

PLANNING ACT 2008

THURROCK FLEXIBLE GENERATION PLANT DEVELOPMENT CONSENT ORDER (“Order”)

Interface with Port of Tilbury London Limited (“POTLL”) and RWE Generation (UK) Plc (“RWE”)

NOTE

This note is prepared for the purposes of submission to the examination of the application for the Order. It considers in particular the appropriateness of provisions in relation to POTLL and RWE insofar as they purport to control the development to be authorised by the Order. This is addressed by reference to a number of particular questions or propositions in order to assist the examination.

This note has been prepared on behalf of the Applicant by DLA Piper UK LLP, more particularly its team responsible for the promotion and protection of ports, which has promoted harbour and other orders and represented port authorities for a number of projects including:

- **Hutchison Ports UK Limited in relation to**
 - **The Port of Felixstowe expansion;**
 - **The proposed Bathside Bay Container Terminal adjacent to Harwich International Port; and**
 - **Thamesport Container Terminal.**
- **C.Ro Ports Killingholme (and its predecessors) in relation to the expansion of Humber Sea Terminal.**
- **The New Tyne Crossing, including interfaces with the Port of Tyne Authority.**
- **Mersey Gateway Bridge, including interfaces with the Mersey Docks and Harbour Board.**
- **Great Yarmouth Port.**

The team has also promoted DCOs requiring protection for port interests, including:

- **The Swansea Bay Tidal Generating Station Order 2015; and**
- **The North Killingholme Power Project, promoted by C.GEN.**

As such, the team is especially well placed to assist the examination in this regard.

1. Can protective provisions be used to prevent development granted pursuant to a made development consent order.

- 1.1 The consideration here raises points which include:
- 1.1.1 The question of whether a protective provision requiring approval can provide the protected person with an ability to prevent or frustrate a development; and
 - 1.1.2 In light of the above, the desirability in the public interest of ensuring that development is not frustrated except where it may be reasonable to do so – i.e. so that an untampered power of refusal does not increase the risk of developments being frustrated.
- 1.2 There is no established legal principle that a person approving a matter under a protective provision may not derogate from or frustrate a development authorised by a statutory order or Act of Parliament. Whilst it may be true that the principle of the development authorised by the Order would have been established, including having considered any impact upon the undertaking of the protected person contemplated under section 127 Planning Act 2008, it does not follow that a protected person must consent to details put to it for approval come what may.
- 1.3 Evidence for this proposition includes the position under the High Speed Rail (London to West Midlands) Act 2017 where local authorities have refused under Schedule 17 of that Act to approve matters put to them by the promoter. The point has been considered by the court, which has in the case of *R. (on the application of Hillingdon LBC) v Secretary of State for Transport [2020] EWCA Civ 1005* upheld the ability of local planning authorities to refuse subsidiary consents where the Act (analogous to a DCO) gives them a consenting power.
- 1.4 In distinction from the drafting proposed on behalf of POTLL, in the *Hillingdon* case there were many tempers upon the discretion of the local planning authority, which raises the point of reasonableness in decision-making.
- 1.5 POTLL assert that paragraph 3(1) of the proposed protective provisions is appropriate notwithstanding that it provides (as drafted) for an absolute power of

approval, untempered by reasonableness. POTLL assert that a protective provision cannot frustrate the implementation of a development, despite the ordinary interpretation of the drafting as it stands.

1.6 As the drafting stands, there is no tempering of the power to approve by POTLL. POTLL could refuse to approve the exercise of powers in *articles 3 (Development consent etc. granted by the Order) including in respect of the permitted preliminary works, 5 (maintenance of authorised development), 11 (street works), 13 (temporary restriction of use of streets), 14 (access to works), 15 (traffic regulation), 17 (authority to survey and investigate the land), 18 (removal of human remains), 19 (compulsory acquisition of land), 22 (compulsory acquisition of rights), 25 (acquisition of subsoil only), 27, (rights under or over streets), 28 (temporary use of land for carrying out the authorised development), 29 (temporary use of land for maintaining the authorised development), 30 (statutory undertakers) and 35 (felling or lopping of trees and removal of hedgerows)* for any reason unless the power is qualified. Such a power in the hands of a third party that has already objected to the application for the Order is likely to be institutionally unacceptable and render the funding of the development extremely difficult.

1.7 In particular, there is an inherent concern that having refused consent for any reason, there would be nothing to stop POTLL from seeking to injunct the commencement of works without the grant of their consent or arbitrating under Article 45, at significant cost to the Applicant and delay to the development to be authorised by the Order.

2. In what circumstances might a statutory undertaker withhold consent reasonably and what options exist to enforce the withholding of consent.

2.1 In circumstances where consent by a statutory undertaker was qualified by reasonableness, the test would be that the withholding of consent must be for a critically important reason. This might be on the grounds that the information supplied in order to discharge the consent submission was insufficient or because as a matter of principle (say on safety grounds or to avoid major disruptions such as widescale electricity outages, the closure of an arterial railway line or risk of serious injury to persons or property). It would not be reasonable to withhold consent

capriciously or arbitrarily for reasons of commercial interference or disturbance, for example, as such impacts are susceptible to being resolved through compensation or under the indemnity comprised in protective provisions.

