant could, in those circumstances, ask the Secretary of State to introduce a confirming Bill, which would in effect reverse the decision of the Joint Committee. Such an idea is not fanciful; it was done in the case of the Okehampton Bypass Order, which is mentioned elsewhere in the Secretary of State's submissions. The possibility of a judicial review of a decision not to promote a confirming Bill should not be discounted either. If the Secretary of State thinks that this is a substantive point, then it is a defect in the Act that could have been remedied when the Localism Bill was going through. It is not a matter for you today; it is a matter for the Government to seek to rectify it.

87. You will be relieved to hear that I come to my conclusions. Firstly, you are bound by the duty set out in section 3 of the 1945 Act. Secondly, section 3 could have been amended by the Planning Act to alter that duty in a manner similar to the way it was altered by the Transport and Works Act. Thirdly, the issue of what is meant by "to the extent that", if it is an issue at all, is not for you but the Joint Committee to decide. Fourthly, if you do consider that it is a matter for you, I submit that, in accordance with practice and precedent, it should be given the "key to the door" meaning that I have explained. Fifthly, in effect that means that the whole order is subject to SPP, and in turn that means the usual rules of locus standi apply to the order as a whole, not just in relation to the acquisition of the special land.

88. Sixthly, if you accept that submission, then the councils have a non-discretionary right to appear before the Joint Committee as a landowner, and a discretionary locus as a local authority that is, or whose inhabitants are, injuriously affected. Seventhly, in relation to the landowners' locus, I submit that, in accordance with practice and precedent, it is open to the councils to oppose any aspect of the order they choose, based on "the post case" argument and, separately, the principle that a balancing exercise must be undertaken as to whether the public benefits of the scheme outweigh the private loss. Eighthly, in relation to the local authority locus point, the inhabitants of the area are specially and directly affected for the reasons set out clearly in the petitions.

89. Ninthly, and finally, if you do not accept the submission that the whole order is for consideration, and only the effect on the special land, it is submitted: (a) that the petition does, contrary to what the Secretary of State asserts, set out an objection to the acquisition; (b) even if you thought it did not, the Halifax precedent says it does not matter; and (c), for the reasons just mentioned, the balancing exercise must be able to be undertaken by the Joint Committee, and factors other than the effect of the acquisition of the land itself must be subject to consideration as part of that balancing exercise.

90. Those are my submissions, and I apologise that it has taken longer than I may have indicated beforehand.

91. **Lord Brabazon of Tara:** Thank you very much, Mr Lewis. We will ask you a couple of questions now and then invite the memorialists to make their submissions.

92. The first question is that the memorials state that the only land affected by the order in which the councils have an interest is highway land. Is that correct?

93. ***Alastair Lewis***: That is correct.

94. **Lord Brabazon of Tara:** Are the interests in that land limited to that of the councils as highway authorities, or do they own the freehold of that land?

95. ***Alastair Lewis***: I am told as highway authorities.

96. **Lord Brabazon of Tara:** It is said in paragraph 4 of your petition that it is unclear whether the compulsory acquisition of rights over the highway land will affect the authorities' highway powers and responsibilities. Can you put it no stronger than that, or can you give examples of how the highway authority functions would be adversely affected?

97. ***Alastair Lewis***: Perhaps I may take brief instructions. *(Pause)* I am instructed that we really cannot put it any higher than that before you today. We will have to leave those words as they stand in our petition.

98. **Lord Brabazon of Tara:** Thank you very much. I invite our counsel to put questions.

99. **Peter Brooksbank:** You have rights in land as highway authority; in other words, you control the surface. I used to do highway law, but I cannot remember how far down the highway authority's rights go.

100. ***Alastair Lewis***: That is correct. Using Lord Denning's terminology, I think it is two spits of the land, or something like that.

101. **Peter Brooksbank:** Would it be fair to say that the councils do not have any private interests in the land?

102. ***Alastair Lewis***: I suppose so, if you look at it in those terms. They own it as a public authority, as the highway authority, in respect of public rights. It is not as if it is, for example, a council office or sports ground that it may own. It is a different kettle of fish.

103. **Peter Brooksbank:** I want to ask a question that is related to the petition for amendment: the issue of the waterway. The conditions that you are proposing would prevent the project going ahead until certain works had been done, and would prevent it operating until other works had been done.

104. ***Alastair Lewis***: Yes.

105. **Peter Brooksbank:** When are these works going to be done?

106. ***Alastair Lewis***: The waterway works?

107. **Peter Brooksbank:** Yes.

108. ***Alastair Lewis***: I suspect I am going to be told that there is not a fixed date for that, but it is some time in the future. I do not think that for any of this planning permission has even been applied for at this stage. I would not say at the moment that it is a pipe dream, but it is a project mentioned in the local planning documents and for which I understand special provision has been made in relation to other infrastructure—a road that crosses the waterway close to where the Rookery South road proposals would cross, if it were to be built.

109. **Peter Brooksbank:** Who would carry out the work?

110. ***Alastair Lewis***: As to the waterway, again I need to take instructions. *(Pause)* I am told that there is a waterways trust made up of a number of bodies, including public authorities and the two councils whom I represent.

111. **Lindsay Hoyle MP:** So, it is a reality, not an aspiration?

112. ***Alastair Lewis***: My clients would say that it is a real project. I do not think that they would have raised it in their petition if it was not. I cannot say that there is a planning application even in process, but it is mentioned in local plan documents. I am sure that is correct.

113. **Lindsay Hoyle MP:** When was it first brought forward?

114. ***Alastair Lewis***: I am being told from my left that the first section is planned in the Milton Keynes area. What that means I do not know, but perhaps it already is in the local plan for Milton Keynes.

115. **Lindsay Hoyle MP:** What is the date in this area, roughly?

116. ***Alastair Lewis***: Four or five years I am told.

117. **Nicholas Beach:** I have a slightly broader question. I understand you do not think that section 128 of the Planning Act imposes any limitation on the scope of the SPP process. Would it be your view that, if it were to do so, it would have an impact on the consideration of locus?

118. ***Alastair Lewis***: Yes; that must be right. It is difficult to imagine what the wording might be, but clearly if there were something in section 128 or, by virtue of an amendment made by that Act, section 3 that in effect directed the two Chairmen to consider only certain aspects, or even directed the Joint Committee to do so, we probably would not be here, but, as you said, we do not think that is the case.

119. **Peter Brooksbank:** I believe you have drafted many Bills yourself.

120. ***Alastair Lewis***: One or two, as the Chairman of Ways and Means well knows.

121. **Peter Brooksbank:** You suggest that the words "to the extent that" mean "if".

122. ***Alastair Lewis***: Yes.

123. **Peter Brooksbank:** If you were drafting something and wanted to say "if", would you say "to the extent that"?

124. ***Alastair Lewis***: I probably would not have done, to be honest.

125. **Peter Brooksbank:** Let me give a couple of examples. Say there is a licensing system under which applicants have to apply to a licensing authority. The authority can charge an amount that is no more than the cost to it of processing the application, but it may require the fee to be paid in advance based on an estimate of the cost. Then the provision provides that, when it determines the application, the authority shall refund to the applicant any fee already paid to the extent that it exceeds the actual cost. That would be very different from saying "shall refund the fee if it exceeds the actual cost", would it not?

126. ***Alastair Lewis***: I think that must be right, but those words are used in a slightly different way there. If you read the whole of section 128 on its own, I think the emphasis is different. I would say that the words are simply given the meaning "if", as I have expounded. I think it is important to emphasise that the beginning of subsection (2) begins, "An order granting development consent is subject to special parliamentary procedure …" You have to look at those words as well as the words "to the extent that" to come to my interpretation.

127. I also go back to the Acquisition of Land Act precedent, which has very similar wording. As far as I am aware, the idea that there should be some limitation on the extent of the powers of the Joint Committee has never been successfully challenged. I was told this morning—I am afraid I do not have the transcripts to back it up—that such a challenge was made in the Okehampton Bypass Order, and the Joint Committee decided that the similar wording in relevant provision of the Acquisition of Land Act did not constrain them. I must make clear that that is something my associate told me this morning based on discussions she had with people in her chambers.

128. **Lord Brabazon of Tara:** Thank you very much, Mr Lewis.

129. We will now move on to the memorialists, first Mr Paul Thompson representing the Department of Energy and Climate Change. Will you speak to your memorial against petitions 36 to 39, please?

130. ***Paul Thompson***: I believe you have—it has been referred to—the Secretary of State's explanatory note and bundle. Accompanying it is a letter from the Secretary of State, which was also copied to the parties.

131. Perhaps I may begin by highlighting that the Secretary of State has challenged the petitioners' right to be heard because the Government do not think that such an application of special parliamentary procedure is consistent with the intentions of the Planning Act. He does so while respecting the deeply held views of the petitioners and without entering into any debate on the merits of the development proposals provided for in the order. That is the basis of this challenge.

132. As I am sure you will appreciate, there are three key elements to our challenge. I begin by highlighting those. Firstly, special parliamentary procedure is triggered by the acquisition of special category land only. That is what triggers it. The mischief behind it is to provide additional protection and means of safeguarding should special category land, common, open space and the like, be subject to compulsory acquisition. You may think it would not be unreasonable that special parliamentary procedure should be directed at that rather than wider measures.

133. Secondly, we say that the petitions and the objections in them do not truly relate to the acquisition of that special land in this case.

134. Thirdly, we say that a right to be heard should not, therefore, be granted; or, if it is granted at all, it should be granted only in relation to the acquisition of the special land.

135. Rather than take you through the lengthy explanatory note paragraph by paragraph, I aim to pick up the main points Mr Lewis has addressed today. I think we will cover all the arguments that way. I would like to begin by saying something

about your role in this matter. Mr Lewis has drawn a distinction between your role under section 3 of the 1945 Act in certifying petitions as proper to be received and your role in determining locus standi and the right to be heard.

136. In my submission your task in determining whether and how to certify the petitions and locus standi is a single process. On one interpretation at least, Mr Lewis appears to be saying that section 3 requires the petitions to be certified as proper to be received, and on that basis they must be referred to a Joint Committee whether or not they are entitled to be heard on the grounds of locus standi. My submission is that just cannot be right.

137. Even if I am wrong on that, and the process of certification under section 3 on the one hand and adjudication on locus standi and the right to be heard on the other must be kept quite distinct, all the arguments that the Secretary of State raises, including those concerning the Planning Act, go to the question of locus and the right to be heard. Accordingly, I invite you to consider our arguments on that basis.

138. I turn to the division of responsibility between your role as Chairmen and any Joint Committee, should the petitions be referred to it. Standing Orders make clear, and *Erskine May* confirms, that questions of locus standi are for you and not the Joint Committee. You will find the relevant note in paragraph 15(c) of our explanatory document, which gives the references. Mr Lewis refers to the London County Council (General Powers) Bill 1913 case as indicating that it is not for you to decide whether or not the councils are injuriously affected—rather, it is for the Joint Committee—and you just need to satisfy yourselves that the allegations are reasonable ones to be made. I am not sure there is necessarily much between Mr Lewis and me on this. The way I put it is this: you need to be satisfied that the arguments raised by the petitioners are not insupportable and are ones on which, if true, having regard to their character, they are entitled to be heard. Those are the arguments that I will be addressing.

139. Mr Lewis also refers to what he calls in his written submission "the balancing exercise", that being a balancing of public benefits against private loss. In my submission that is certainly something for a Joint Committee to be concerned with in those cases where petitions on such orders are properly referred to it, but it does not bear upon the question for you, which is simply: should these petitions be heard?

140. Overall, therefore, I submit that questions of locus and the right to be heard remain with you. The Joint Committee, if petitions are referred to one, will then consider whether particular allegations are made out, and also possibly have regard to the relevance of arguments that are sought to be put to it, but locus and the right to be heard is a matter for today's proceedings.

141. Perhaps I may now address the various references made to the treatment by Parliament of the Planning Act. Mr Lewis made several points. In my submission much

of this is in the nature of speculation, because there is nothing in the proceedings on the Bill, as far as we can find, that helps us on this.

142. I refer to one or two points in particular. The amendment made to the 1945 Act by the Transport and Works Act 1992, which Mr Lewis makes something of, relates to schemes of national significance that require approval by Parliament under the latter Act. It is about avoiding duplication of parliamentary procedure that would otherwise arise in those cases. In the case of a Transport and Works Act order that is of national significance, for it to proceed at all there must be approval by Parliament. So, what this provision is doing is avoiding duplication. There is no equivalent procedure in the Planning Act, so there was no need to make any provision for it.

143. Another point in relation the Planning Act is that, while it is a truism that Parliament could have included anything in the Bill for the Planning Act—including some special further limitations on the application of special parliamentary procedure—but did not do so, my case is that there was no need to because, for the reasons given in more detail in the explanatory note, you have the power to rule out the petitions. Mr Lewis suggests that you do not and seeks to bolster the argument by claiming that this would have needed something in the Planning Act, but if you look at this in detail, it is a circular argument.

144. Reference has also been made to the role of the Infrastructure Planning Commission and the fact that, under the Localism Act, the Planning Act arrangements are changing. I make two points on that. It is, surely, much more probable that more specific provision would have been included for special parliamentary procedure in the Planning Act, particularly under the original regime, where the IPC was the decision maker in almost all cases, if the petitioners were right and the intention was to provide an opportunity for anyone to be heard on general grounds in every special parliamentary procedure case. If anything, I would argue that it supports my case that the Planning Act is silent on this.

