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21 June 2022

Dear Sirs

Planning Act 2008 (PA 2008)
Application by the Port of London Authority for an award of costs against London Resort Company Holdings Limited regarding an application for an order granting development consent for the London Resort

1. This letter represents the concluding written submission of the Port of London Authority (**PLA**) in accordance with paragraph 4 of the letter of the Examining Authority (**ExA**) dated 7 June 2022.

2. The PLA's submission is made with reference to the ExA's letter of 7 June and to its earlier letter of 23 May 2022; it is made in response to the submission made to the ExA by London Resort Company Holdings Limited (**LRCH**) dated 23 May 2022 in respect of the PLA's application for an award of costs against LRCH dated 21 April 2022 (**PLA's costs application**).

3. The ExA has invited submissions from the PLA on the three matters which it has identified as forming the basis of the PLA's costs application. Each of these is addressed below. However, as a detailed consideration of the general principles in relation to costs awards, as set out in *Award of costs: examination of applications for*

development consent orders – Guidance, July 2013 (the **Guidance**), underpins the PLA's observations on both Matters 1 and 2, it is included here, so as to avoid unnecessary duplication.

General principles in the Guidance in relation to costs which may be awarded

4. The general principles in respect of a costs application (as opposed to the right to claim costs) are the same for both those applications which relate to compulsory acquisition and those that do not. Consequently, a discussion of the general principles set out in the Guidance is germane to both the first and the second parts of the PLA's costs application. Paragraph 3 of Part D confirms, in relation to the conditions that must be met for an award of costs under that Part, that the "general principles are stated above"; the general principles of the Guidance and the "additional and different considerations" given in Part D are not, therefore, mutually exclusive.

5. The general principle at Part B, paragraph 6 is that "All parties will normally be expected to meet their own costs". In the context of the Guidance, it is of note that
   (i) the presumption about what will not normally be awarded does not prevent a claim being made; and
   (ii) the Guidance does not contain any pointer to what might be considered 'normal', so that a decision as to what is 'normal' is at the discretion of the ExA, conditioned only by the requirement for fairness and judicial review reasonableness.

6. The right to make claims is governed by the general principle at paragraph 14: "All parties (as defined in Part A, paragraph 2) who have taken part in the examination may apply for an award of costs and may have an award of costs made against them." The question whether costs are awarded in any given case is a matter of discretion. There is no general principle that in any particular case costs definitely will, or will not, be awarded.

7. Paragraph 11, therefore, sets out a presumption of what will normally, but not invariably, happen:
   11. Costs will normally be awarded where the following conditions are met:
   • the aggrieved party has made a timely application for an award;
   • the party against whom the award is sought has acted unreasonably; and
   • the unreasonable behaviour has caused the party applying for the award of costs to incur unnecessary or wasted expense during the examination – either the whole

of the expense because it should not have been necessary for the matter to be examined and/or determined, or part of the expense because of the manner in which the party behaved during the examination.

8. Whilst the conditions set out at paragraph 11 of Part B do not relate to claims made under Part D, the latter contains consistent wording at paragraph 3:

   What conditions would normally have to be met for an award of costs to be made in an application involving compulsory acquisition?

   3. The general principles are stated above. To enable an award of costs to be made to a successful objector, they will need to have objected to the compulsory acquisition request and have:

   • maintained their objection at all times before the decision of the Secretary of State on the development consent application;

   • participated in (or have been represented during) the examination by the submission of a relevant and/or written representation); and

   • had their objection sustained by the Secretary of State

9. In each case, 'normal' is not absolutely decisive. It guides the ExA, so that divergence from it would have to be justified but does not remove the ExA's overall discretion.

10. The above relates to who may apply for costs and the conditions relating to the decision on a costs application. The Guidance does not specify a period for which costs incurred may form part of a costs award, nor which costs are relevant. The Guidance gives broad descriptions of costs with reference to matters such as eligible applicants and required behaviours. These are examined in more detail below.

11. Paragraph 1 of the Guidance states that it sets out the general principles for awards of cost "in relation to the examination" of applications. "In relation to" suggests that the general principles apply more widely than just to the examination period itself.

