

Head of Highways and Planning
North Lincolnshire Council
Church Square House
PO Box 42
Scunthorpe
North Lincolnshire
DN15 6XQ

DEVELOPMENT CONTROL SECTION	
11 OCT 2010	
DATE RECEIVED	
Referred To	

Our reference BJB/0956072/O10307661/SAMF

Your reference

8 October 2010

Dear Sirs

Planning Application by Able UK Ltd – PA/2009/0600 – Proposed change of use from agriculture to industrial for A3, C1, B1, B2 and B8 land uses for port related storage and associated service facilities – Land at East Halton

We refer to our letter of 29th September, sent on behalf of our clients Associated British Ports. You have now had our letter for over a week and we must say that we are disappointed that we have not yet received your reply - nor indeed even an acknowledgement. Whilst we accept that a delay of seven days in responding to a letter may be viewed by some as not being unreasonable, there is in this case, as you are fully aware, a distinct degree of urgency, bearing in mind the potentially far-reaching consequences of the Able application currently before you. This urgency is even more pressing bearing in mind that despite our clear request, we do not yet know your intentions as to when you propose to take this application to committee.

We do not intend simply to reiterate the comments that we made in our letter of 29 September, but we do ask for a response, by return, to the questions that we have raised - particularly in the context of any legal advice that you may have received in the context of the Able application and an indication as to timescale for consideration of the application by members.

We should perhaps remind you in the context of our earlier letters of 7 May and 13 July, that one of our client's principal concerns in relation to this application is that your authority is not, in law, able to determine the application currently before you because it is inextricably linked to the development proposal recently published by Able for a deep water port. It is patently unarguable that the impact and consequences of the two development proposals must be considered jointly in terms of the UK and European legal and regulatory regime, their respective and joint planning merits, their cumulative environmental impact and the clear consequences for the local community. These concerns have been put before you in some detail in our earlier letters, but are now, we must say, underlined in practical terms by our client's understanding, following discussions with your authority that, putting aside the material impact of the development proposal, your authority is aware of the clear links between the present planning application and Able's Marine Energy Park proposals. For example during those discussions your authority informed our client that it is Able's intention to relocate their car business from their southern site to the site applied for in the planning application in order to free up land for the marine park development. In the light of this information it is simply untenable for the applicant to argue that its two proposals are not linked and should not be considered together.

We should perhaps add that Able, regardless of their legal obligations, have an obligation to act properly and responsibly. It must be beyond argument that the standards applied to our clients Associated British Ports and others in the industry must also be applied to Able. In our view, in seeking to push through the planning application before you without any reference to the wider Marine Energy Park proposals on the same Able site, which proposals are clearly linked to the planning application, Able are attempting to circumvent due legal process and to deprive the public of their right to participate in the proper consideration of Able's full development proposals.

It must, therefore, logically follow that if your authority allows Able to continue on its current course and determines to approve their application, such a determination will be susceptible to challenge. Further, you should be aware that we have advised our client that such a challenge can be successfully pursued by way of judicial review through the courts.

In the light of the above, we ask you again to respond to our letter of 29 September – by return.

Yours faithfully,



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Brian.Greenwood@osborneclarke.com

cc. Mr Mike Wood
Head of Legal & Democratic Services
North Lincolnshire Council
Pittwood House
Ashby Road
Scunthorpe
North Lincolnshire
DN16 1AB

From: Simon Driver/EM/NorthLincs
To: "Mike Welton" <Mike.Welton@northlincs.gov.uk>
Date: Wednesday, October 13, 2010 08:06PM
Subject: Fw: Able UK application

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Email Sent By Blackberry

From: "Hawthorne, Emma (NE)" [Emma.Hawthorne@naturalengland.org.uk]
Sent: 13/10/2010 18:11 CET
To: Simon Driver
Cc: Andrew Taylor; Geoff Popple; "Nottage, Peter (NE)" <peter.nottage@naturalengland.org.uk>; William Hill
Subject: Able UK application

Dear Simon

Please find attached a letter sent on behalf of Peter Nottage.