145. In relation to the "democratic deficit" argument, which is run particularly by Miss Clark, to whose petitions you will come later—but it bears upon the same point and appears somewhere in the unitary authorities' case—perhaps I may point out that this is a purely political point in practice about whether, as is no longer the case, an unelected body such as the Infrastructure Planning Commission should be a decision maker, as the previous Government provided for in the Planning Act and which the current Government has amended so as to stop it applying in future. I submit that on this point you are entitled to conclude that it is not your task as Chairmen somehow to give retroactive effect to that policy change. It is a policy argument; it is not one for today.

146. I turn now to the question of the local authorities' status as landowners and Mr Lewis's "key to the door" analogy. Mr Lewis propounds the argument, which is perhaps his main point, that as landowners the unitary councils are entitled to be

heard before a Joint Committee on the whole merits of the order. What this amounts to is that the councils are entitled to be heard on any points the councils care to raise, which they have put in their petitions, merely because of the fact that some of their property is subject to compulsory purchase, meaning that it is unnecessary to consider further whether they are directly and specially affected, or whether they ought to be heard on whatever points they have cared to raise.

147. I suggest that this aspect of the "key to the door" argument, as he describes it, is a particularly unattractive one, because in essence it is entirely technical and opportunistic rather than founded on an argument on the merits. Be that as it may, the key question is whether you are indeed constrained to waive the district councils through simply because they are landowners. Is that the key to the door? I invite you to conclude that it is not, and you do not have to for four reasons in particular. The first is that the precedents to which Mr Lewis referred, in particular the London and North Western Railway Bill 1868, relate to private Bills from a different age. In contrast to special parliamentary procedure orders, which began in 1945, proceedings on those Bills provide no other hearing to those affected by compulsory purchase. In those circumstances, I think we can all agree that there is a case for landowners to be entitled to a full hearing, even if, as stated in that case, it is to object to a footway in Willesden on the basis of some landholding in Preston. It make some sense, but that is not the position here; that is not the case with special procedure orders.

148. Secondly, while Mr Lewis seeks to discount the Manchester Corporation Bill 1927 case and the reference to *Erskine May* to which I have referred, and which he picked up on—it is in paragraph 18(d) of the explanatory note—the rule about landowners' entitlement to be heard is demonstrated by that case and reference as not being absolute. That is the extent of my point. I am not saying that our position is on all fours with the Manchester case, far from it; it is not. The point I am making is that the landowners' locus standi, based as it is on historic private Bill procedure, is not in any event absolute. It has been qualified before, and it can be qualified still.

149. Thirdly, I submit you are entitled to place reliance on the fact that special parliamentary procedure orders are quite distinct, and as such you can take into account their distinctive features. Those distinctive features are: the purpose of special parliamentary procedure to which I have referred; the basis upon which this order has been made subject to special parliamentary procedure, to which I will return; and the fact that the order has been subject to prior procedures, namely, in the case of development consent orders such as this one, the detailed examination process under the Planning Act.

150. Fourthly, standing orders give you an unfettered right to decide the rights of the petitioners to be heard. That is in Standing Order 242(3) of the House of Commons and 208(3) of the House of Lords.

151. In essence, what I am saying is that there is no basis upon which you have to conclude that, just because the local authorities are landowners, they have an automatic right and the door is swung open to them—far from it.

152. I deal now with a related point that Mr Lewis picked up: the lack of particularity about the councils' objections as landowners. Mr Lewis disputes the claim, which the Secretary of State has made, that the local authorities have not actually objected to their land being taken. He relies on the Halifax Corporation case for saying that, even if the Secretary of State is right in claiming that the petitioners do not object to their land being taken, it is unnecessary for a landowner to do so. I make clear that the Secretary of State accepts the councils allege in their petitions that "the compulsory acquisition is unjustified" and the claim that "it is unclear whether the compulsory acquisition will affect their highway powers and responsibilities". They do say that. The point I am taking on this is that they do not actually detail the grounds of their objection. It would seem that is because they do not really have any. The landowner objection is, I submit, a stratagem adopted, to use Mr Lewis's metaphor, simply to open the door to Joint Committee proceedings.

153. I turn now to a separate issue, which is whether the acceptance of my case means there will be no more Joint Committees on special procedure orders. That point has been taken against me. Mr Lewis suggests that as one implication. I say it is not the case. As expressly conceded in paragraph 23(c) of my explanatory note, Joint Committee proceedings can still be expected in relation to orders involving the acquisition of special land, commons, open spaces and the like, where the petitions are objecting to the taking of that land.

154. Mr Lewis cites in particular the Joint Committee proceedings on the Stoke-on-Trent Tunstall Northern Bypass Order. That appears, like the Okehampton Bypass case to which I referred in my explanatory note, to be another example of a classic objection to the taking of special land, in that case open space. I would suggest nothing can be assumed as to why it so happened, that there was no challenge to locus standi in that case nor, without seeing the form of the order and the petitions, as to the relevance of the Joint Committee proceedings. My point is simply that, as in cases such as the Okehampton Bypass, where special land, common land, or whatever, falling within that category is subject to compulsory acquisition, people can still object to it by way of a petition under special parliamentary procedure, and one would expect such petitioners to be given locus in any event upon the basis that the safeguard for special parliamentary procedure is to provide a further hearing into the question of whether that special category land should be taken. That can be agreed without prejudice to the case I am making today.

155. I turn to another issue raised by Mr Lewis: the "compelling case" test. Mr Lewis began his written submission and has returned to this today by placing emphasis on the principle that compulsory acquisition should occur only where a particular test is

satisfied, namely a compelling case in the public interest. I do not question the applicability of that test to compulsory purchase generally, only Mr Lewis's related assertion that it is Parliament's duty to satisfy itself on it in SPP cases. I suggest that cannot be right, because Parliament is under no obligation to do anything by way of scrutiny of an SPP order other than in terms of JCSI scrutiny; in particular, it is under no obligation to convene Joint Committee proceedings in the absence of petitions being deposited against it. Certainly, if the issue of whether compulsory purchase powers should be conferred comes before a Joint Committee, the "compelling" test will be relevant, but that test is not itself a reason for referring petitions to a Joint Committee.

156. I turn now to the meaning of the phrase "to the extent that" in determining the scope of potential Joint Committee proceedings. We probably all agree that this is central to my case, because the key point of my argument is that those words import a limitation that carries through to locus standi. Mr Lewis argues that the words triggering special parliamentary procedure, in this case "to the extent that" an order authorises compulsory acquisition of special land, are not in any way delimiting but rather are a key to the door—that phrase again.

157. This "key to the door" argument means treating the words "to the extent that" as meaning no more than "if", and I think that was acknowledged in the questioning of Mr Lewis before I began. My submission on this is simply that it is wrong, unnecessary and inappropriate to treat "to the extent that" as meaning "if". Responsibility is conferred on you to decide on locus standi and the right to be heard, and you are entitled to take into account all considerations that you deem relevant. In my submission those include giving appropriate significance to those words and to their natural meaning.

158. Mr Lewis raised some subsidiary arguments in this respect, and I would like to touch on those quickly. Firstly, he argued that the Planning Act did not require objection to compulsory purchase as a trigger for special parliamentary procedure. That is so; I concede that, but it does not take away from the fact that it is the acquisition of such land, and the desirability of conferring special safeguards in relation to it, that the procedure is all about.

159. Secondly, Mr Lewis points out that there will always be a prior hearing where special parliamentary procedure is triggered. Indeed there will; that is true, but it does not mean that all matters should be reheard.

160. Mr Lewis referred to the Harbours Act 1964 as originally ensuring that all harbour orders were subject to special parliamentary procedure. That is no longer the case; the Act has been amended. The fact that some statutes, such as that one, refer orders to special parliamentary procedure without any wording like "in so far as" or "to the extent that" is, if anything, supportive of my case. It is entirely possible for a statute to say that an order shall be subject to SPP without any limitation, but if it

goes on to include a qualification, the appropriate course is to have due regard to that qualification and give it its natural meaning.

161. Mr Lewis also takes issue with the Secretary of State pointing out that referral of the petitions as proposed by the petitioners would involve rerunning many of the arguments canvassed at the detailed examination stage. The fact of the matter, however, is that it will. I submit that, except possibly in relation to the acquisition of special land, there can be no case for that.

162. Finally on this point, in relation to the European directive referred to in my explanatory document, all I need add is that the general rule to be applied in relation to directives is that member states' laws and procedures should be interpreted, where practicable, to produce compatibility rather than conflict. The approach that I invite you to take does just that, whereas I suggest the petitioners' approach gives rise to potential conflict, and it is open to you to choose.

163. A further matter touched upon, which I feel I should mention, was public policy. In response to the point the Secretary of State has put—that the petitioners' case appears to be challenging public policy—Mr Lewis said that they do not challenge the merits of national policy but simply the way it has been applied. I would respond that, if the petitioners think the Infrastructure Planning Commission got it wrong, that appears to be a legal question, which, if anything, is a matter for the courts and, you may think, not for a Joint Committee.

164. If you will bear with me for one second, I believe that I have covered the main points Mr Lewis has dealt with. I was not proposing to take you through the entirety of my explanatory document, but I would just like to check that there are no further points I need mention at this stage. *(Pause)* I think not.

165. On that basis, I quickly conclude my case as follows. The decision on locus and the right to the heard is yours and yours alone to make. You certainly can grant the unitary councils' locus standi. Standing orders make clear that local authorities can always be granted a discretionary locus if the Court of Referees—I think we are agreed that in this case that means you, if one carries it across—think fit. But you are not bound to do so, there being no binding authority one way or the other; you are not tied by precedent. In so far as precedents do suggest that landowners should be given an absolute right to be heard on all matters, and local authorities are normally allowed through, those precedents are not directly applicable and I say are inappropriate for application in the present instance.

166. You are entitled to, and should, take into account the limited scope of the special land trigger for special parliamentary procedure in this case. If you do determine that the unitary councils should be allowed to be heard before a Joint Committee—my primary submission is that should not be your decision—I submit you should limit their case to be that against the special land only included in the

order and subject to compulsory purchase and not the wider matters that they seek to raise.

167. On that point, I will close unless I can help you with any questions.

168. **Lord Brabazon of Tara:** Thank you very much, Mr Thompson. I have one question. On what basis do you say that the statements made by the petitioners for the purposes of the proceedings under the 2008 Act are relevant to the question of whether the petitioners have locus standi in proceedings on the special procedure order?

169. ***Paul Thompson***: I am sorry; I did not quite catch all of that.

170. **Nicholas Beach:** I think that in paragraph 12(a) of the memorial, you refer to statements made in the proceedings under the 2008 Act as being inconsistent with what was being said.

171. ***Paul Thompson***: I think this is the "statements of common ground" point, isn't it?

172. **Nicholas Beach:** Yes. I think the Chairman's question was: how do you say that is relevant to locus standi?

173. ***Paul Thompson***: The point we are making here is that the unitary councils appear to be raising in their petition matters that are contradicted by their stance in the examination as evidenced by the statements of common ground. Why is that relevant to locus standi? As I indicated earlier, in my submission you are entitled to take into account all relevant circumstances and consider not whether the allegations made in the petitions are true but whether they are supportable. I think it goes to the point I have been seeking to make—that the petitions are a stratagem to open the door in a way that I suggest is inadmissible.

174. **Lindsay Hoyle MP:** You mentioned something about landowners not having rights. Do you not feel there is lack of justice in the landowner having no rights, yet you have just talked about it without conscience?

175. ***Paul Thompson***: Let us take the simple case of a compulsory purchase order for a single parcel of land that just happens to be special land, common land, and the landowner does not want it to be taken. I would not suggest that landowner had no locus and should not be heard. I am suggesting that these petitioners do not. It may help at some stage to look at the plans that Covanta and Mrs Gorlov submitted, but the position in relation to the two local authorities that we are discussing is that they are local authorities for quite a large area. Their land interest is simply in relation to this small bit of highway; that is all. Their petitions are not about that but their grievances about the development consent order generally. What I am saying is that

they should not be given a landowner's locus because they are not complaining as landowners; they are complaining about other things.

176. My secondary position, as I think you noted, is that, if you do not accept our wider case, we submit that, assuming they are allowed to be heard at all, they should be heard only in relation to that special land—simply the highway land—which is fine, because if they have a complaint that it should not be taken because it should remain theirs, that will be an alternative view. I do not think I am arguing that landowners generally who are affected by compulsory purchase should not be entitled to be heard. That was not my submission.

177. **Lindsay Hoyle MP:** Basically, are you saying it should be a no through road, but if traffic does come through, it will be travelling at 15 mph, not the normal speed limit?

178. ***Paul Thompson***: I am not quite sure I follow the analogy, but yes.

179. **Lindsay Hoyle MP:** I am saying that if you do not win the first argument, you want to do something on the second. You accept that landowners in other areas would have rights but, in this case, because it is a local authority, you feel that it is not quite the same.

180. **Paul Thompson**: Yes. If, say, the whole of the area subject to the order was special land—common land, or whatever—I do not think we would be having this argument, because it would be like an Okehampton Bypass case. What it would be about is whether this common land should be taken, and all sorts of arguments would be relevant to that. Effectively, what we do not understand is how the taking of that bit of highway verge really is a basis to support the wide-ranging grievances that the unitary councils and others wish to rerun before a Joint Committee.

181. **Lindsay Hoyle MP:** You are frightened of it opening up the whole argument.

182. **Nicholas Beach:** Specifically on the European point, reading the written submissions it appeared you are saying that the provisions of the 1945 Act, when made subject to the Planning Act, were incompatible with article 7.4 of the relevant directive, because it potentially leads to a situation where a decision would be made against the applicant that was not capable of being reviewed. Is that right? Is it the Government's position that the legislation as it stands is incompatible with the directive?