12. Paragraph 4, final bullet point, notes the expectation of robust but realistic pursuit of costs by "[a]ll involved in the examination process". The Guidance does not define "examination process", but in terms of sensible interpretation it must be wider than the examination itself. The question of "examination process" is considered specifically at paragraph 19 of the Atlantic Array decisions: "The *process* for the examination of a DCO for an NSIP is therefore wider than the statutory period of the examination starting with the PM. To take too narrow a reading of the guidance on costs would place affected persons at a financial risk with no guarantee of recompense whilst

simultaneously encouraging them to engage formally and potentially risk their own costs. That would be inconsistent with other areas of the planning process and incompatible with HRA."

13. The Atlantic Array decisions state that the examination process is wider than the statutory period of the examination but does not provide any other parameters. It is clear that the examination process must include the production of relevant representations, as they inform the decision maker of the matters to be considered in examining an application. However, the PLA submits that the examination process relates to all matters which will ultimately inform and/or affect the course of the examination, whether those matters are heard or not. This might include, for example, the negotiation of protective provisions which, if agreed, would avoid the need for, or limit the scope of, examination of those matters covered by the provisions.

14. In broad terms, engagement prior to acceptance of an application informs, and so can affect the course and scope of, the subsequent examination of that application: it allows issues between the parties to be addressed and, where possible, resolved, which would otherwise have to be considered at examination. The importance of this approach is emphasised by *Planning Act 2008: guidance on the pre-application process for major infrastructure projects*, March 2015, which states:

    Pre-application consultation is a key requirement for applications for Development Consent Orders for major infrastructure projects. Effective pre-application consultation will lead to applications which are better developed and better understood by the public, and in which the important issues have been articulated and considered as far as possible in advance of submission of the application to the Secretary of State. This in turn will allow for shorter and more efficient examinations. (Para 15)

15. The PLA accepts that the nature of some pre-application consultation may not affect the examination in this way. However, as consultation and subsequent negotiations

    (i) that relate to the operation of statutory functions and duties that regulate and protect public rights (in the case of the PLA, the regulation of the River Thames and the public right of navigation under the Port of London Act 1968), and/or

    (ii) are designed to produce provisions (such as protective provisions ensuring that such functions and rights are not prejudiced by the DCO proposals), for insertion in the dDCO, so avoiding the matters they cover having to be argued in the examination

are such as to affect the course and scope of the examination, it logically follows that they form part of the examination process.

16. Paragraph 14 of the Guidance states that an award of costs may be applied for by all parties who "have taken part in the examination". Paragraphs 15 and 16 go on to define a full award of costs as the whole of the costs "in relation to its involvement in the examination process". A partial award of costs is similarly defined by reference to a full award, i.e. by the same criteria (paragraph 18). This must demonstrate that references to involvement in the examination in the Guidance extends to the examination process. Full and partial awards of costs can be made in respect of both compulsory acquisition and non-compulsory acquisition applications. Further, as a full or partial award is defined with reference to involvement in the examination process, any additional restriction on what may constitute a costs award would not be tenable.

17. Paragraph 27 of the Guidance addresses the matter of what counts as necessary or wasted expense in relation to non-compulsory acquisition claims. In the section dealing with what counts as such expense, paragraph 27 states that "the factual basis of an application may relate to what happened before the consent application was submitted or before the Preliminary Meeting if those facts are claimed to demonstrate unreasonable behaviour." It then says "Costs incurred that are unrelated to the examination are not eligible" i.e. are not eligible for recovery. This qualification, in the context of a paragraph which states that non-examination facts, including non-examination costs, are admissible in evidence, makes clear that the introduction of such costs evidence does not of itself render those costs recoverable. This is the only reference to non-examination costs evidence in the Guidance. It follows that to take this qualification to be a restriction on the whole scope of costs recovery under Part B of the Guidance, and potentially those under Part D, would be inconsistent with those other provisions of the Guidance considered above.

18. If the Guidance's framework is that all costs relating to involvement in the examination process are potentially recoverable, and a full award can include all of those costs, and a partial award part of them, any restriction in the Guidance of the scope of recoverable costs can only logically apply to particular circumstances, and not as a general principle.