Best wishes

Emma

<<10-10-13 Final letter to Simon Driver.pdf>>

Emma Hawthorne
 Conservation Advisor - Humber Estuary
 Marine and Coastal Team
 Natural England
 25 Queen Street

Leeds

LS1 2UN

Please note my new postal address

Direct dial 0300 060 1873
 Mobile 0777 3341639



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13 October 2010

Our ref: HESSSI/O/NLincs

Your ref: None



Simon Driver
Chief Executive
North Lincolnshire Council
By Email

Natural England
Yorkshire and Humber
4th Floor, Foss House
Kings Pool
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YORK
YO1 7PX

T 0300 060 1911
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Dear Simon

Humber Estuary Site of Special Scientific Interest (SSSI), Special Protection Area (SPA), Special Area of Conservation (SAC) and Ramsar site

Planning application by Able UK – Application no. PA/2009/0600

We have talked a great deal about this application in recent days and I believe it is important that I clarify some matters to ensure that you have a full understanding of our position (including our objections) and the advice we have provided formally to the Council since July 2009.

Despite our advice to the contrary, I understand that you are still of the opinion that your Council should determine this application tomorrow, on 14 October 2010.

We appreciate that the Council sees this application as vital to the future economic prosperity of the sub-region and beyond. You are therefore keen to see it progress and have perhaps felt frustrated by the objections of Natural England and others.

Against this, I would note, however, the track record that Natural England has built up with regard to other developments around the estuary in which we have frequently enabled and facilitated major developments. We have been cooperative with competent authorities and taken steps to avoid delay or excessive cost. Immingham Outer Harbour, Grimsby RoRo, the Maintenance Dredging Protocol and Quay 2005 are all good examples where major development has proceeded successfully in this manner. Natural England is also on record as expressing our desire for this development to proceed as part of the shared vision of the South Humber Gateway to deliver a World Class Economy and a World Class Environment. There is nothing unique about the Able UK application and we are, therefore, as frustrated as you that this development seems to conflict with our experiences elsewhere on the estuary. At some point, it would be useful for us to explore why this has happened.

We welcome the recent impetus that has been brought to some of the outstanding issues and attempts to find solutions. However, we believe it is asking too much of regulators (including the Council) to provide definitive opinion and agreement on the highly complex issues raised in the documents we have received, which were sent to us little more than two days before the Committee meets. In such circumstances, it is only responsible of Natural England to request more time to provide the best and most constructive advice possible.

We believe that the unresolved issues include, but are not limited to the following:

- **Coastal squeeze**

We have discussed this at length with the Environment Agency and we are both agreed that the issues surrounding coastal squeeze cannot be resolved as quickly as we would have liked. However, the Council requires this to be resolved in order to complete its own Habitats Regulations assessment. The Council's

existing appropriate assessment appears to defer the judgment of adverse effect to the Environment Agency's Habitats Regulations assessment of the land drainage consent. This is not acceptable as the proposed flood defence works form part of the planning application; it is our understanding that the works are necessary in order to meet the requirements of PPS25. The Council's appropriate assessment also states that following discussions with me, you are satisfied that coastal squeeze is not an issue for this application. This is not the case; as stated in my email dated 7 October 2010 "I am afraid that I cannot at this point give you the assurances you are looking for and that there is a coastal squeeze issue associated with this application that still needs to be resolved".

The local planning authority must be certain that the delivery mechanisms for coastal squeeze are in place and can be relied upon by the Able development. Unfortunately, it is Natural England and the EA's advice that we are not yet at this stage.

- **Appropriate assessment**

As the Council will be aware, for the purposes of carrying out an assessment under Regulation 61(3) of the Conservation of Habitats and Species Regulations 2010 (the "Habitats Regulations"), it must consult with Natural England and have regard to any representations made by that body. As you may be aware, this obligation to have regard to any representations made by Natural England under regulation 61(3) was interpreted in the recent case *Akester v Department of Environment, Food and Rural Affairs and Wightlink Limited* [2010] CO1834/2009 as meaning ' [a competent authority is] *bound to accord considerable weight to [Natural England's] advice, and there had to be cogent and compelling reasons for departing from it*' (paragraph 112).