183. ***Paul Thompson***: We say it is not if you find in our favour, but that if you do not do so, that is the argument, yes. To explain that, the point is that the directive provides a regime in relation to these sorts of authorisations, which includes an entitlement to a reasoned decision and a right of appeal. Were this matter to be referred to a Joint Committee and that Joint Committee dismissed the development

consent order, there would not be a right of appeal, and so it would not fit within the "fair hearing" concept embodied in the directive.

184. Incidentally, we do not accept Mr Lewis's suggestion that there is an answer to that because the relevant Minister could come forward with a confirming Bill. The concept is of a proper appeal, and that is not a right of appeal but a ministerial, political decision. Were you to decide that the petitioners did not have a locus, that point would not arise. Were you to decide my more limited case that the petitioners are entitled to be heard only in relation to the special land, that would be consistent with the directive because it would still allow the decision to authorise the generating station to go through, and the issue as to whether or not a particular piece of land was taken for it would be all that was in issue. So, it would not hit that point.

185. **Nicholas Beach:** As I understand it, you accept that, irrespective of questions of locus, the effect of the special procedure relates to the order as a whole; in other words, any reference made by the Joint Committee, even based on a narrow consideration of just the special land, would still be in relation to the order as a whole. Your position is not that the limitation affects the parts of the order that are subject to the special procedure but merely the way in which that procedure has to be operated when being considered by the Joint Committee. That is right, isn't it?

186. ***Paul Thompson***: I think so, yes.

187. **Nicholas Beach:** So, the effect of a reference by the Joint Committee would be in relation to the order as a whole. Even if the Joint Committee had considered only the narrow issue of the special land, nonetheless its decision would relate to the order as a whole and, therefore, it would be the order as a whole that would fall. Therefore, I do not quite understand how you argue it would be compatible if it was only the limited scope that was considered by the Joint Committee.

188. ***Paul Thompson***: The Joint Committee has the power, if petitions are referred to it, to disallow the order or propose amendments, doesn't it? So, I think the position must be that, if it was persuaded on the basis of consideration of the petitions on the limited case that this special category land should not be taken, it could propose the amendment of the order to exclude the highway land, but what the directive is about is the authorisation of generating capacity, and that would not be in issue. That is the way we put it.

189. **Nicholas Beach:** Obviously, that is making an assumption as to how the Joint Committee might approach it, but there is also the question of whether a motion was tabled as part of the process. You would say that relates to the whole order, because you say that the whole order is in issue. I am just trying to tease out to what extent you can, as it were, run the argument that there is an aspect of the procedure that is incompatible with the requirements of article 7.4 but, at the same time, argue that

incompatibility can be entirely dealt with by limiting the scope of the proceedings before the Joint Committee.

190. ***Paul Thompson***: It is possible to consider a whole number of different scenarios, some of which I acknowledge could, on the basis of my argument, create a conflict with the directive, but the scenario that we commend, which is that the petitions are not referred to the Joint Committee, or referred only on the limited grounds of the special land, logically produces potential answers that are compatible with the directive.

191. **Nicholas Beach:** The Government are content that the legislation as it stands is compatible with the directive.

192. ***Paul Thompson***: It is capable of being applied in a way that is compatible with the directive.

193. **Lord Brabazon of Tara:** Thank you very much.

194. Shall we move now to Mrs Gorlov, who represents the company involved?

195. ***Alison Gorlov***: I speak for Covanta. Having said that, although my submissions will go on for a little while, you will be glad to know that I do not propose to repeat much of what Mr Thompson has said. There is no point in your hearing it twice. Covanta agrees almost entirely with what the Secretary of State is arguing, and, to the extent that we do not quite agree, it is a matter of nuance and I do not propose to take issue with anything Mr Thompson has said. Perhaps you would be good enough to treat what he has said as having been adopted by us.

196. What I would like to address is the question of scope. When I was preparing these submissions, I did not intend to present you with the sorts of documents you have had from Mr Thompson and Mr Lewis. I still do not think it was necessary. However, as I was going through my speaking notes, it occurred to me that it might assist if, after these proceedings, you had a note of more or less what I had said, perhaps in advance of the minutes. So, I have provided copies of such a document, which the petitioners have also had, but it is not one you should feel you should have read and have been unable to see before this morning.

197. ***Alastair Lewis***: I am not sure we have seen it.

198. ***Alison Gorlov***: I am so sorry; it should have been circulated, but it matters not. I simply wanted to flag up the fact that what I am about to say has been committed to writing; it is not information of the sort that needs to be read first. These are submissions, but, in case it was thought helpful afterwards to see what I had said—perhaps to measure what I actually said against what I was proposing to say—I simply wanted to tell you that there is a note of what I am about to say and it

will be made available to you afterwards. It is intended to be an aide memoire of what I am about to say, not extra information.

199. **Lindsay Hoyle MP:** I would have thought it could have been provided in advance so we could at least have a look at it. I am amazed you do not feel we should have had it. I would have felt it would have been advantageous for everybody here at least to have had sight of a copy.

200. ***Alison Gorlov***: Let me say that, had I completed it earlier, I might very well have taken the same view. I thought I was going to do something rather different. When I did complete it, I realised it was a document that might have been circulated in advance. As that was not feasible, I have suggested to Miss Toft and Miss Bolton that we might proceed in the way I have just suggested. It probably sounds alarming to have been told what I have just told you but, if I may say so, it should not be. I am making submissions; you will hear them. They are of a nature that does not call for consideration of quantities of paper of the sort you have seen from Mr Lewis and Mr Thompson.

201. **Lindsay Hoyle MP:** I understand your view, but you understand that we may judge it differently.

202. ***Alison Gorlov***: Indeed. I wanted to flag up that a piece of paper existed. I do not want to alarm anybody into thinking they are disadvantaged by not seeing it in advance.

203. **Lindsay Hoyle MP:** I understand that. You keep echoing the same point.

204. ***Alastair Lewis***: We still have not got it. It is not even as if enough copies have been made for distribution today.

205. ***Alison Gorlov***: It is being circulated now *(Handed)*.

206. ***Alastair Lewis***: We had no indication that this was coming.

207. ***Alison Gorlov***: I sense Mr Lewis's irritation. I apologise for that. If it assists to follow with a finger what it is I am saying, that is fine.

208. ***Alastair Lewis***: We provided all ours in advance, as you know. This followed conversations with Miss Bolton weeks ago: "Would it be good if we submitted something in advance?"—"Good idea. Make sure you do it well in advance." Mr Thompson did it even earlier than we did. Mrs Gorlov has had the opportunity to see everything we were going to say. We have not had that opportunity. We did have the opportunity to see everything Mr Thompson wanted to say, and we are very grateful for that.

209. ***Alison Gorlov***: I do not want to repeat everything, but let me just say: I apologise if Mr Lewis feels disadvantaged in any way. I would just note that there is no requirement to produce material in advance of a hearing such as this. It is helpful on occasion to be able to do so, and that is why it has been done by others. If I had not said that this document was available, and had not made it available, I do not think Mr Lewis would have said what he just did; he would not have been concerned that he had not seen a piece of paper. As I say, there was no obligation on the part of Covanta to provide it. Had I finished the job earlier, I might very well have circulated it. I therefore apologise to anybody who feels disadvantaged by not having seen it, but, at the risk of upsetting Mr Hoyle, I say again that I do not think it is the sort of document that requires advance consideration. That is a judgment one is entitled to make.

210. **Lindsay Hoyle MP:** If everybody now has it, I think that is fine.

211. ***Alison Gorlov***: Yes.

212. **Lord Brabazon of Tara:** Carry on, please.

213. ***Alison Gorlov***: If I may, I would like to address the question of scope in slightly more detail than has been done hitherto. As Mr Thompson said, it is crucial to all the questions that you have to consider today.

214. By way of introduction, the suggestion has been made by Mr Lewis that the issue of whether section 128 of the Planning Act has the effect of limiting the scope of these SPP proceedings in some way ought to be decided by the Joint Committee. For reasons on which I will elaborate hereafter, I submit that the reverse is the case. This is a decision that must be taken by you as Chairmen at this stage because, once petitions have been certified, the order stands referred to the Joint Committee for the purpose of considering the petitions. That is the wording of section 3 of the 1945 Act. That means that once it has got to the Joint Committee, this point has gone by. I will comment on that further in due course. I just want to set the scene, as it were. This is a matter for you and you alone.

215. The question of scope is addressed in the Covanta memorials at paragraphs 11(b); in the Waste Recycling Group petition at paragraphs 12(b) and 14; and, in the case of the two councils represented by Mr Lewis, paragraph 15. The question comes into play if you decide that these petitions should be referred to a Joint Committee, but, as others have said, it is about the real subject of SPP in this case. The issue, therefore, is wider than deciding to refer to the Joint Committee and then asking yourselves what should be referred. It goes to the relevance of the petitions themselves.

216. If you conclude that the petitions, or any part of them, are objections to matters that are not subject to SPP, then in Covanta's submission the right decision

for you to take is that those petitions, or parts thereof, are not proper to be received, because they will fall outside the scope of these SPP proceedings.

217. Mr Lewis has emphasised the fact that, in his view, "proper to be received" relates to issues that are purely procedural. Indeed, those are procedural requirements, but we go slightly further than that and say that, if what has been referred to special parliamentary procedure is subject matter that is limited in scope, a petition against some other subject matter is not a petition that forms part of the special parliamentary procedure; it is simply outwith the scope of these proceedings, and so is not a petition that can be heard by the Joint Committee. It cannot be referred and cannot be heard by them

218. That is why we say that the question of scope is very important and has potentially a very significant effect on the outcome of the proceedings. I emphasise this because the point itself is rather narrow and semantic and involves a detailed interpretation of precise words, which is not the most thrilling of exercises for lawyers, never mind for you. Please do bear with me because I am going to take you through the way Covanta sees this in slightly more detail than has been done by others in this room.

219. The order is subject to special parliamentary procedure in accordance with the Statutory Orders (Special Procedure) Act 1945. Those representing the petitioners have made submissions to you about the effect of that Act in the context of scope and whether the petitions are proper to be received. The referring statutes somehow have a subsidiary role. As Mr Lewis puts it, they provide a key to the door of SPP. What those submissions have not addressed is whether every statute providing for SPP actually opens the same size door. We say it is perfectly possible to open the door to SPP in a way that is open and unrestricted or, through a different door or size of door—put it as you like—in a way that limits the scope of the subject matter. I emphasise "subject matter".

220. Some issue has been made of the fact that an order is one and indivisible; indeed, it is. The order is referred; it is the whole order that is referred, but it is subject to referral for a reason. What the 1945 Act says is that the purpose of the referral is to consider the petitions. If the subject matter of the petitions is limited in scope, because the subject matter of what is referred to special parliamentary procedure is limited in scope, it follows that it matters not whether you look at it as if the order is referred, or simply part of it. What we are saying is that the subject matter for consideration is limited, and in a moment I will come to what that limitation is.

221. I hope not to upset anybody again, but at this point I should like to have handed in and noted some examples of statutory provision for orders subject to special parliamentary procedure. *(Handed)* This is simply a chart, some of which will be familiar to you, that is a convenient way of looking at what is already before you. Has it gone round yet? I will wait for it to reach everybody. If you turn to the last item,

it is section 128 of the Planning Act 2008. What we have done here is pull out the relevant bits of referring legislation and the words that actually refer the orders to which they relate. I will again read section 128(2): "An order granting development consent is subject to special parliamentary procedure to the extent that the order authorises the compulsory acquisition of land to which this section applies if the condition in subsection (3) is met."

222. As you will see shortly, referrals to SPP take a wide variety of different forms. In Covanta's submission the effect of the section 128(2) formulation is that the subject matter of the order is relevant to the compulsory acquisition of land belonging to a local authority or statutory undertaker. One reaches that conclusion by looking at the detailed wording of section 128(2). If you thin it out a bit, it says that an order is subject to SPP to a stated extent if the subsection (3) condition is met. The condition is that a local authority, or statutory undertaker, has made a representation that has not been withdrawn. The stated extent of the application of SPP is limited to the provision made in an order for the compulsory acquisition of special land, which is land that falls within subsection (1). We say that this is a limitation because that is the ordinary meaning of the words—I see my note says "swords"; perhaps you will be good enough to ignore that—as they appear in the sentence.

223. You have heard a bit from others about "to the extent that" and "in so far as" and what those words mean. I almost thought of inflicting on you my trawl through a wide variety of dictionaries published between 1890-something and 1965, and a bit of Fowler's *Modern English Usage,* which would have shown that "in so far as" and "to the extent that" mean the same thing, but even I thought that was going a bit too far. Perhaps you would be good enough to take it from me. Anyway, we say that there is no issue about "in so far as" and "to the extent that".

224. I would, however, like to come back to Mr Brooksbank's point about whether "if" is the same, because we do not think it is. What nobody has looked at so far this morning is: what is the ordinary meaning of these words as they appear in the sentence? Perhaps at this point I might remind you that we are not looking here at EU law, and that the interpretation of non-EU law turns initially on the meaning on the words of the page, not some speculation as to the intended purpose of the provision.