Matter 1: the 'successful objector' claim for costs, and specifically whether there are any arguments that, if successful, a part award should be made that would be different to, or lesser in extent than any award that could possibly be made under Matter 3

19. The ExA has stated, in its letter of 9 May 2022, that it considers the first part of the PLA costs application to be valid and that the PLA is a successful objector under Part D of the Guidance. Further, in its submission of 23 May 2022, LRCH confirms that it does not dispute that the first part of the PLA costs application is valid as a matter of principle.

20. All costs incurred, including but not limited to those relating to compulsory acquisition, have been a matter of concern to the PLA from an early stage of engagement with the London Resort scheme. At that stage the PLA stated in terms that their costs of the consultation must be met by LRCH. The PLA confirms that, as a successful objector under Part D of the Guidance, it is seeking to recover under Part D only those costs incurred in relation to impacts on the PLA as a result of proposed compulsory acquisition of its land and rights in the first part of the PLA's costs application.

Temporal scope of costs

21. LRCH submits that only costs incurred by the PLA in the period between service of a section 56 notice, being 18 February 2021, and the date of withdrawal of the application ought to be included in any costs award made by the ExA. LRCH submits that this is consistent with the rationale in paragraphs 13 to 15 of the decisions made in respect of the Atlantic Array Offshore Wind Farm scheme, as annexed to Section 51 Advice issued by the ExA on 7 April 2022 (**Atlantic Array decisions**).

22. The PLA does not accept that LRCH's proposed temporal restriction on costs is consistent with the specified paragraphs of the Atlantic Array decisions. The PLA agrees that the ExA in that case distinguished between (i) the encouragement of affected persons to engage in the process following acceptance of the application (para 15), and (ii) the choice by a potentially affected person whether or not to engage in earlier periods of formal and informal consultation (para 14).

23. However, the PLA does not concede that the distinction drawn provides justification for the assertion that costs are only payable under Part D of the Guidance where incurred after acceptance of the application. Paragraph 14 of the Atlantic Array

decisions notes that the promoter of that scheme had engaged with affected persons some time before submission of the application, with the direct effect that "the objections had been sustained over a considerable period of time". The paragraph then goes on to note the "context of the PA2008" which "encourag[es] early engagement".

24. The PLA submits that there is no rationale in paragraphs 13 to 15 of the Atlantic Array decisions from which it can be deduced that costs may not reasonably be recovered which were incurred prior to acceptance of the application. Indeed, the costs order in the Atlantic Array decisions is for "costs incurred in the preparation and submission of RRs in respect of their land and/or rights and in preparation or making of their objections to the proposed compulsory acquisition affecting their rights". There is no limit within the costs award to those costs incurred after acceptance of the application only.

25. LRCH acknowledges this point in its submission, quoting the Atlantic Array costs order, and stating that, if adopted in respect of the PLA costs application it could lead to dispute about the precise scope of any costs award. The PLA does not accept this point. There can be no uncertainty or imprecision about the costs actually incurred by the PLA in respect of the costs relating to proposed compulsory acquisition of its rights at any stage, including prior to acceptance of the application.

26. Further, as a public body with statutory duties and functions, the PLA cannot be said to have a choice whether or not to engage with a promoter before an application is accepted. In addition to informal engagement, which the PLA undertakes in order to assist any promoter with a scheme which affects the river Thames, in terms of its status as a person with an interest in land under s42(1)(d) of PA 2008, the PLA has an obligation to engage in formal consultation prior to an application's acceptance. It is self-evident that the PLA cannot wait until acceptance before it starts engaging on a major infrastructure project that will impact the river.

27. The ExA is directed to Section 6 of the PLA's costs application, which details the chronology of engagement between the PLA and LRCH, including in respect of the impact of the proposed compulsory acquisition of its land and rights under the London Resort scheme. This demonstrates that, in relation to those elements of the draft protective provisions which address compulsory acquisition of PLA land, Part D costs were reasonably incurred by the PLA prior to acceptance of the application.

28. For the reasons set out above, the PLA submits that it would be neither fair nor reasonable for a costs award regarding the PLA's claim under Part D of the Guidance to exclude costs incurred prior to service of a section 56 notice in relation to the impacts on the PLA's land and rights as a result of proposed compulsory acquisition. As defined in paragraph 15 and 16 of the Guidance, costs are recoverable in relation to a party's involvement in the examination process. The PLA's involvement in the examination process has, of necessity, included incurring costs prior to acceptance of the application.

