SILVERTOWN TUNNEL DCO EXAMINATION

UPDATED LEGAL POSITION STATEMENT

FOR LONDON BOROUGH OF NEWHAM[1]

1. The London Borough of Newham ("LBN") has long expressed support - in principle - for a package of additional crossings of the River Thames in its vicinity in order to reduce congestion and improve access to key regeneration areas within the Borough.
2. However, this support has always been contingent upon:
   i. a full understanding of the impacts of any such proposal; and
   ii. the securing of appropriate mitigation in respect of such impacts where necessary.
3. The current iteration of the (revised, now 5th) draft Silvertown Tunnel Development Consent Order, 5th April 2017 ("ST rdDCO") continues to give rise to particular concerns because it proposes, not only to introduce user charging for the new ST, but also to introduce, for the first time in its 120 year history, charging for use by the public of the Blackwall Tunnel ("BT").
4. The BT (constructed by London County Council to serve East London in 1897) has operated as a free means of crossing the river ever since (with an additional bore opening in 1967 also being free of charge).

[1] This Opinion supplements the Legal Position Statement, dated 27th January 2017. We said that we would review the latest draft of the DCO. We have reviewed the latest available as at 10th April 2017, being document reference TR010021-001622-TfL 3.1 Draft DCO R5, April 2017. This Update is our present concluded opinion on this apparent 'final' draft DCO.

5. By Article 53(1) of its ST rdDCO relating to construction of a new tunnel between Royal Borough of Greenwich and LB Newham, TfL proposes to subject the existing public free passage through BT to a charge. No prior relevant works are proposed to be executed to the BT, nor is it physically within the redline of the Land Plans by which the actual scope of the ST rdDCO is identified.

6. It remains surprising that charging for BT passage has been introduced as an "ancillary" or "consequential" element of the DCO whilst simultaneously being outwith the Order Limits and yet BT charging is presented by TfL as "fundamental" to the proposals: 77%[2] of the expected combined BT/ST flows are predicted to use the BT. Thus, BT charging will represent the lion's share of the income stream for financing the scheme. It cannot be considered to be an "ancillary" or "consequential" element of the proposals, but rather as their lynchpin.

7. Following extensive research, we can find no precedent whatsoever in any DCO nor Act of Parliament for charging being imposed on a nearby, *previously un-taxed* and *existing* river crossing as part of the consent for a *new tolled* crossing. There is also no precedent for the imposition of a road user charge on an existing road except through the scheme of the Greater London Authority Act 1999 (see below). Whilst TfL relies for support for its proposed user charging on (tolled) river crossing precedents subject to Parliament's express authorisation, no such tax on an *existing* crossing has achieved this. The Severn Bridges Act 1992 provided for *harmonisation* of charges across the two bridges: one already open and tolled; the other (new crossing) authorised by the Act. The same

[2] As per TfL position articulated to the Examination on Tuesday, 17th January, 2017

applied with the Dartford-Thurrock Crossing Act 1988, as the bridge and its tolls were authorised to supplement the capacity at the pre-existing tolled tunnels.

8. TfL properly recognises the difference between a toll and a charge and seeks to rely upon the latter alone. But the Planning Act 2008 does *not* expressly authorise the charging of an *existing* road without more. The Transport Minister's Statement to the House of Commons in July 2013 is that, nationally, "the Government has made a clear commitment not to toll *existing* road capacity and this has not changed". We understand this commitment in respect of *existing* roads to encompass both tolls and charges. This is reflected in the NNNSIP Guidance 2014.

9. In London, Parliament has provided an express scheme for the charging of land and areas comprising existing roads and delegated power to the Mayor to determine the same. Section 295 and Schedule 23 of the Greater London Authority Act 1999 authorise the imposition of road user charging on existing roads (without more) subject to an elaborate procedure in respect of "designated areas", to full consultation, and with the power to hold a public inquiry into objections. This remains the real alternative to Article 53(1) (in so far as it relates to the BT) and the Schedule 23 scheme can be relied upon in due course if the Panel so recommends and/or the Secretary of State curtails the final draft DCO so as not to grant the power sought so far as it concerns BT.