225. The words "to the extent that" are words of limitation, so one needs to look at what is being limited. That is where the position of the words in the sentence is important. This is really not just semantics. There are two possibilities here. What the petitioners say is that "to the extent that" simply delimits the aspects of the order that make it subject to SPP. Something has been said about what might or might not have been enacted in different places. Section 128 might have been worded so that was its effect, but it is not worded that way; it is worded differently. On an ordinary reading

of the words—just as a matter of grammar—"to the extent that", placed where they are, qualifies the statement that the order is subject to SPP. What it is saying is that those words limit the scope of the subject matter of the order that is subject to SPP, and that is simply the way it is written.

226. This is not verbal acrobatics. For words to have different meanings depending on where they are in the sentence is hardly limited to legislation. To give just a silly example, if it is said that the school teacher shouts when a class is unruly because he cannot teach, what does it mean? It means to most of us that he is unable to make himself heard above the melee and so he shouts. Try it slightly differently using the same words. If you say the school teacher shouts because he cannot teach when the class is unruly, that means something different, doesn't it? It could mean that he shouts his annoyance; he sits in the staff room and shouts aloud complaining of what it is like when he is sitting in his classroom and is prevented from teaching because of unruly pupils. Those are two different meanings based on the same words but in a different order. Put simply, we say that the different order in the sentence counts. In the case of the school teacher, it all depends on what is captured by the word "because". What does it qualify?

227. The petitioners have made quite a point about the fact that historically SPP has resulted in the entire case for a particular order being reopened without restriction. We do not contest that. I do not know that any of us can say hand on heart that is invariably the case, but none of us either could claim to have made a comprehensive trawl of everything or to reconcile the scope of proceedings with the precise wording of the conferring enactment. So, those earlier unrestricted cases may or may not be right, but what we say is that the fact they were unrestricted is not in itself a precedent for anything at all; it simply means that the issue has to be looked at in the present case on the basis of the enactment by which we got here, namely section 128(2) of the Planning Act.

228. Perhaps we might turn back to the list of examples. We have heard a lot about what these various Acts say, and what they might have said. If you glance at them, you will see that they are quite varied. The draftsman could have said all sorts of things intended to get us to the same place. I have grouped them in a way that I hope makes sense. Looking at group A, we would say that these are a model of clarity. They say that where X is the case, whatever the facts are and whatever the issue is, Y happens, Y being SPP or the predecessor provisional order confirmation. There is the use of "where" or "if". There is a condition. If such and such a thing is done in the order, then SPP or its predecessor procedure follows. We say that makes it absolutely clear that in both cases where the condition is fulfilled, the whole order, and all the subject matter of the order, becomes subject to whatever the special treatment is.

229. Group B is trickier. By the time one comes to look at group B, the draftsman has become slightly more legalistic. The fashion of the day was "in so far as". In the cases identified in group B, the order is different. We say that in those cases "in so far as" are introductory words, as Mr Lewis put it, and they relate to the circumstances that give rise to SPP. They identify the trigger. What follows from the trigger is that the whole order, or all its subject matter without restriction, becomes subject to SPP.

230. In group C you have four further examples, one of which is section 128. This time you will see that the "in so far as", or, in the case of section 128, "to the extent that", is somewhere else. The "somewhere else" as a matter of grammar and normal construction, on an ordinary reading of these words, qualifies not the circumstances that trigger SPP but the scope of what is made subject to SPP. That is why we say that section 128 limits the scope of what has been made subject to SPP in this case.

231. You may think it extraordinary that there are so many ways of saying the same thing. It could be due to different styles of drafting; it could be due to different modes of expression over the years, but we do not think you can assume that is the case. You have to assume that the draftsman, and ultimately Parliament, meant what he said. That is the way in which statute law is interpreted in this country. You cannot assume that the intention is always the same. Why should it be? For example, if you look at the titles of the Acts referred to in these examples, you will see that the Acquisition of Land (Authorisation Procedure) Act 1946 appears in all three groups. What is more, the first item in group C is paragraph 9 of the first schedule to that Act, and the first item in group B is paragraph 11. Whatever those two paragraphs mean—you have heard me say that we think they mean two different things—beyond doubt they are expressed differently two paragraphs apart. Why? I think we have to suppose that something different must have been intended. They must almost certainly have been drafted by the same draftsman. They are not remote from each other; they are the same sort of subject matter. There is no reason why, if they were intended to be the same, they ought not to be the same, and they are not. We say that lends support to the argument that different provisions referring orders to SPP mean different things.

232. That is probably more than enough about grammar. I am sure you are fed up with it, but I am afraid I do have a little more to say. Mention has been made of the Okehampton Bypass case. I ought to mention it here because precisely this issue of scope was discussed in that case. These were a couple of orders to authorise the compulsory acquisition of land for a bypass, and some of the land to be taken was common land. The petitioners wanted to argue their case against the bypass itself. There was detailed argument about whether they ought to be allowed to do so. The Government said that they ought not because: it was an order made by the Minister and therefore it represented an act of Government; SPP had been devised so as to allow that in certain circumstances a procedure equivalent to the private Bill procedure should apply, where appropriate; the Government could not promote a

private Bill, only a hybrid Bill; and the rule in relation to hybrid Bills was that petitioners could not challenge the principle.

233. Whether you think that is right or wrong, I am not going to express a view on it. It does not matter. Incidentally, it was thrown out by the Chairmen; they would have none of it, and the orders were referred. The reason I mention it is that, although the argument was a scope argument, we would not want you to think it was the same argument that is being advanced today. As far as I can see from the transcript of the proceedings, no reference at all was made to the effect of the referring statute in that case; it simply was not argued. So, we say the Okehampton case is not one that need trouble us further.

234. There is one case, however, to which I would like to refer: the Manchester Corporation case involving two compulsory purchase orders in 1966. Notice of this was given to all concerned. These orders related to the compulsory acquisition of land to provide public housing. You should have had three pieces of paper, one two pages stapled together with some passages side-scored. That was provided yesterday. We realised this morning that the decision had not been appended, and you should have been handed that page this morning. I passed it to Miss Toft and Miss Bolton earlier today. I beg your pardon; it is being handed in now. It is a five-line paragraph. I do not think Mr Lewis, or indeed you, would have any difficulty in receiving it now. I am sorry; it dropped off the paper circulated yesterday. *(Handed)*

235. These were two CPOs to authorise the compulsory acquisition of land required for public housing. The power being exercised was section 96 of the Housing Act 1957, and the procedure governing these compulsory purchase orders was in section 97 of that Act and schedule 7. I do not need to refer to those provisions in detail, only to say that schedule 7 to the Housing Act 1957 is at the foot of page 2 of the examples paper. You will see the example of section 150 of the Act, which we say is a restricted example of a referral to SPP. This was a different case. Schedule 7 to the Housing Act applies the Acquisition of Land (Authorisation Procedure) Act 1946. The orders were subject to special parliamentary procedure because of paragraph 9 of schedule 1 to the 1946 Act. You will find paragraph 9 on page 2 of the examples note. Paragraph 9 is also an example of what we believe limits the scope of what is referred.

236. These two orders were referred to the Joint Committee, which heard unrestricted evidence on them. You might ask whether this is a decision directly contrary to what I am saying to you now. We do not think it is. The argument that paragraph 9 restricts the scope of SPP is precisely what was argued by counsel for the Government. The Joint Committee said it could not accept that argument, as you will see from the piece of paper just handed to you. You will also see that the Chairman of the Joint Committee said that the conclusion had been reached regretfully. One might speculate on what he meant by that, but no reasons were given. However, I do

not think you can conclude that this rejection of counsel's arguments is contrary to what I have been saying, for the reason that what you have in front of you is the transcript of the proceedings before the Joint Committee. As far as we are aware, the issue about scope was never argued before the Chairmen. Therefore, one has reason to suppose that it was never considered.

237. As I indicated earlier, by the time one gets to the Joint Committee the order stands referred; the petitions have been certified; and the Chairmen have certified what, if any, limitations there should be on the referral to the Joint Committee. So, if the Joint Committee has before it the entirety of a petition, it has to consider it, and whether and to what extent it affects the order. It does not have a choice in the matter because section 3 of the 1945 Act says that the order stands referred for the purposes of considering the petitions.

238. In the Manchester case it is evident from the transcript that the Chairman was not comfortable with the position in which the Committee found itself, but it had no discretion in that case. Having reached the stage it had, it had to hear the entirety of the arguments in the petitions. I mention those because otherwise it might be taken against us and it ought not to be.

239. There are just a few further points I would like to make. You have heard a great deal about restricting the scope of the special parliamentary procedure in this case. You have not heard very much about the practical implications of what it might involve, and that is a slightly trickier thing to deal with. We have in this case cables under a highway verge. It is not a long length of cable. Everybody in this room has had the opportunity to see the plans showing where these cables run. These cables are an integral and essential part of the plant that is authorised by the DCO. Does that mean, therefore, that the whole of the issue regarding the provision of this plant—whether it should be provided at all—can be reopened? We do not think that limiting the scope does enable the issue of principle to be reopened, even though these cables are very important to the operation of the plant, for the reason that a decision has been taken that the order should be made and that the plant should be authorised. That is not a decision that concerns the special land or the cables to be laid in it.

240. Objection could have been taken that the cables might have been routed somewhere else on adjoining land, which is not special land. All sorts of points might have been made, for example that the cables were not needed and one could achieve the same result in another way. Those points were not made. Those points could be made without challenging the principle that the plant should exist. What we say is that it is perfectly possible to restrict the scope of SPP and to do so in a way that enables the issues that relate to the special land to be considered. Those issues may go further than whether the land should be acquired. They will go to aspects of the

scheme, but they will not go to the principle of whether this plant should be constructed. They are not matters of principle.

241. Of course, in order for these points to be argued, they had to be raised by the petitioners. We have heard that the local authorities, represented by Mr Lewis, think they have in some way objected to laying the cables in the highway. Covanta agrees with the Government that there is no objection. There is a possibility of a point, but they have not thought what it is. That is not an objection. The Waste Recycling Group's petition could potentially have had a bearing on the cables in the highway, but it does not, and I will come to that later. But in relation to the local authorities, they could have objected to something relating to these cables in the special land and chose not to.

242. What does all this add up to? To some extent that depends on what view you take of the petitions. You have heard the landowners say that they can raise all sorts of issues. Those issues are not in the petition. The implication is that they could add to what is in the petition.

243. In relation to private Bills, Standing Order 1(11) in the Lords and 128 in the Commons provide that a petition must particularise the grounds of objection and that the petitioner cannot raise additional points. That applies to private Bills; it is not stated as applying to SPP orders. However, one of the tasks before you as Chairmen is to certify these petitions as being proper to be received, if that is what you think they are. We submit it would make an absolute nonsense of the certification procedure if a petition could then be altered or added to in some way. It could subtract something, but certainly not add to it; otherwise, why certify it in the first place?

244. We submit that one has to look at what the petitioners can be heard on and what can be referred purely on the basis of what they have said in their petitions. We say that, firstly, the scope of these proceedings is limited in its subject matter; it is limited to issues that bear on the laying of cables in the highway. Secondly, we say that flows from the wording of the referring statute: section 128(2) of the Planning Act 2008. It follows, therefore, that it is not a matter of discretion. If the restricted scope is the meaning of section 128 as we say, automatically issues outwith that scope fall outside these proceedings. It is not as if there is a discretion to admit them; either they are in or statutorily they are out. The implication of them falling out is that a petition could not be referred in so far as it relates to any of those issues, and that the petitioners could not have the locus standi to argue those extraneous points because they are not before you. All that is before Parliament is the subject matter of the SPP, which we say is limited. The petitions cannot, therefore, be proper to be received in that respect, because that respect does not exist as part of the SPP proceedings.

245. If you agree with that, the only course you could take would be to say that these petitions are capable of being referred only in so far as they touch on relevant issues that fall within the scope of SPP, but there is nothing in any of the petitions—nothing in the local authorities' petitions—that falls within that scope. Express it however you like by reference to locus standi, petitions being proper to be heard or the meaning of the 1945 Act, as applied by section 128 of the Planning Act—whichever bit of the jigsaw puzzle you care to fit it in—we submit you come to the same conclusion: that these proceedings are limited, and there is nothing falling within that limitation that could be referred to the Joint Committee, and we invite you so to find.

246. **Lord Brabazon of Tara:** Thank you, Mrs Gorlov.

247. We will now invite Mr Lewis to make any brief comments on what we have heard from the memorialists.

248. ***Alastair Lewis***: I take it you want me to be brief, and I shall be. As to what Mr Thompson said, I referred to his European point as one of desperation, but it is his only point on which I wish to come back. He seemed to be arguing against himself in one particular respect, namely he said that if the order authorised only special land, the Department would not have memorialised, because they accept it could not be a better reason for the issue to be referred to SPP. Let us say a developer was foolish enough to propose a compulsory purchase order that authorised only a parcel of National Trust inalienable land. The order would be referred to you, and Mr Thompson says that the Department would not challenge. Let us take that forward and assume that the National Trust was successful when the order went before the Joint Committee. The whole order would be thrown out by the Joint Committee. There would be no right of appeal.

249. What I am trying to say is that Mr Thompson is arguing against himself by saying on the one hand he would not challenge in certain cases, even though there would be a real threat of the whole order being thrown out without a right of appeal, but, on the other hand, he is complaining that there is no right of appeal. That is the point I want to make on that. It is not a big point; it is, as I said, a desperate point.

250. There is also the point that another remedy is available to the Secretary of State or Covanta. Were the Joint Committee to throw out the order here, no doubt Covanta would ask the Secretary of State to promote a confirmation Bill. If the Secretary of State refused, I think that would be a point for judicial review. The Alconbury case, in terms of human rights anyway, says that a judicial review is akin to a right of appeal, and therefore there is, we submit, no point on this anyway.