29. The PLA is funded by users of the river. This means that if the PLA were to provide its services to a promoter, in engagement and commenting on pre-application matters including the proposed compulsory acquisition of its land, without having the costs for those services met, the promoter would receive an effective subsidy at the public's expense.

Private treaty acquisition costs

30. LRCH contends that any costs incurred in negotiating the acquisition of land by private treaty should be excluded from a costs award for a claim under Part D. This is contrary to the compensation code which applies to all compulsory acquisition of land, including land for compulsory acquisition under a DCO. So, as a matter of principle, the PLA rejects this contention.

31. To exclude such costs would be inconsistent with the obligation on a promoter seeking powers of compulsory acquisition to acquire the required interest(s) in land by negotiation wherever possible. Further, in circumstances where land is acquired by private treaty, and that land is under threat of compulsion, such acquisition is to be treated as if it were undertaken compulsorily. It would, therefore, be entirely inappropriate to exclude from a costs award costs incurred in relation to acquisition by agreement but under threat of compulsion.

Basis of assessment for costs

32. LRCH submits that, in making a costs award, the ExA should specify that the quantum of costs claimed are to be assessed on a standard basis, rather than an indemnity basis. Paragraphs 20 and 21 of the Guidance deal with "How should the amount of the costs be settled where an award is made?" Paragraph 21 provides that if the parties are unable to agree the amount of costs to be paid, "the party

awarded costs can refer the matter to the Costs Officer of the Senior Courts Costs Office (**SCCO**) for a detailed assessment", and notes that when a costs award is made, a guidance note on the procedure for detailed assessment of costs under the Civil Procedure Rules (**CPR**) Part 47 is sent to the party awarded costs. There is nothing in the Guidance which indicates the basis on which a costs award should be assessed.

33. LRCH's submission refers to the Upper Tribunal (Lands Chamber) Practice Directions, October 2020 (**Practice Directions**). The Practice Directions set out the Tribunal's approach to managing disputes, which includes the making of a costs award. Consequently, the Practice Directions are not applicable to the PLA's costs application. (However, it is worth noting, *inter alia*, that the Practice Directions state that the Tribunal will "normally" award costs on the standard basis (para 24.11), but that it may also award costs on the indemnity basis (para 24.12).)

34. Section 2 of The Senior Courts Costs Office Guide, 2021, (**SCCO Guide**) sets out that costs are as defined in CPR 44.1(1), and notes that "[t]he court has complete discretion as to the order of costs to make (para 2.3). Under CPR 44.2(4), the court should have "regard to all the circumstances", which includes at (a) "the conduct of all the parties". In general practice, justification for awarding costs on an indemnity basis is if there is something in the conduct of the party against whom costs are awarded which takes it out of the norm. The PLA submits that the conduct of LRCH, as set out at sections 6 and 7 of its costs application is sufficient justification for an award of costs on an indemnity basis.

Matter 2: the jurisdiction to award costs for unreasonable behaviour in these circumstances

35. In its submission, LRCH has no comment as to the jurisdiction of the ExA to award costs for unreasonable behaviour. Rather, LRCH states that, as the application for its scheme was withdrawn prior to the Preliminary Meeting, then, on a narrow interpretation of paragraph 12 of the Guidance, the examination could not be held to have commenced and consequently, there could be no claim for costs in accordance with the three conditions at paragraph 11.

36. The PLA cannot agree with LRCH's interpretation. The ExA states in its letter of 9 May 2022, that it "has not reached a concluded position on the question of whether it has jurisdiction to consider the second part of the costs application" (paragraph 7).

The ExA points out that whilst there are circumstances in which successful objector claims, i.e. those as set out in Part D of the Guidance, can arise in the time prior to a Preliminary Meeting, further to paragraph 12 of the Guidance "it is not clear that costs for unreasonable behaviour can do so, but neither are such claims conclusively excluded". The PLA reads the ExA's specific citing of paragraph 12 of the Guidance as evidence that the question of jurisdiction raised by the ExA lies solely in the fact of the London Resort application's being withdrawn before the Preliminary Meeting.