10. By contrast with the power to charge *new* roads or *new* tunnels, not only does the PA 2008 *not* provide power for the charging of *existing* roads in the absence of relevant works, it does not concern nor encompass more than the *designated* 'ST project'. The use of a DCO for the proposed construction of ST has only been possible because of the section 35 Direction obtained from the Secretary of State on 1 June 2012, by which the

ST development (and not more) is “to be treated as development for which development consent is required”. That is, BT has never been within the scope of nor a part of the *designated* ST project. The PA 2008 cannot apply to more than the designated ST project and so cannot encompass BT. The application for designation to the Secretary of State does *not* indicate that the DCO will be used to impose charging on BT; it simply states that “the viability of a range of funding options to enable delivery are (sic) now being considered”. That this should have been the case at the time of the application to the Secretary of State is significant: firstly, TfL cannot claim that inclusion of BT user charging was expressly considered and accepted by SoS as part of the Direction-making process; secondly, BT charging cannot be claimed as an inevitable and incidental part of the project for which a direction was applied for, as it was plainly not so regarded in 2012.

11. TfL has itself been ambivalent about which power it seeks to rely upon. Helpfully, in their Deadline 2 response (DC11), TfL now accepts that, as BT is not subject to any of the “land and works” provisions of the DCO, section 144 of the PA 2008 is not available to TfL in relation to BT charging. We agree. Section 144 concerns authorisation of charging of tolls and TfL accepts that it is not proposing a toll of BT. The contingent provisions of subsections (2) and (2A) cannot here apply.

12. TfL therefore falls back on section 120 of the Planning Act 2008 to find authority for BT charging as either “*ancillary*” to the ST development (subsection (3)) or “necessary or expedient for giving full effect to any other provision of the order….*incidental, consequential, supplementary*…provisions ” (subsection (5)). It is evident that charge cannot relate to the BT because it is outside of the relevant Land Plan area and no relevant works are proposed to be executed within the BT. It is also evident that the

scope of these statutory terms – e.g. “ancillary” , “incidental” - cannot in law on any reading encompass a draft Article that is advanced *by TfL* as “fundamental” to delivery of the ST. It seems to us that these provisions were intended to capture subordinate but supportive elements of the proposals – i.e. ancillary or consequential, rather than primary or fundamental elements of the proposals. Indeed, it is TfL’s own financial case that charging of the use of BT would generate 77% of the combined traffic flows (and thus of the revenues). The scope of the designated ‘ST project’ cannot expand to encompass the BT and it remains Government policy not to charge existing roads (not subject to relevant works). Thus, it cannot appear necessary nor appear expedient to charge the existing BT. If it were to be, the power under section 120(5)(c) potentially to tax free passage of existing roads would be unlimited. We conclude that this cannot be the case.

13. Further, the power conferred by section 120(3) and (5) is not unlimited and cannot extend to subject to user charging existing roads or areas beyond the actual area defined in the Land Plans comprised within the dDCO.

CONCLUSIONS

14. BT charging would end 120 years of free river crossing and, in turn, represent the opportunity to create a perpetual new multi-million pound revenue stream for TfL. It would also establish a precedent to charge for the use of all existing London river crossings without relevant works.

15. Given:

i. current Government policy *not* to charge *existing* roads;

ii. the absence of any express power within the Planning Act to impose charges on existing roads where no relevant works are proposed;

iii. the absence of any precedent for imposing charges on an existing uncharged river crossing by any DCO or Act of Parliament;

iv. the failure to deploy the statutory process expressly established by Parliament for establishing user charging in areas of London;

v. the absence of any formal recognition of charging "regime change" for the BT in the Order Title or Limits;

vi. the accepted fundamental role articulated by TfL for imposing user charging on the existing BT in the delivery of the new ST, whose construction will depend upon BT charges for 77% of its funding (cf. the position explained to the Secretary of State in 2012 when seeking the section 35 Direction);

vii. the scale and scope of the charges per vehicle trip (in perpetuity) envisaged by TfL for use of BT and their potential impacts on the vulnerable communities living in the Boroughs adjacent to the tunnel portals, who currently rely upon the BT for access to make work, education and healthcare related trips and for other day to day needs;

it is our view that the Panel, and the Secretary of State, will need to scrutinise with great care the lawfulness of the proposals for BT user charging and whether they *can* and, if

so, *should* be brought forward as "ancillary" or "incidental or consequential" to the provisions of the DCO pursuant to section 120(3) or (5) of the Planning Act 2008 in light of the fundamental nature of the powers sought in Article 53.

16. Subjecting the subsisting free passage of BT to a charge in perpetuity as part of this DCO cannot properly be regarded as falling within the scope of section 120(3) or (5) of the Planning Act 2008.

17. Article 53(1) – as presently advanced and in so far as it purports to impose a user charge in perpetuity on the BT – is ultra vires the statutory provisions relied upon by TfL.

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10th April, 2017