251. Turning to Mrs Gorlov, we argue that, looking at the sheet of paper with the different statutory provisions on it, which we first saw this morning, section 19 in group B should be alongside the Planning Act in group C. It seems to me that her

only justification for putting it in group B rather than group C is that the words are in a different order. We would strongly argue against that. The reason I have focused on section 19 is that was the basis for the Stoke case I mentioned earlier.

252. Following on from that, we cannot possibly say why the draftsman of the Acquisition of Land Act 1981 used different wording in sections 17 and 19. As Mr Brooksbank said, I have drafted a few Bills myself. I am sure there are examples where I may have used slightly different wording in one provision from another, and I probably could not explain it to you now if asked to do so. I do not think you should place any store in that argument at all.

253. Lastly, I refer to the Manchester case. Again, this was a document we saw for the first time this morning. The extract from the Chairman's decision is at the top of page 2. Great store seems to have been placed in the fact that the Committee say they regretfully come to the conclusion that they cannot accept the decision of the Chairmen. I submit that you should not read anything into those words at all. It is quite commonplace for Select Committees of all types to say to an unsuccessful petitioner, "Well, regretfully we are unable to accept your submissions." It is rather facile to say that is such an important point in this case. We do not know what the Chairman was thinking in this case. He simply decided the order in the way we think the matter should be decided before you today. We think that what Mrs Gorlov has presented this morning supports our case rather than goes against it.

254. **Lord Brabazon of Tara:** Mr Thompson, do you want to say anything?

255. ***Paul Thompson***: If it helps, just to take the example of the National Trust and a compulsory purchase order, that would not be a consent to a generating station under a DCO.

256. ***Alastair Lewis***: I accept that.

257. ***Paul Thompson***: We are at the very boundaries of what is relevant, I think, in dealing with that point.

258. ***Alison Gorlov***: If I may say one thing, Mr Lewis makes a great deal more of "regretfully" than I do, or intended to do. My point is purely this: if you look at the side-scored passages of the proceedings in previous days, there is evidence that the Committee was uncomfortable with the position in which it had been placed with an argument about scope when it had already received the petitions, and that was an issue to which it attached importance.

259. **Lord Brabazon of Tara:** I think that concludes the first part of our proceedings.

260. I suggest that we now take a break until 10 to one. We will not have a lunch break. It would inconvenience people more if we took a lunch break than if we went on, but we need a short break and so we will resume at 10 minutes to one.

The Hearing adjourned from 12.38 pm until 12.50 pm.

261. **Lord Brabazon of Tara:** Ladies and gentlemen, we will start again if we may. Next I would like to invite Mrs Sue Clark to address the hearing on petitions 1 to 34.

262. ***Sue Clark***: Thank you, Chairman. It will be most helpful, I think, if you have access to the map that was supplied by Covanta. If not, I have some others here.

263. **Lord Brabazon of Tara:** I think it is in one of our bundles, but we can look at this one here. Thank you.

264. ***Sue Clark***: Thank you. Sirs, as you know, I am Sue Clark and I am a member of Cranfield Parish Council. I am also, I think you should know, a member of Central Bedfordshire Council for the Cranfield and Marston ward, but I am here today representing the parish council and am acting as agent for all the parish councils. I would also like you to know that also present in the room are my two fellow ward councillors for Cranfield and Marston, plus a group of parishioners, parish councillors and town councillors from across the parishes and especially from Marston and Stewartby. I think this shows a measure of their concern that they have taken the time off work and made the effort to attend this hearing.

265. I will begin by making a number of general points that apply to all the councils and, in doing so, I will be relying heavily on the submissions already made on behalf of the unitary authorities. When it comes to the topic of locus, I will be distinguishing between some of the parish councils because they are affected in different ways, and that will become apparent as I talk through where they are on the map. My aim has been to keep my submissions as concise as possible and not to repeat anything unnecessarily.

266. I am not a trained lawyer. I may occasionally need to take some advice from my colleague, Ian Pickering, who is sitting beside me, and he is not a trained lawyer either.

267. Like Mr Lewis, my submissions will focus on two areas: firstly, whether the petitions in general are proper to be received; and, secondly, the more specific issue of locus standi. I will not dwell too much on the first issue because I will be adopting, on behalf of the parish councils, very similar arguments to those you have already heard from Mr Lewis.

268. It is, of course, acknowledged that the parish councils are in a different position from Bedford Borough Council and Central Bedfordshire Council. No land owned by the parish councils is proposed to be taken compulsorily under the order. We do not claim in any way that we are prejudiced by the taking of the special land: we cannot; it is not ours; and we have no interest at all in the identity of its owner.

269. Our concern is a more general one for the residents in our areas about the proposed development, which, as the promoters rightly say, is opposed in principle by the parish councils.

270. Nevertheless, a number of arguments raised by Mr Lewis on behalf of the unitaries apply equally to the parish councils, and I submit that, in addition to the specific points about locus standi that I shall make later, they should provide enough weight in support of my submission that all the parish council petitions should be allowed to stand.

271. In answer to the question "are the council's petitions proper to be received?" Mr Lewis has already set out the unitaries' argument in relation to the scope of Section 3 of the 1945 Act. The unitaries kindly let me have sight of a draft of Mr Lewis's submissions before today. I have read them and adopt what Mr Lewis says about the scope of Section 3, and I do not intend to go through all that again.

272. The first of the unitaries' submissions that we adopt is that you are bound by the duties set out in Section 3; in short, that means that, subject to locus standi, if the provisions of the Act and the standing orders have been complied with, then you must certify that our petitions are proper to be received. We have complied with all the procedural steps that apply as regards all of our petitions, and nobody has suggested that we have not. I will deal with locus later.

273. I have also seen and adopt Mr Lewis's supplementary arguments in favour of this strict interpretation being given to Section 3 and, in particular: the fact that the opportunity was available to, but not taken by, the draftsman of the Planning Act to include a provision that would amend Section 3 so that it said explicitly what the promoters have submitted it means; the fact that Parliament's own guidance does not suggest that it is your role to question the meaning of the Planning Act, but instead to decide mainly on the question of whether petitioners have a locus to oppose the order, which, I submit, means the order as a whole, not just the part of it that authorises the acquisition of the special land; the fact that, in essence, the promoters appear to be arguing, reinforced by the submissions they have made in relation to the Directive, that, in the case of a Planning Act SPP, a person who presents a petition of general objection should never be allowed locus, which cannot be right; the fact that the DCLG guidance does not suggest that Parliament should be constrained in the way suggested by the promoters but instead says that, where special land is taken, the order would be subject to special parliamentary procedure without making any qualification.

274. I also adopt the "key to the door" argument advanced by Mr Lewis and backed up by his comparisons between the Planning Act and the Acquisition of Land Act, and the Stoke-on-Trent case. This particular aspect is of great importance to the parishes in the absence of our being able to rely upon an argument that our land is taken. Of course, I am not legally qualified, so have to rely on the arguments put by others today, but, to me, if Mr Lewis is correct in what he says about previous cases not being constrained in the way that is proposed by the promoters here, and where the parent Act is worded in similar terms to Section 128 of the Planning Act, I do not think it can be right for Parliament to take a different tack all of a sudden.

275. In particular, I do not think you should be swayed by the fact that the Planning Act is untested; that national policy underpinned the decision of the IPC; that it was intended for the Planning Act to provide a streamlined order-making process; or that there is a European Directive that provides that there should be a right of appeal. All of those matters—all of them—could have been dealt with by the draftsman of the Planning Act simply by altering Section 3 of the 1945 Act.

276. I would like to make one further point that is not covered by Mr Lewis. In his explanatory note, the Secretary of State makes reference to the importance of safeguarding national policy. Like the unitaries, we do not challenge national policy in our petitions, but we do challenge the way it has been applied.

277. The additional point I would make is that the current Government have changed national policy on how national infrastructure projects like this one should be dealt with under the Planning Act. If my understanding is correct, the Rookery Order is, and will be, the only one made by the IPC and, from now on, all decisions under the Planning Act will be taken by the Secretary of State. This is because of the Coalition Government's policy to ensure that these decisions are taken by elected representatives and not quangos. This SPP process provides Parliament with the opportunity to fulfil that policy and allow our concerns to be considered in a democratic way.

278. I submit, in conclusion on this part, the same thing as Mr Lewis. The Planning Act does not restrict the scope of Parliament's scrutiny of the order. You are constrained by Section 3 of the 1945 Act, and that means that what you have to decide is whether we, as parish councils, are specially and directly affected by the order as a whole. If you disagree with me in that submission and instead take the view that the only subject that petitioners can raise is the effect on them of the acquisition of the special land, then we have no case. I would not wish you to make that decision, however, until you have heard my specific submissions on locus.

279. Moving on to the question of locus standi, we claim that all the parish councils who have petitioned are specially and directly affected by the order. We are relying only on one standing order when it comes to establishing this, and it is Standing Order 96 from the House of Commons and Standing Order 118 from the House of

Lords. As you have already heard, it says, "It shall be competent to the Court of Referees, if it thinks fit, to admit the petitioners, being the local authority of any area the whole or any part of which is alleged in the petition to be injuriously affected by a bill or any provisions thereof, or being any of the inhabitants of any such area, to be heard against the bill or any provisions thereof."

280. Standing Order 1 sets out the definition of "local authority", and it includes parish councils.

281. If you are minded to agree with my primary submission that the Joint Committee is entitled to consider the order as a whole, then, in my submission, it is crystal clear that the parish councils of Marston Moretaine, Millbrook, Stewartby and Wootton clearly fall within the ambit of Standing Order 96. As the plans show, the works proposed would be located in the area of the councils. You can see that if you look at the map. The main bulk of the works is in Marston and Stewartby parish, with some land taken from Wootton and Millbrook. I have been informed that it would be highly unusual, if not unprecedented in recent times, for a local authority in whose area works are proposed not to be allowed locus. Mr Lewis has highlighted this in his submissions. He mentioned that he was unable to find a single example of a precedent since 1920 where a local authority that works proposed in its area was challenged successfully, or at all.

282. In case there is any doubt about that, I would submit that the inhabitants of these parishes are injuriously affected. I would like to start by talking about the parishes of Stewartby and Marston Moretaine in particular, because I think they are really most severely affected by this order.

283. The siting of a major regional waste processing facility in these parishes will, put simply, blight Marston and Stewartby villages. Living close to one of the country's largest incinerators, with fears about air quality and air emissions and with the ugliness of an enormous industrial plant and hundreds of waste HGVs using the local roads every day, will ensure that these communities will be injuriously affected.

284. We have had real experience of the injurious effects caused by major waste processing, and we know just how negative the impacts can be. For 30 years, some of the worked clay pits in the Marston Vale were used for landfill; the final site at Stewartby only closed at Christmas. The unpleasantness of living near such sites, the stigma, the smell, the unsightliness, the blown litter, and the effects of hundreds of waste lorries importing waste into Central Bedfordshire lives fresh in the memory of the residents of many of the parishes in the Vale, and nowhere more so than in Stewartby and Marston.

285. The reintroduction of waste management on a regional scale would be a huge step backwards for an area that is finally free from the industrial effects of brick making and land filling. Historically, this has been a damaged industrial landscape,

but the brickworks at Stewartby, which were hugely polluting, closed in 2009. That led to a dramatic improvement in air quality, and the degraded landscape itself, which was scarred with worked clay pits and landfill, is being regenerated and restored. The Vale has emerged as an attractive and desirable place to live, and we are genuinely enjoying those benefits. If the incinerator were to be built, many of those improvements would be wiped away.

286. The northern part of the Marston Vale, close to Bedford, is identified as a key growth area, with considerable new housing planned. Stewartby is identified for strategic development. The wider locality supports hi-tech industry: Cranfield Technology Park, Lockheed Martin, and Millbrook Proving Ground. Tourism is being introduced, with Center Parcs near Millbrook, and the Country Park at Marston provides for local leisure activity, with over 200,000 visitors a year. A return to major waste processing would damage this positive growth.

287. The visual impact of the mass and bulk of the main industrial building, at 200 metres long and up to 43 metres high, with a chimney stack of 105 metres, will have a serious visual impact on both of the parishes. The location of an enormous industrial plant, with ancillary buildings and open-air ash storage, will be out of keeping with what is actually a rural setting in open agricultural land and will be completely out of scale. It will be very dominant in the landscape and a completely inappropriate setting for an industrial facility of this size.

288. In Stewartby, the main visual impact will come from the stack and associated plume, which will move in and out of view as we move around the parish—a constant reminder of its presence. In Marston, the main building, as well as the stack and plume, will be visible. The worst effect, though, will be felt in the Country Park, which is right next to the Rookery pit and where, in the words of the IPC commissioners, the visual effect will be overwhelming. There is no doubt the incinerator will harm the enjoyment of large numbers of visitors to the park.

289. Residents are anxious and fearful about the potential harm from emissions, especially given our experience with the former Stewartby brickworks, where temperature inversions acted as a lid and regularly trapped noxious sulphurous fumes near to the ground. Whilst we appreciate it will not be the same, there is still scepticism and a cynicism about safety levels. It is felt that temperature inversions and their effects are not properly understood or accounted for, and that this is a matter that should be considered by the Joint Committee.