Natural England provided full and comprehensive comments on the first draft of the appropriate assessment in February this year. We were not consulted again until we received a final draft on 4 October 2010. This document was then signed off by the Council on 8 October without any response from Natural England. As we have not been given a reasonable amount of time in which to check whether the comments that we made in February have been addressed in the final appropriate assessment, we advise that our original comments still stand; that is that the proposed SPA/Ramsar mitigation areas are insufficient and it cannot be ruled out that the proposed development would not have an adverse effect on the integrity of the Humber Estuary designated site.

- **Unilateral statement**

Whilst we welcome the commitment from Able UK to the undertakings in this statement, we are unsure how this document fits in with the planning application.

In particular, we welcome the commitment to have a single block of mitigation land delivered upfront and managed specifically for SPA/ Ramsar birds close to the Humber Estuary. As Natural England has stated previously, the requirement for 80ha to mitigate for this development was primarily due to the multi-functionality of the mitigation areas. We are therefore happy to consider an area smaller than 80ha, which will be managed specifically for SPA/ Ramsar birds. However, given that the Committee meeting is on Thursday we do not have sufficient time to consider these new proposals with our national specialists and view the proposed mitigation areas on a map. It is also unclear what impacts these changes will have on protected species, for example badgers.

In summary, we welcome the fact that Able UK are willing to amend the mitigation areas and work with Natural England to ensure that they have optimal functionality for SPA/Ramsar birds, however the various documents received do not provide the clarity and certainty as required by the Habitats Regulations. Fundamentally, we are not certain which 'application' the Council is being asked to approve when there are areas of the Unilateral Statement which contradict the planning application and the Council's own appropriate assessment.

Under these circumstances, Natural England has no option but to **maintain its objection** to the existing planning application, including objecting on coastal squeeze grounds.

As I am sure you will agree, we need to ensure that the best decisions are taken to ensure the best chances of success. Natural England believes that hurrying to determine this application on 14 October would be hasty, unsound, and open the entire decision-making process up to legal challenge. This will ultimately lead to significant delay. We are committed to working with all stakeholders to pursue a successful conclusion to this application but the first step on that road must be to defer the decision until an alternative date.

If the Committee do decide to determine this application tomorrow, despite what I have stated in this letter, our next step will be to write to the Government Office for Yorkshire & the Humber, recommending that they call this application in.

I look forward to hearing from you.

Yours sincerely,

A black rectangular redaction box covering the signature of Peter Nottage.

Peter Nottage
Regional Director
Yorkshire and Humber Region

Cc
North Lincolnshire Council Geoff Popple
Andrew Taylor

Richard Cram Able UK
Peter Barham
Nic Dakin
Karl Turner
Rt Hon Alan Johnson
Dr Austin Mitchell
Andrew Percy
Martin Vickers

From: Simon Driver/EM/NorthLincs
To: "Mike Welton" <Mike.Welton@northlincs.gov.uk>
Date: Wednesday, October 13, 2010 08:04PM
Subject: Fw: Able UK Ltd

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Email Sent By Blackberry

From: "Mozley, Andrew" [andrew.mozley@environment-agency.gov.uk]
Sent: 13/10/2010 18:00 CET
To: Simon Driver
Cc: "BAXENDALE, ANDY" <andy.baxendale@environment-agency.gov.uk>; "Dugher, Mike" <mike.dugher@environment-agency.gov.uk>; "Winn, Philip" <philip.winn@environment-agency.gov.uk>
Subject: Able UK Ltd

Simon

Please find attached a letter from Andy Baxendale (Area Manager) regarding the Able UK proposals. A hard copy of this letter will be in this evening's post.