37. In its submission, LRCH states that paragraph 13 of the Guidance, which refers to the additional and different considerations that apply to compulsory acquisition requests, "clearly sets out the exclusion to paragraph 12". LRCH appears to have interpreted the ExA's point that "neither are such claims conclusively excluded" to refer specifically to compulsory acquisition claims under paragraph 13 and Part D. This is not correct. Paragraph 7 of the ExA's letter is dealing exclusively with the second (non-compulsory acquisition) part of the PLA's costs application. The ExA's statement that "neither are such claims conclusively excluded" cannot therefore be a tacit cross-reference to Part D. The ExA's comment must be read as referring to the absence of wording expressly preventing claims for costs incurred prior to the Preliminary Meeting.

38. In terms of the jurisdiction of the ExA to consider the second part of the PLA's costs application, paragraph 12 of the Guidance is part of that section setting out the conditions for an award to be made; paragraph 11 provides that "costs will normally be awarded where the following conditions are met:" The last of these conditions relates to the costs incurred during the examination, that period being defined by paragraph 12. As discussed at 7 to 9 above, paragraphs 11 and 12 of the Guidance outline the circumstances whereby costs will <u>normally</u> be awarded. It does not exclude other circumstances where costs might be recoverable, and consequently does not remove the ExA's discretion to conclude that

(i) it has jurisdiction to consider an award for costs incurred prior to the Preliminary Meeting and
(ii) the Guidance cannot apply so as to produce a decision which would conflict with the essential requirement that any such award must be fair and reasonable.

39. As the Guidance is silent as to circumstances where an application is withdrawn before the Preliminary Meeting, it appears not to contemplate that eventuality. The PLA submits that is not possible to say that the Guidance definitively precludes

recovery of costs where a Preliminary Meeting is not held, because it says nothing to those specific circumstances. Where the Guidance does not cover the case, the ExA must exercise its discretion to arrive at a fair decision.

40. As noted above, paragraphs 15 and 16 of the Guidance define a full award of costs as being the "whole of the costs of a party in relation to its involvement in the examination process". If the ExA can accept that any pre-Preliminary Meeting costs are potentially recoverable when an application is withdrawn after the start of the Preliminary Meeting, and that there are such costs in a given case, there seems no logical justification for refusing to consider a claim for these costs merely because of a withdrawal before the Preliminary Meeting is held. This must, therefore, be a reason for the ExA to exercise its discretion.

41. For the reasons set out above, the PLA submits that the ExA may exercise the discretion which the Guidance accommodates, and therefore has the jurisdiction to consider the second part of the PLA's costs application.

Matter 3: the unreasonable behaviour alleged in the costs application and whether it meets the test for an award set out in the Costs Guidance

42. LRCH has not made any submissions in respect of Matter 3. As set out above, the PLA submits that the ExA has jurisdiction to consider the second part of the PLA's costs application in respect of unreasonable behaviour on the part of LRCH.

43. The test set out in Part B of the Guidance for making an award of costs resulting from unreasonable behaviour is in the three conditions set out in paragraph 11; namely, a timely application for costs, unreasonable behaviour by the party from whom costs are sought (in this case LRCH) and the unreasonable behaviour causing "the party applying for the award of costs to incur unnecessary or wasted expense during the examination". In addition, paragraph 26 says "[a]n applicant for a costs award will need to demonstrate clearly how any alleged unreasonable behaviour has resulted in unnecessary or wasted expense".

44. Part C of the Guidance provides examples of possible events and behaviours that may give rise to an award of costs. These are given as examples only: the list is not exclusive.

45. Whilst the Guidance is silent generally as to circumstances where, specifically, an application is withdrawn before a Preliminary Meeting is held, the example given at the final bullet of Part C paragraph 3 is relevant to the PLA's costs application as it refers to circumstances where an application is withdrawn after the Preliminary Meeting. In such circumstances, "[i]f an application is withdrawn without any material change in circumstances concerning relevant issues arising out of the application, an award of costs is likely to be made […] if there are no exceptional circumstances and the claiming party can show that they have incurred quantifiable wasted expense as a result". In the present case, the PLA maintains that the withdrawal took place without there having been a material change of circumstances relevant to the costs of the negotiations between the parties.