290. HGVs bringing waste to and from the plant will have to use the local road network to access the site, and this will have a significant effect on the existing road-users and the residents who live nearby. The use of Green Lane in Stewartby as the access to the site, with several hundred HGVs using it daily, will affect the villagers every day, as Green Lane is also the main access to Stewartby from the A421. The C94, another part of the access route, runs along the back gardens of homes in

Marston, and the noise from the lorries will disturb residents' quiet enjoyment of their homes and gardens. Our experience also suggests that the HGVs do not tend to stick to the designated travel routes, but will find alternative, more convenient, if unsuitable, routes, affecting the communities further.

291. In conclusion, therefore, for all these reasons, I submit that the parishes of Marston and Stewartby will most certainly be specially, directly and injuriously affected.

292. As I have mentioned, the issue is different as regards the precedents for those parishes within which the proposed works are not located. Nonetheless, I submit that the residents of the parishes are, indeed, injuriously affected over and above residents in other areas. The main effects from the incinerator will be felt in different ways and to different degrees in the parishes across the Vale. To try to simplify this, I have subdivided the remaining parishes into three groups.

293. The first group includes Lidlington, Ampthill, Houghton Conquest and Cranfield. I have also included Wootton and Millbrook in this group, and I have included them here, despite the fact that they have land included in the DCO, because the overall effects on this group of parishes are broadly similar.

294. These parishes will be specially and directly affected because they are also very close to the site and, for similar reasons to the ones that I outlined for Stewartby and Marston, they will also be affected by emissions and by the HGVs using non-authorised routes. This is a real problem, for example in Ampthill, where HGVs regularly flout the 7.5 tonne weight restriction to travel through the Georgian town centre.

295. These parishes have also benefited in the same way from the ending of landfill and the closure of the brickworks, and the consequent improvements in air quality and the restoration of the landscape, and are all enjoying those benefits. Wootton, like Stewartby, has been identified for economic growth and the strategic development of housing and employment.

296. For the parishes in this group that are situated on the valley floor, like Wootton, the visual impact will be similar, with the incinerator moving in and out of view, depending on whereabouts you are.

297. The Marston Vale, however, is enclosed by higher ground: the Greensand Ridge to the southeast and the Cranfield Ridge to the northwest. Where the parishes are on higher ground, like Millbrook, Lidlington, Ampthill and Cranfield, there are panoramic views across the Vale. These views will be interrupted and spoilt by the incinerator from many vantage points. Views from the conservation area of Millbrook, for example, will be affected, with the incinerator dominating the otherwise rural scene. From Ampthill Park, which is an historic landscape, situated on the Greensand

Ridge and valued for its splendid views, the incinerator will only be four or five fields away, absolutely dominating the view and spoiling the pleasure and enjoyment of the many visitors—some 250,000 a year. Views from other heritage sites and long-distance footpaths will be similarly affected.

298. The second subgroup of parishes consists of Brogborough, Hulcote and Salford, Woburn, Woburn Sands, Aspley Heath, Aspley Guise, Ridgmont, Husborne Crawley, Kempston and Flitwick; if you like, it is the next ring out. For this group, visual impact within the parish really is not the issue. These parishes are really affected by concern over emissions—and this is based on our experience of the brickworks, which could be smelt over virtually the whole of the area covered by these parishes—and also by traffic.

299. This group of parishes will be affected by HGVs when they are not following the designated transport routes, especially when there is congestion or closures on the neighbouring trunk roads. In quite a few of these communities, the routing system takes them through the villages when the major trunk roads are closed.

300. In addition, I would particularly like to draw your attention to Brogborough, which is a very small parish and has been particularly badly affected by the antisocial behaviour and the nuisance that was caused by the waste lorries and their drivers when they were travelling to and from the landfill sites. It included such unbelievable antisocial behaviour as drivers relieving themselves into bottles and chucking them into the lay-by in the village and into the gardens, and litter blown from the lorries lining the roadsides and the gardens. It had a real effect on the people who lived in that community. Such problems will return with the re-importation of waste into the Vale. If you live close to some of these sites, it is the small details that make life unpleasant.

301. The final group of parishes comprises Leighton-Linslade, Hockliffe, Toddington, Houghton Regis and Harlington. This group of parishes, as you can see, are further removed from the site, but these parishes are all concerned about the potential for increased traffic movements as a result of the application. Hockliffe, for example, is on the A5, Toddington on Junction 12 of the M1, and Houghton Regis is used as a rat-run between the A5 and the M1.

302. Obviously, this second category of petitioner is different from the unitaries and the four parishes that have land in the area of the order. However, I would urge the committee not to reject their petitions simply for the reason that the works do not fall within their area. Mr Lewis has provided me with a case that demonstrates that locus has been allowed under the local authority head before, so it would be precedented. That case was the case of the London County Council (General Powers) Bill 1913, against which the Hampstead Borough Council petitioned. The bill authorised the closure of an area of open space, which was Parliament Hill Fields, that, in the words of the promoters, was some distance away from the boundary of

the council. Nonetheless, the council's locus was upheld, having argued that the amenity of the district would be affected.

303. I do recognise that Parliament Hill Fields was, in the petitioner's own admission, to be regarded as part and parcel of the larger Hampstead Heath, the rest of which was, presumably, within their boundaries, but the case clearly demonstrates that there is no cast-iron requirement for the subject matter of the bill to be located within the area of a local authority for the standing order to apply.

304. Therefore, in summary, I would submit as follows: the wording of Section 128 does not restrict the consideration of Parliament to the issue of the acquisition of the special land. You have the discretion under Standing Order 96 to allow the locus of a parish council in relation to the order. All the parishes are injuriously affected by the order for the detailed reasons I have mentioned, but Marston Moretaine, Millbrook, Stewartby and Wootton are particularly special cases because the proposed works are located within their boundaries. Thank you.

305. **Lord Brabazon of Tara:** Thank you very much, Mrs Clark. I do not think I have any questions; I had a couple of questions but you have already answered them in your opening remarks. Could we go straight on now to Mr Thompson, please?

306. ***Paul Thompson***: Thank you, sir. I am not going to repeat all the arguments that we deployed in relation to the unitary councils, but I think, if you accept my case against the unitary councils, either in disallowing those councils completely or in limiting their right to be heard to points concerning the special land, then I think Ms Clark accepts that it follows that none of the parish and town councils would be heard because, if I win on that, it sort of carries across.

307. If the two unitary councils are allowed through, the additional arguments are all self-explanatory, and I will only take a minute, if I may, just to remind you what they are. The parish and town councils are not landowners subject to compulsory purchase at all. Secondly, their objections do not relate to the special land—the highway verge. All but four of them are, to varying degrees, remote from the development site, and Ms Clark has helpfully referred you to this plan, which sets it out very nicely. Their concerns are matters that fall within the remit of the petitions of the two unitary authorities. I think there is a degree of duplication there. That does not mean that they are not allowed to make those points; I am simply drawing that to your attention.

308. Whilst Ms Clark refers to the alleged loss of visual amenity, impact on local roads, concerns about emissions and traffic movements—those are matters that she has raised and that are clearly suggestive of direct and special effects—in my submission you are entitled to conclude, having regard to the plan and the other points made, that their interest is, if at all, too remote to support an entitlement to be heard, either for all of them or at least some of them, and particularly those most

remote. Ms Clark has indicated that she relies solely on the discretionary locus standi, which is made available under standing orders for local authorities, and I freely admit that it is a matter for your discretion. That standing order is applicable and I have nothing further to say.

309. ***Lord Brabazon of Tara:*** Thank you, Mr Thompson. Mrs Gorlov?

310. ***Alison Gorlov***: I do not think I have anything to add to what Mr Thompson just said. In relation specifically to scope, everything that I said earlier concerning the two unitaries applies equally to the town and parish councils.

311. **Lord Brabazon of Tara:** Thank you. Mrs Clark, would you like to say anything briefly in reply?

312. ***Sue Clark***: Yes, I would just like to say in reply to Mr Thompson that, whilst only four parishes may actually have land that is included within the DCO, the other parishes are still affected and, therefore, I would argue, have locus standi in that their amenity is affected by this application. Parishes, you say, may be too remote to support an entitlement to be heard. For the same reasons, I would argue that is not the case, but I think it would be fair to say—and I hope I have made that clear—that, as you move outwards, the impacts change and are suffered to different degrees.

313. **Lord Brabazon of Tara:** Thank you very much. Next we have Ms Alison Ogley addressing petition number 35, please. Perhaps you could open by explaining the interest in this.

314. ***Alison Ogley***: Thank you, sirs. I represent the petitioners Waste Recycling Group, WRG Waste Services Limited and Anti-Waste Limited. The parent company is Waste Recycling Group; the other two are subsidiaries. It is in all three names just to cover all the bases and to make sure we did not fall foul of a procedural rule. We are landowners who are being compulsorily acquired. That is set out specifically in the petition. We have, throughout the entire DCO process, objected on the basis of the test for compulsory acquisition not being met. We do not consider that there is a compelling case in the public interest, and that is specifically set out in Section 4 of the petition. That is the basis for our petition. There is no objection to the development consent order otherwise. It is only related to that.

315. In terms of whether or not we have locus, there are two areas for which we claim locus. The first is the landowner, which you have heard about from Mr Lewis already, and I do not intend to repeat what he said; there is much common ground between us, obviously. The second is on competition. Standing Order 92 says that you can petition on the basis of competition.

316. One point that has been raised by the petitioners throughout this proceeding before the IPC and specifically referenced in our petition—I will just find you the

reference, if I can—at 4.4.4 is that the award of compulsory acquisition powers to this particular project has the ability to skew the market in this particular area. In fact, in terms of the Directive referred to by the Secretary of State, I think there is a real risk that having compulsory acquisition powers in this particular arena for big projects and not small projects is not in compliance with the Directive, which post-dates the 2008 Act and only came into force early last year. I do not think that has been properly thought through, but that is not really a matter for today; that is just an aside.

317. As I say, we think that we have locus. We are landowners. I think it is notable that neither of the memorialists have paid any real attention or dealt with in any real detail the specific provisions of the 1945 Act. Unsurprisingly, they have stuck to the 2008 Act, which I am sure I would have done in their shoes. Just to make clear our position, we say that it is a matter for you. Your discretion, as Mr Thompson said, is entirely unfettered as to whether or not to allow locus. The reason for that is because it is the Statutory Orders (Special Procedure) Act that regulates this procedure.

318. That is specifically set out in the first section of the Act. It says, "The provisions of this act shall apply in relation to any order so made or confirmed." Section 1.2 says, "The order will not have effect until it has been brought into effect in accordance with the provisions of this act." Then Section 3.3, which you have already heard much about, states that "if the chairmen are satisfied with respect to such petition that provisions of this act and of standing orders have been complied with in respect of thereof, they shall certify that the petition is proper to be received".

319. Mr Lewis also made comments on that word "shall". That is mandatory. There is no discretion. If we comply with the 1945 Act and the standing orders, that is the end of it and we should have our petition certified. That is what Section 3.3 says in plain terms. Section 128 of the Planning Act 2008 does not go anywhere near amending that provision, and it would have needed to do so explicitly if it were to have the meaning that the memorialists are arguing for

320. Just on that point, Mr Thompson says that there is no debate in Hansard about the passing of the 2008 Act and what was really intended, and that is right—there is nothing. But what I did find is a process on the explanatory notes that go with the Bill and with the Act for section 128 of the Act. When it was first proposed in 2007 by the House of Commons, there was reference to special parliamentary procedure but there was no reference to the Act of 1945. When it went to the House of Lords in 2008, those words were specifically added in, and the words say, "The special parliamentary procedure and the system which governs it is contained in the Statutory Order (Special Procedure) Act 1945 and 1965," and that stayed in the final version of the explanatory notes to section 128 of the Act. That is an explicit recognition that the Acts of 1845 and 1965 takes precedence.

321. The other point that I should address, because it is raised against the petition by the memorialists, is whether or not our petition is really a general petition or whether it is one of amendment. Again, I say that it is one of amendment, and the reason I say that is because Section 3.4 of the 1945 Act says that "where, in the opinion of a chairman, a petition presented as a petition for amendment involves amendment of the order which would constitute a negative of the main purpose of the order, they shall certify it as a petition of general objection." What we need to do is ask ourselves: what is the main purpose of the DCO? The main purpose of the DCO is not to award compulsory purchase powers; it is to grant development consent.

322. If you have a look again at the explanatory notes to the Planning Act 2008, paragraph 3 says it is there to "create a new system of development consent for nationally significant infrastructure". Paragraph 4 says, "Development consent will be given in the form of an order which may also confer upon developers certain rights." "May" is the word used. This goes on to say, "These rights may include compulsory acquisition of land." It is not a mandatory provision; it is a discretion. It is confirmed in Section 122 itself of the Planning Act, which states, even where you meet the test, which we say is not met, for a compelling case in the public interest, an order granting development consent "may include provision for authorising compulsory acquisition." Again, it does not go to the heart of the development consent process; it is an added thing on top if you meet that requirement, which, we say, has not been met here, for various reasons that are alluded to in the petition.

323. On that basis, I do not think there is any case to make that the petition or the amendments that we are asking for would negate the main purpose of the order. If, for example, the IPC had decided that the compelling case in the public interest test had not been made out, we would be in the same position. The development consent order would still have been made; it just would not have provided those powers, and Covanta would be in exactly the same position as pretty much everybody else in the waste industry who is in this particular area in the commercial market. They just have to negotiate like everyone else. It would not be a kibosh to the whole project; these things rarely are. You do deals; that is what happens. That is what I say in terms of whether or not ours is a general petition or one for amendment.