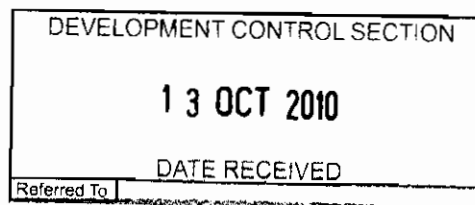
If you have any queries about the letter, I'm sure that Andy will be very happy to discuss them with you.

Kind regards

Andrew

Andrew Mozley
Planning & Corporate Services Manager
Environment Agency - Northern Area, Anglian Region
Waterside House, Waterside North, Lincoln, LN2 5HA

Tel: 01522 78 5899
Mobile : 07765 405427



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Simon Driver
Chief Executive
North Lincolnshire Council
Pittwood House
Ashby Road
Scunthorpe
D16 1AB

Our Ref: RAB/Able UK
Your Ref:

Date: 13 October 2010

Dear Simon,

I am writing to confirm our current position regarding the Able, East Halton, application. I am acutely aware of how important this development is both for the Company and your Council. I have been actively involved in discussions with Able UK, Natural England and yourselves to seek to resolve a number of issues for this development.

In relation to the development proposal, I believe we now have an acceptable position for each of the key areas that we need to secure in order to support Able's proposals. I have set this out below:-:

- **The provision of a strategic foul water drainage system** – We now have confirmation that the development will be connected to the public sewer.
- **A Flood Defence Consent** -This is linked to an associated Habitats Regulations Assessment, which will need to recognise the coastal squeeze losses, and the Environment Agency's strategic compensation plan. Whilst we are not in a position to grant such a consent at this stage, we consider that this is a matter we can deal with in due course.
- **A legal agreement relating to the flood defence works.** We are confident that this agreement is well advanced and Able are currently considering the draft agreement. We are content that this need not hold up the planning application, providing that a Section 30 legal agreement is signed before planning permission is actually granted.

Waterside House, Waterside North, Lincoln,
LN2 5HA.
Customer services line: 08708 506 506
Email: enquiries@environment-agency.gov.uk
www.environment-agency.gov.uk

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I believe we have a position which resolves our concerns at the planning stage. My Planning Team will forward under separate cover, further details regarding how we propose the above to be covered in any planning permission.

I am aware that Natural England continue to have real concerns over this proposal in relation to the Habitat Regulations. I understand that it is their intent to clarify this in writing for you. These issues are complex and they have involved us in their considerations. I have set out our current position below:-

- We agree with Natural England (NE) position that the development will require compensatory habitat to be created to offset the effects of direct losses.
- In relation to Coastal Squeeze, our position has consistently been that the EA will provide this as an integral part of our Humber Estuary Strategy. We have worked with NE to find a solution and I am pleased to confirm that this has been successful, and the agreed way forward is set this out below:-
- NE have this week confirmed that providing we formalise the Habitats Regulations Assessment (HRA) for our Humber Flood Risk Management Strategy and that this HRA:
 - formally acknowledges the position that third parties may wish to maintain defences that we can or may no longer be able to maintain, and
 - embodies appropriately clarified No Alternatives and Imperative Reasons of Overriding Public Interest assessments

then Able, and others, will be able to call upon this, when completed, to meet these compensatory habitat requirements. I believe that Defra will actively support this approach. I cannot be certain how long this process will take but my assessment is 2-4 months, and we will press for as early a completion as possible.

- With the strategic HRA in place, there will need to be a project level HRA completed by yourselves, but we expect that would be a modest process in terms of the time it will take.
- We believe in these circumstances, we have NE's agreement that coastal squeeze losses can be carried and met by the state.

I hope you will find the above a useful and positive step in resolving the complex issues that we have all been dealing with. I do understand the imperative to secure planning permission at the earliest appropriate time. However, I hope that you will consider the above as a positive way forward and worth further discussion prior to submission to the Planning Committee.

I would be happy to meet with you, along with Natural England and Able to discuss the above as soon as is practically possible.

I have forwarded a copy of this letter to both Natural England and Able UK for their information.

Yours sincerely

Andy Baxendale
Area Manager (Northern)