Preparation for the examination

46. Paragraphs 6.9 to 6.12 and 7.1 to 7.8 of the PLA's costs application set out the sequence of events from LRCH's initial request to delay the examination on 15 April 2021, through subsequent procedural decisions issued by the ExA in 2021 and 2022 on the timing of the examination, to issue of the Rule 6 letter with the examination timetable on 14 February 2022, culminating in the withdrawal of the application. Paragraphs 7.1 to 7.8 of the PLA's costs application address specifically the matter of whether there could be any material change in circumstance or exceptional circumstances, in accordance with the final bullet of paragraph 3 of Part C of the Guidance, which could preclude an award of costs being made as the result of LRCH's unreasonable behaviour during that period.

47. For the reasons given in Section 7 of the PLA's costs application, the PLA submits that there are no such circumstances, and that the delay in withdrawal of the application to the evening before the Preliminary Meeting was unnecessary, particularly in terms of the reasons given by LRCH for its withdrawal at that stage, and so represents unreasonable behaviour by LRCH. Consequently, the expense incurred by the PLA: in responding to the ExA's procedural decision letter of 21 December 2021 and those following until issue of the Rule 6 letter on 14 February 2021; and in making preparations to appear at both the Preliminary Meeting, and the initial hearings scheduled for the following week, was wasted as a result of LRCH's unreasonable behaviour. It therefore meets the test set out in Part B paragraph 11 of the Guidance.

Production of draft protective provisions and other DCO amendments

48. As noted in the chronology at section 6 of the PLA's costs application, in September 2020 the PLA was asked by LRCH to prepare a detailed revision of a set of draft protective provisions, in order that they could then be negotiated between the parties and included on the face of the dDCO. The details relating to this exercise are set out in detail at paragraphs 6.4 and 6.5, which also included appropriate amendments to the dDCO. In summary, the PLA incurred significant costs in producing a complex document, prepared at LRCH's request but never progressed beyond a single meeting with LRCH's solicitors, after which LRCH ceased to engage on the matter. The intention of LRCH to meet the PLA's costs to prepare and negotiate protective provisions and other amendments is evidenced by the fact that LRCH's solicitors offered an undertaking for costs on 7 May 2021. (This offer was not taken up as the PLA was separately attempting to secure a wider costs recovery arrangement with LRCH.)

49. The second part of the PLA's costs application is based on LRCH's unreasonable behaviour which includes requesting the PLA to undertake this work, and then (as described in the costs application) abandoning all contact with the PLA. The production of draft protective provisions for the benefit of the PLA and other relevant amendments to the dDCO was not unnecessary, but in the context of LRCH's failure to progress them, and subsequent withdrawal of the application, represents wasted expense. This meets the test set out in the Guidance.

Production of relevant representations

50. LRCH withdrew the application before the Preliminary Meeting ostensibly because of the designation of the Swanscombe Peninsula SSSI and Port of Tilbury London Limited's stated intention and need to use the land proposed for the London Resort park and glide for the purposes of the Port of Tilbury. However, as was clear from the PLA's consideration of the dDCO and application documents, and was demonstrated to be the case when reviewing the pNRA, in the DCO application as made the scheme design and the EIA were not yet fit for purpose. This evidences that the application for the DCO was submitted before LRCH was fully in a position to proceed. That placed the parties in the position that, faced with a 'live' application which was proceeding in the normal way, they had no option but to work on the documentation. That called for timeous preparation of all documents. In accordance with its standard good practice,

the PLA therefore undertook significant work in preparing its relevant representations so that they would be signed off in time for the deadline for their submission.

51. The withdrawal of the application meant that the costs incurred in preparing the RRs were wasted. The PLA maintains that withdrawal in the circumstances described in paragraph 50 above represents unreasonable behaviour by LRCH which gave rise to these wasted costs. Accordingly, the costs applicable to preparation of the PLA's relevant representations also meet the test for recoverability in the Guidance.

Yours Faithfully,

Lucy Owen
Deputy Director of Planning and Development
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