324. I also thought it might be useful just to make reference to what *Erskine May* says is the purpose of special parliamentary procedure. It is in one of the extracts in the Secretary of State's bundle. It is the 21st edition at page 950. It states there that, in terms of the purpose of SPP, its provision was necessary to provide a quicker procedure to secure effective parliamentary control over the exercise of such powers, both in respect of broad questions of national policy and in respect of detail affecting private individuals. It is there to provide a safeguard and it is not limited; it is about broad questions. If you have a landowner's standing, you should be entitled to raise issues on those broad questions, and that is what we are saying we should have the ability to do.

325. In terms of whether or not our petition relates to the special land, one point springs to mind, which is that, whether it is special land or WRG's land or anyone else's land that is being compulsorily acquired, the same compelling case in the public interest test has to be met. Therefore, the arguments that we have put forward to the effect that those tests are not met remain good, whether it is about the special land or our land. In that respect, I would suggest that it would be perfectly proper, even if it were to be limited to the special land, for our petition to go forward.

326. There is one interesting element that I should mention, because the Secretary of State and Covanta's memorials and their submissions make interesting comments about general issues. The problem in this case, and the problem that was before the IPC, is, because you have a situation where planning permission is being considered at the same time as compulsory acquisition, it has not been possible to separate those two issues out. You have to look at the overall merits to be able to work out whether or not there is a compelling case in the public interest. The two are interrelated; you cannot make a sensible distinction between them.

327. The table that was handed out in support of Covanta—I just cannot put my hands on it now.

328. **Lord Brabazon of Tara:** Is that the one with the dates of the various Acts?

329. ***Alison Ogley***: It is, yes. I have one marked-up version of it—thank you. I would simply say that this is a distinction without a difference, quite frankly. You can make the same argument that is being made in respect of Section 128 of the Planning Act about Section 24 of the Water Act, because it states, "A compulsory purchase order made under this section may authorise the purchase" etc "but where any such order authorises the acquisition of land so held inalienably or of any land forming part of a common open space or allotment, the order shall … be provisional only and not have effect until it is confirmed by Parliament."

330. It is quite possible, using that language, to argue that any further inquiry or confirmation by Parliament should only look at the common open space or allotment issues. It really is a distinction without a difference; it is just daft. I do not see that you can read into Section 128, which has been suggested, when you take into account the 1945 Act. That wording is so clear and so direct that it would have needed something express to overrule it. I think that is pretty much everything for us; all the other points have been covered.

331. **Lord Brabazon of Tara:** Thank you very much indeed, Ms Ogley. I do not know if we have any questions. Some of them have been answered already. Mr Beach?

332. **Nicholas Beach**: I wondered if you could clarify for me the land in which you claim to have an interest and the nature of the interest that you claim to have.

333. ***Alison Ogley***: Yes, of course. It is set out in our petition, which is probably the easiest document for me to refer you to. We have land but we also have a restrictive covenant that we benefit from on adjacent land. The terms of the restrictive covenant would prevent development of a similar nature to your petitioners' business going ahead on the adjacent land. Because we are a waste operator—that is what we do—we are in the same business as Covanta. That is one of the reasons my clients are quite cross, because they cannot get compulsory purchase powers because they do not have an NSIP. It is paragraph 2.1 to 2.3 of our petition. We own the subsoil of land and there is reference there to the land plan.

334. **Nicholas Beach**: What I was not clear about was whether that was a reference to plots that formed part of the special land. They do not.

335. ***Alison Ogley***: I do not believe that is the case.

336. **Nicholas Beach**: None of your interests relate to land.

337. ***Alison Ogley***: Special land?

338. **Nicholas Beach**: Yes.

339. ***Alison Ogley***: I do not have anyone with me today who could give me specific instructions on that. I do not think that we have land interests in the special land itself.

340. **Nicholas Beach**: I was confused by the reference to items 22 and 23.

341. ***Alison Ogley***: I think it is to a document that was before the IPC.

342. **Nicholas Beach**: It is not the plan that refers to plots 22 and 23 then.

343. ***Alison Ogley***: I am not sure. I am sorry.

344. ***Alison Gorlov***: Sir, if you would bear with me, I may be able to help. It should be in the plans that were handed to you when you initially saw these papers. It is the plan that looks like that. There is a blow-up of it. Plot 22 is at that point.

345. **Lord Brabazon of Tara:** I have some different maps.

346. ***Alison Ogley***: I think it might be the plans that were originally laid with the order.

347. **Lord Brabazon of Tara:** We may have some more maps in here.

348. ***Alison Gorlov***: I beg your pardon. I am being reminded that you may have something that looks slightly different.

349. **Nicholas Beach**: I was working from this one but it might be that—

350. **Lord Brabazon of Tara:** This is the same.

351. ***Alison Gorlov***: That is the one, and you have a blow-up of it. It is that document, I beg your pardon.

352. **Nicholas Beach**: That land is indicated on this plan as being Bedford Borough Council—is that right?

353. ***Alison Gorlov***: That is right. Those are 22 and 23. Would it be helpful to pass this to Ms Ogley to help her identify the land in which her clients have an interest?

354. ***Alison Ogley***: I am afraid I would have to go back and check; it is not something that I would be able to confirm immediately, because I have been working, unfortunately, from slightly different plans.

355. **Nicholas Beach**: Okay.

356. ***Alison Ogley***: It does look possible that we own the subsoil of plot 22, which is special land.

357. **Nicholas Beach**: Yes, that is what I was not sure about.

358. ***Alison Gorlov***: Again, sir, I wonder if I might assist. We do not know about the title to this land for certain, but I am instructed that an assumption was made that, as a frontager, they might have a subsoil interest in it. It cannot be verified, but this is the assumption that somebody fronting a highway owns the subsoil underneath the public highway up to the centre of the highway.

359. **Peter Brooksbank**: That would be right.

360. **Lord Brabazon of Tara:** We have taken that point on board, I think.

361. **Nicholas Beach**: But we still do not know the answer as to whether or not that person is your client.

362. ***Alison Ogley***: No, it would appear not. As I say, it is not something that I have taken instructions on. Those are not my instructions and I have not been through the title myself.

363. **Nicholas Beach**: Thank you.

364. ***Alison Ogley***: I am sorry I cannot help with that. I can make a call back to the office if I can have some time to do that.

365. **Lord Brabazon of Tara:** I am looking to Mr Beach for advice.

366. **Nicholas Beach**: I am assuming, on the basis of what you are saying, that you do not have any interest in the special land, unless you say otherwise. One has to proceed on some basis.

367. ***Alison Ogley***: Yes, I think I would be uncomfortable confirming one way or the other without taking instructions from my client. Could I have 10 minutes to make a phone call and just double check?

368. **Lord Brabazon of Tara:** Yes, by all means.

369. ***Alison Ogley***: Thank you.

370. **Lord Brabazon of Tara:** I think I understand the question: is this land that is owned part of the compulsory purchase?

371. **Nicholas Beach**: Special land covered by Section 128.

372. **Lord Brabazon of Tara:** Which is going to be compulsorily—

373. **Nicholas Beach**: Yes, but there are other compulsory purchases.

374. **Peter Brooksbank**: Can we suspend until you can make the phone call?

375. ***Alison Ogley***: Thanks.

376. **Peter Brooksbank**: That would be the best way. We might not need 10.

The Hearing adjourned from 1.40 pm until 1.47 pm.

377. ***Alison Ogley***: I have made the call. I am waiting for a response. I wondered whether or not we might be able to make progress on other issues in the meantime, rather than waste time.

378. **Lord Brabazon of Tara:** Thank you, Ms Ogley. We will wait.

379. ***Alison Ogley***: I have left my colleague outside with the phones.

380. **Lord Brabazon of Tara:** In that case, I will ask Mr Thompson to begin questioning.

381. ***Paul Thompson***: Thank you, sir. I can be quite short, but can I begin by pointing out that, on this occasion, there are two issues for you to consider? Firstly, there is the issue of whether the petitioner has locus; and then, secondly—and this is not an issue that we have had before today—whether their petition should be a petition for amendment or treated as a petition of general objection. I will deal with each of those points in turn.

382. Taking the locus one first, I am not going to repeat all the local authority arguments, which we have spent large parts of today discussing, because all of them that are not local authority-specific—not about a local authority's discretionary matters—are equally applicable to this petitioner, and I carry those across.

383. The two distinct features of this petitioner that we would highlight—the first in a qualified way—is that they either do not have an interest in the special land or, if they do, I think we are going to hear it is an interest in the spit below the highway as an adjoining landowner. In any event, that is the extent, if at all, of their landowner status in terms of the special land.

384. The other point to highlight is that they have rights in other land subject to compulsory purchase under the order, but that is not what this is about. The petitioner is here, as the petitioner makes plain, effectively to stymie this scheme and to exact what would appear to be a ransom-style bargain. That is their position, and we accept that they have included in their petition a reference to competition and that there is—it has not been mentioned before in the pleadings or today, but it has been by Ms Ogley—a discretionary locus in the standing orders on grounds of competition. I do not discount that there is, but we invite you to exercise your discretion against this petitioner. That is the position. They have a very limited basis for their petition, and we say that it does not, for all the reasons that we have gone through earlier today, bear upon what this is about—the special land—and that they should not be heard.

385. If I can then turn to the quite separate issue, they have presented their petition as a petition for amendment, and we say it should be treated as a petition of general objection. I begin by answering the question: why have we taken this point at all? It may not be obvious to all concerned. There was a time prior to 1965 when petitions of general objection did not go to joint committees at all unless there was a motion on the floor of the House referring them in. In fact, since 1965, if they get through a hearing of this sort on challenge, they do get referred, unless there is a motion on the floor of the House that goes the other way and says, "Do not refer them." That was one basis upon which there used to be challenges—or could be challenges—to petitions for amendment being treated as petitions for general objection.

386. Of course, it is no longer the case and that is not the basis for doing so now. We have made this point because, should you be minded to refer this petition to a joint committee, we wanted to make it very clear that, as we see it, it is a wrecking petition. That is what it is about. What we did not want to do is to get to a position, were this petition to be referred to a joint committee, for there to be an interesting argument between the lawyers saying, "You did not take that point earlier, so why do you say it now?" The amendments that they are proposing are perfectly commercially sensible from their point of view, but they do wreck this proposal, as we understand

it, and therefore, we have suggested that, if you are minded to accept this petition, it should be categorised as a petition of general objection. That is, I think, all I have to add on this one.

387. **Lord Brabazon of Tara:** Thank you. Mrs Gorlov?

388. ***Alison Gorlov***: First of all, sir, perhaps I might assist with Covanta's view concerning land ownership. The book of reference shows these petitioners as having an interest in the numbered plots that are the special land. I am instructed that they are there because of the presumption I mentioned earlier that they would have an interest as frontagers. We do not know if that is the case, but that is the reason why they are in there. We do not know if we want to acquire their subsoil, but we may. It is within the plots; that is why they are there.

389. Covanta, therefore, is not in any way resiling from what is in the book of reference. So far as Covanta is concerned, they are treating these petitioners as if they do have an interest in the special land and, indeed, that is recognised in our memorial, where we refer specifically to paragraph 6 of the petition as being something that could potentially apply to the special land. That is the first point I wanted to make.

390. I might just say a word, if I may, please, about the operation of the 1945 Act, where you have again been told that the 1945 Act is what must be complied with. We do not disagree with that at all, sir. Of course it must be, but what these petitioners seem not to have recognised is that the route by which you get to the 1945 Act is, in this case, Section 128 of the Planning Act and, therefore, it is necessary for you to look at that referring section to see what it says and how the referral is made. If the referral is in some way limited in scope, then these proceedings are limited. I will not expand further on it, but that is the point that seems to have been missed.

391. One other thing, though, that I should say on it is that it has been suggested that, in some way, the 1945 Act takes precedence over the 2008 Act. Sirs, it is not a question of precedence; it is a question of taking the two pieces of legislation that relate to each other and seeing just how that relationship works. I do not think I have anything more to say. Thank you, sir.

392. ***Alison Ogley***: Sirs, I am able to come back to you. Yes, my instructions are we do own plots 22 and 23, the subsoil of which are shown on the plan and are special land.

393. **Lord Brabazon of Tara:** Thank you. If there is nothing more, we will not be able to announce our decision today but we will be publishing a special report, which will contain our decisions, together with some of the reasoning behind those decisions. I will therefore now adjourn the public session of the hearing at this point and we will continue our deliberation in private. We will reconvene for a further

private meeting in the future—in the near future, I hope—to agree a final report. We will then report our decision to the House and the report will be published shortly afterwards. We are, I think I might say, concerned about this European aspect of it, because it would seem to me—I am not quite sure, but from some of what we have heard anyway—there does not seem to be any point in us being here at all, if it is true, but we will take advice on that.

394. Thank you all very much for coming today and giving us the additional evidence to assist us in making our decisions. It has been most useful. As I say, we hope we will be able to come to a decision before too long, but I am not giving any promises about the time. If I could ask you please to leave while we continue with our deliberations in private—preliminary deliberations, I should say.

public session adjourned at 1.56 pm.

Appendices

Appendix 1: Letter from the Chairmen to the Secretary of State, Department of Energy and Climate Change

Mr Edward Davey MP
Secretary of State for Energy and Climate Change
3 Whitehall Place
London
SW1A 2AW

14 March 2012

We are writing to you in connection with our consideration of the Rookery South (Resource Recovery Facility) Order 2011, deposited in both Houses of Parliament by your predecessor, Mr Huhne, on 29 November 2012. The Order is subject to Special Parliamentary Procedure under the Statutory Orders (Special Procedure) Act 1945.