- 2.2 Outright refusal followed by arbitration or other dispute resolution happens rarely as the parties would usually have achieved consensus on the technical details of the construction, storage or operational aspects of the project, such that safety risks should have been mitigated or altogether removed by the time of close of examination of an application for development consent.
- 2.3 However, in some cases this may not be possible where discharge of protective provisions is not possible. For instance, we are aware of a case where works authorised by a statutory order were prevented from proceeding by a protective person owing to the potential for interaction between the piling required for the authorised works, unexploded ordnance and subterranean assets of the protective person. In that case, approvals were not given and matters had to be resolved to the satisfaction of the protected person, but with the element of safety providing evidence of reasonableness.
- 2.4 It may be possible to define the reasonable grounds for withholding consent under the DCO. However this would require bespoke drafting which is notprecedented and is difficult to achieve:
 - 2.4.1 to specify limited circumstances where it may be reasonable to withhold a consent is not likely to be acceptable to a protected person, who will not wish to have unforeseeable circumstances where it may be exposed to harm and will not be able to refuse consent;
 - 2.4.2 conversely, to provide a list of reasonable circumstances will be unappealing to the promoter and the protected person would be likely to seek words of inclusion to cover unforeseeable circumstances.
- 2.5 For this reason it is a commonplace to apply a simple test of reasonableness to the discharge of protective provisions.

3. Is it appropriate for the protective provisions imposed for the benefit of POTLL to include the protection of land (and activities on land) to be acquired and developed at a future date.

- 3.1 In any application for development consent, it is only possible to have regard to known considerations. Therefore, it follows that future expansion of a port and the use of the land in any expanded land-holding is dependent upon the state of knowledge of the parties at the time of the examination of the application for a DCO. In this case, the consideration can only have regard to that which has been fully articulated before the Examining Authority, not to speculation about future land uses of developments. Otherwise, a properly articulated application is constrained by a potential future use that is speculative at best.
- 3.2 In this case, POTLL and RWE are seeking to ensure application of protective provisions to land which has no consent for future development, namely *the RWE site to south and east Work 12*. It is plainly not appropriate to afford protection to an unknown future use of such land simply on the basis of its prospective ownership by POTLL.
- 3.3 Protection is afforded to the land and undertakings of statutory undertakers such as POTLL and RWE by the Planning Act 2008 under sections 127. This applies to land *that has been acquired* for the purpose of the undertaker's undertaking and considers the potential for serious detriment to the undertaking. In this case, future acquired land is not covered by Section 127 and, even if it was, the extent of its inclusion in *the existing undertaking* is very limited indeed. The latter point means that the undertaking is not likely to be adversely affected by the acquisition of estates/rights in the relevant land.
- 3.4 In this regard it is possible to have regard to the definition of the operational land of POTLL. The operational land of statutory undertakers is defined in section 263 of the Town and Country Planning Act 1990 as:
- (a) Land which is used for the purpose of carrying on their undertaking; and

(b) Land in which an interest is held for that purpose.

- 3.5 The relevant land clearly falls outside of the statutory definition of operational land in that the land is not presently used for the purpose of the carrying on of the undertaking of POTLL.
- 3.6 POTLL assert that the relevant land benefits from the freeport designation of the Thames Freeport. However, this has no additional planning status. Permitted development rights associated with freeports are no more than an extension of those already applying to ports in general.¹ As these permitted development rights apply to the land of ports and as such are parasitic upon operational land status, the new permitted development rights do not suggest that any additional protection should be afforded to POTLL (or RWE). The land in question does not – and on acquisition would not necessarily – have the status of operational land. Freeport status does not enhance any presumption in favour of protection for POTLL.
- 3.7 In the light of this it is not appropriate to extend the undertaking being protected in the DCO beyond its current operational land. It would not be proportionate to extend the protection speculatively to any future extension to that operational land, which POTLL is looking to purchase on risk, fully aware of the proposals for this nationally significant infrastructure project. This is particularly the case when TPL itself is a statutory undertaker.

4. To what extent can the so-called Open Ports Duty be relied upon by the Applicant to enable it to land Abnormal Indivisible Loads (“AIL”) at the Port of Tilbury, thereby obviating the need for Work No. 10, 11 and 12(b)?

- 4.1 The Open Ports Duty arises from section 33 of the Harbours, Docks and Piers Clauses Act 1847 which provides that:

Upon payment of the rates made payable by this and special Act, and subject to the other provisions hereof, the harbour, dock and pier shall be open to all persons for the shipping and unshipping of goods and the embarking and landing of passengers.