On 8 March 2012, we held a Hearing under the provisions of House of Commons Standing Order 242 (House of Lords S.O. 208) to consider whether the petitions received against the Order were proper to be received. In anticipation of the Hearing, on 1 March, we received a letter from the Minister of State, Charles Hendry MP, setting out your approach to the Order and the petitions against it. The letter was accompanied by an extensive note from the Agent acting on your behalf, Mr Paul Thompson of Bircham Dyson Bell, explaining your position in detail and citing the basis in law and parliamentary precedent for your objections to the 39 Petitions against the Order.

In the letter and attached submission from Bircham Dyson Bell, reference is made to the potential incompatibility of the proceedings under the Statutory Orders (Special Procedure) Act 1945 ("the 1945 Act") with article 7(4) of Directive 2009/72/EC concerning common rules for the internal market in electricity. Article 7 regulates Member States' procedures for authorising new generating capacity. Paragraph 4 of that Article requires the applicant for authorisation to be informed of the reasons for refusal where an application is refused. It also requires appeal procedures to be made available to the applicant.

The submission made on your behalf points out that there is a potential incompatibility between Article 7(4) and the domestic legislation which requires an order granting development consent for an electricity generating station to be subject to special parliamentary procedure where it provides for the compulsory acquisition of special land. This is because a potential consequence of the special parliamentary procedure is to prevent the order granting consent from having effect. No appeal would be available to the applicant against such an outcome.

We will of course give careful consideration to this point and the submissions made on it, when reaching our view on the *locus standi* of petitioners and on the other matters raised at the hearing on 8 March. But it seems to us there is a wider point here which is separate from the issues raised

at the hearing. We consider it cannot be right to require an order granting development consent to be subject to special parliamentary procedure if the only acceptable outcome from a legal standpoint is that the procedure has no effect on the order. It seems to us that there is a particular difficulty with section 4(1) of the 1945 Act which allows either House, within the period of 21 days from the date on which the Chairmen make their report under section 3(5), to resolve that an order be annulled. It is your view, and that of the other parties, that the special parliamentary procedure applies to the order as a whole which is indivisible. If that is right, then any resolution under section 4(1) would also necessarily relate to the order as a whole. This would accord with Parliamentary practice in both Houses in that there is no procedure to annul part of a special parliamentary order (or any other statutory instrument). Since there can be no appeal against a resolution, it must surely follow that in your view there would be a breach of the Directive if a resolution for annulment of the order were to be passed.

We would be grateful for confirmation that, despite the points raised in this letter, you still consider the legislation can be made to work in a way that is compatible with Article 7(4) of Directive 2009/72/EC. It would also help to have your detailed reasons for this view.

If, in fact, it is your view that changes to the legislation are required to ensure the compatibility of the current legislative framework with Article 7(4) of Directive 2009/72/EC, we would be grateful for an indication of the Government's plans and anticipated time scale for such action.

It would be helpful to receive your response by noon on Monday 26 March. A copy of this letter is being sent to agents for the petitioners and the other memorialist. If those agents have comments on the points raised in this letter, they should submit them to the same deadline.

It may be helpful for all parties to know that we do not expect to report before the end of March.

Yours sincerely,

Lord Brabazon of Tara DL
Chairman of Committees
House of Lords

Lindsay Hoyle MP
Deputy Speaker, Chairman of Ways and Means
House of Commons

Appendix 2: Text of a letter from Sue Clark (Agent for 23 parish and town councils (petitions 1-34)) in response to the Chairmen's letter to the Secretary of State, Department of Energy and Climate Change

Rookery South (Resource Recovery Facility) Order 2011.

The 23 parishes.

Thank you for the copy of your letter to the Secretary of State, dated 14 March 2012. I would like to make the following comments on behalf of the 23 parishes:

1. Bedford Borough Council and Central Bedfordshire Council (the unitaries) have kindly allowed me to read a copy of their response to your letter of the 14th of March. The parish councils agree with the points made in paragraphs 1 - 3 by Mr Lewis, on behalf of Bedford Borough and Central Bedfordshire Councils in his response to your letter.

2. The parish councils note the unitaries' comments on potential wasted costs made in paragraph 4, and would also not wish to find themselves in a similar position of going to the effort and expense of preparing and appearing before a joint committee, (should any of our petitions be certified as proper to be received) only to find the process nullified by legislation at a later stage. The parish councils, therefore, also agree with the suggestions made by Mr Lewis in his letter in respect of this, and request that you also note our concerns in relation to the possibility of wasting effort and costs, especially given the limited resources available to the parish councils. Should you decide to report to the Houses before this is resolved, and should any of our petitions be certified as proper to be received, the parishes would also respectfully request that the Secretary of State or Covanta provide an indemnity against reasonable costs incurred by the parishes in relation to a joint committee hearing.

3. Should the Government, in order to comply with the terms of the directive, decide to amend or bring forward legislation to provide a means of appeal, we would expect that an equivalent right of appeal would be provided for any party, such as the parishes, who submit a petition of objection or amendment to Parliament in accordance with the SPP.

4. We do very much hope that it will be possible to find a resolution, so that the SPP can proceed.

Appendix 3: Text of a letter from Alastair Lewis, Sharpe Pritchard (Agent for for Central Bedfordshire Council and Bedford Borough Council (petitions 36-39)) in response to the Chairmen's letter to the Secretary of State, Department of Energy and Climate Change

Thank you for sending me a copy of your joint letter of 15 March to the Secretary of State, and for giving me the opportunity to respond on behalf of the Councils.

1. Summary of the councils' arguments at the hearing

Whilst I acknowledge that this is not an opportunity to rehearse any new arguments in relation to the directive, I think it would be useful to summarise the points that the councils made at the hearing:

- If the order were referred to a joint committee and the committee were to reject the Order, then the applicants could ask the Secretary of State to promote a confirmation bill. I acknowledge that that process itself is not an 'appeal' in the usual sense of a court or tribunal process, but it does provide a process which gives the applicant an opportunity for the matter to be reviewed and reconsidered;

- If the Secretary of State refuses to promote a confirmation bill then the applicant could seek judicial review of that decision. Judicial review has been held to be compliant with Article 6(1) of the ECHR (right to a fair hearing) see R v Secretary of State for the Environment, Transport and the Regions ex parte Holding and Barnes etc (2001 UKHL 23) (the Alconbury Case);

- The councils acknowledge that if a joint committee were to amend an SPP order or were either House to pass a resolution negativing an SPP order, then there would be no confirmation bill process, and therefore no appeal;

- Mr Thompson for the Secretary of State said that had the Order encompassed an area of land that consisted only of special land, the Secretary of State would not have memorialised. This is surely at odds with any contention that the whole process is non-compliant.

2. If there is an incompatibility then it is a matter for the government to deal with by legislation, not for the two chairmen in this particular case

As I said in my submissions, any incompatibility with the Directive is a matter for the government to deal with, and it would presumably be achieved by making an order under the European Communities Act 1973. The issue is nothing to do with locus or with whether the councils' petitions are proper to be received. In the context of the hearing before you it is a red herring. If the Planning Act 2008 is incompatible, then it is incompatible whether or not petitions have been

deposited against the Order. As I mentioned in my submissions, if you consider that the councils' petitions are proper to be received and that the councils have locus, then you must certify the petitions as being proper to be received, despite any underlying constitutional issues that may exist.

Assuming that you agree that it is a matter for government then the councils would ask that you use all your powers available to require that the Secretary of State make the government's position known as soon as possible in clear terms, and either confirm that they will promote amending legislation or state that on reconsideration it is not necessary, setting out a clear timetable for action. In doing so, the government must make clear whether its intention would be to make any amending legislation retrospective in its application, as it surely would have to be in some respects if it were to address the Rookery case.

3. The Councils' position on amending legislation

If the government were to decide that legislation is required to rectify an incompatibility, then of course the councils would make their views known to the government during the consultation period. However, the councils would wish to place on the record now that in their view, the importance that Parliament has always given to special category land must prevail.

In other words, if the government remains of the view that there is an incompatibility with the directive, the councils are of the view that any amending legislation should not exempt electricity related applications from the SPP process, but instead a new appeal mechanism should be provided. This could be achieved by formalising a right of appeal from a decision of the Secretary of State not to promote a confirming bill, by enabling the Secretary of State to promote a confirming Bill where a joint committee amends an order, and by removing the negative resolution procedure for electricity cases.

4. The Councils' position on potential wasted costs

The points made under this heading are the most important for the councils.

The one situation in which the councils would not wish to find themselves (assuming you were to certify their petitions as proper to be received) would be going to the considerable effort and expense of preparing for an appearance before a joint committee and making an appearance only to find that the whole process was a waste of money and effort (whether or not the councils are ultimately successful) because the government promotes legislation (whether during the proceedings or after) which nullifies the SPP process in the present case.

Therefore, again assuming that you were to certify that their petitions were proper to be received, the councils would ask that in your special report you highlight the councils' concerns in relation to possible wasted costs and effort and make recommendations accordingly. For example, you could recommend that the joint committee process should be put on hold until either legislation is in effect, or the government announces that there is no compatibility issue and that there will be no legislation. Another possible course of action would be to recommend that the Secretary of State or Covanta provide an indemnity in respect of reasonable costs incurred by the councils in relation to the joint committee hearing were the proceedings to be nullified by legislation.

I hope that these points will be taken into consideration.

Appendix 3: Text of a letter from Charles Hendry MP, Minister of State, DECC in response to the Chairmen's letter to the Secretary of State, Department of Energy and Climate Change

Rookery South: Special Parliamentary Procedure and Directive 2009/72/EC

I write in response to the letter of 14th March 2012 which you wrote to the Secretary of State for Energy and Climate Change, following up on the hearing you held on the Rookery South (Resource Recovery Facility) Order 2011 ("the Order") on 8th March 2012 under the Statutory Orders (Special Procedure) Act 1945 ("the 1945 Act").

I would begin by reiterating that the Government's role in this process is not to take a view one way or another on the merits of the Order or the proposed development to which it relates, but simply to explain how it considers the legislation ought to operate. In providing this opinion and in commenting previously on the petitioners' right to be heard, the Government is not suggesting that any of the petitioners are not genuinely aggrieved by the Infrastructure Planning Commission's ("the IPC") decision and it does not seek to endorse the judgments the now abolished IPC made.

You ask whether, in the light of the submissions made by Mr Thompson on the Secretary of State's behalf at the hearing, we think that certain outcomes which may occur under the 1945 Act would be incompatible with the rules about authorisation of new generating capacity set out in Article 7 of Directive 2009/72/EC concerning common rules for the internal market in electricity. In particular, you raise the question of motions to annul the Order under section 4(1) of the 1945 Act.

We agree that the annulment of the Order in its entirety would not be compatible with Article 7. But no action which you, in your current roles, might take would inevitably lead to that outcome. If, in the future course of the Special Parliamentary Process, it became apparent that such an outcome was being envisaged, the Government would reiterate its advice that it was incompatible with Article 7. Even so, other parties might not necessarily share the Government's opinion on that matter and so might take actions which they would justify in accordance with alternative interpretations of the legislative position. However, we consider the proceedings on the Order can reach a meaningful conclusion without such an outcome.

For example, a person specially and directly affected by the proposed compulsory acquisition of rights over local authority land could argue against the Order on the grounds that, even allowing for the merits of the proposed Rookery South Resource Recovery Facility as approved by the IPC, the proposed compulsory acquisition was an unjustified intrusion on that person's rights – perhaps because a less intrusive way of achieving the same objective could readily be found. In the Government's view, that petition would be proper to be received, and, depending on the outcome of proceedings before the Joint Committee, it could lead to amendment of the Order without the loss of the Rookery South project as a whole. We do not think that the absence of judicial appeal against the loss of compulsory purchase rights over land for an ancillary part of the development

would infringe Article 7 in the same way that special parliamentary procedure as interpreted by the petitioners could.

As far as a motion under section 4(1) is concerned, we would note the following points. Both Parliament and the Executive have a duty to secure compliance, in so far as they can, with the UK's international obligations, for example under the EU Treaties. If there were the prospect of a section 4(1) motion to annul, and it was considered that that motion would, if carried, in and of itself, produce a result that was not compatible with Article 7, there would be a number of options. The motion may not be tabled; if tabled, it may not be selected for debate; if debated, it may not be voted on; if voted on, it may be defeated; if passed, it may, exceptionally but not impossibly given the need to secure compliance with applicable EU law, be treated as a motion for annulment only of that part of the order which has caused it to be subject to special parliamentary procedure.

In short, if the relevant circumstances arise, those concerned will have to decide what to do in order to comply with the Article 7, but the Government does not think that it would in principle be impossible to secure compliance by one means or another.

Accordingly, we do not think that the risk of special parliamentary procedure in the present case having an outcome which would be incompatible with Article 7 is great enough to justify legislative action to avoid all potential incompatibility. In any case, we doubt very much whether it would be proper to introduce amendments to the 1945 Act or the Planning Act 2008 which had any effect on the present proceedings. However, it was announced, alongside the Budget, that the Government would act to remove duplication in the consenting regime for major infrastructure development by bringing forward legislation to adjust the scope of special parliamentary procedure. This proposal is intended to go rather wider than issues of Article 7 compatibility, but clearly Article 7 issues that might otherwise arise in future cases could be addressed as part of any reforming legislation.

I hope this answers your questions. The Order has thrown up novel issues almost at each stage of the special parliamentary procedure and I very much appreciate the care which is being taken by yourselves and your officials in this matter. I am sorry that it has not proved possible to respond to your letter by 26th March as requested, due to other pressures.