¹ Town and Country Planning (General Permitted Development etc) (England) (Amendment) Order 2021

- 4.2 The relevant provision of the 1847 Act is incorporated into the legislation for the Port of Tilbury's T1 terminal(s).² The duty extends to harbour authorities who are required to set rates, which is provided by that legislation.
- 4.3 Some harbour authorities also have the power, for the purposes of, or in connection with, the management of the harbour, to appropriate harbour facilities for the exclusive or preferential use of specified trades, persons, vessels or goods, or classes of vessels or goods, notwithstanding section 33. This means in practice that exclusive use or occupation of port land can be given to another entity.
- 4.4 In theory the Open Ports Duty imposed upon POTLL would allow the Applicant to land the AIL comprising gas engines required for the development at the port and specifically the T1 terminal. However, uncertainties remain as to how the AILs could then be delivered to the site of the development. These include:
- 4.4.1 to what extent the duty could be relied upon to transport the engine through the Port itself to the development, particularly where land may have been reserved for exclusive or preferential use by other harbour operators or tenants.
 - 4.4.2 the extent to which the AILs can physically be landed at and delivered to the development site – do the relevant quay and internal roads have sufficient strength to enable this?
 - 4.4.3 the confidence with which the Applicant can be assured that the AILs will actually be prioritised for delivery, and absent such certainty, whether there is a self-help remedy for the Applicant.
 - 4.4.4 the certainty that there are no impediments to the delivery of AILs and hence to the delivery of the scheme and thereby the justification for the exercise of compulsory acquisition powers under the Order.
- 4.5 In light of these uncertainties, it is not appropriate to require the Applicant's scheme, a nationally significant infrastructure project, to be reliant upon the Open Ports Duty - it is necessary and appropriate to have an entire solution for the delivery of the key apparatus for the Scheme. The risk is increased if there is an

² Section 6 of the Port of London Act 1968 (as amended by the Port of Tilbury Transfer Scheme 1991 Confirmation Order 1992)

ability for POTLL to refuse consent to works or other activities which would be needed to connect the quay to the site of the Applicant's works (see paragraph 1 of this note).

5. Is it appropriate to impose a requirement in the DCO (or obligation elsewhere) on POTLL to enter into a handling agreement to address the above concerns?

- 5.1 In response to the Applicant's position on the Open Ports Duty and the uncertainty over the extent to which this provides acceptable coverage, POTLL proposes that an obligation be imposed on them in the dDCO to enter into a 'handling agreement' to facilitate the unloading, storage and transit of AILs through the port for delivery to the site of the development.
- 5.2 At this point, no drafting has been supplied to the Applicant to address this. However, the following can be observed:
- 5.2.1 The terms of any handling agreement cannot be known at this stage;
- 5.2.2 If and to the extent that the terms of such an agreement can be known, it is not clear why it could not be entered into at this stage or concluded now; and
- 5.2.3 Where any obligation is imposed, there has to be an incentive for POTLL to comply with it – presumably by sanction for failure to do so, although no such sanction has yet been proposed; and
- 5.2.4 Any such obligation has to be enforceable by the court.
- 5.3 In particular, it is uncertain to what extent a court could enforce the terms of an obligation to secure an agreement, the content of which was unknown. This is akin to an agreement to agree, which is not enforceable by the court. Case law in this area distinguishes between:
- (a) Unenforceable obligations/rights arising from the parties having deferred their agreement on contractual terms (with either party remaining free to agree to disagree about the matter); and
- (b) Potentially enforceable obligations/rights arising from the parties having reached agreement on contractual terms (with certain elements remaining

to be resolved in the future based on objective criteria or a particular mechanism, assessed by the courts pursuant to the parties' agreement).³

- 5.4 If POTLL and RWE wish the Applicant to withdraw powers to construct Work No 10 or agree to a fetter on the Applicant's right to exercise such a power, it is clear that the terms of the handling agreement must be agreed prior to close of the examination of the Order. Even in such circumstances, , the Applicant might only agree to a fetter on the right to exercise powers provided that the terms of the handling agreement were honoured. The order facing power should remain.
- 5.5 The use of section 120 Planning Act 2008 is of no assistance here. This is because:
- 5.5.1 Section 120(3) does enable a DCO to "make provision relating to, or matters ancillary to, the development for which consent is granted." Whilst it is possible to see that a handling agreement would be ancillary to delivery of the project by TPL, this provision on its own does not enable the issues set out in paragraph 5.3 to be resolved;
- 5.5.2 Section 120(4) provides a power to make provision for the items expressly identified in Part 1 of Schedule 5 to the Act. However, none of these has ever been used to provide for a handling agreement to be required hitherto, and even if one of the powers was relied upon, this would not address the unenforceability matter identified above; and
- 5.5.3 Section 120(5) enables legislative provisions of general application (such as the Harbours Docks and Piers Clauses Act 1847) to be applied, modified or excluded, and for amendments, repeals or revocations of local statutory provisions (such as the acts and orders applying to the undertaking of POTLL). However, even if such a provision was included - and one has not yet been proposed – this still would not address the issue identified in relation to enforceability above.
- 5.6 Therefore, the use of the DCO and powers contained in section 120 Planning Act 2008 do not provide answers to the issues associated with a handling agreement of unknown terms. Similarly, they provide no incentive upon POTLL to enter to such an agreement.

³ Morris v Swanton Care & Community Ltd [2018] EWCA Civ 2763

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9 August 2021