

BY E-MAIL

Natasha Kopala
Department for Transport
Great Minster House
33 Horseferry Road
London
SW1P 4DR

Our Ref 92616940.1\DO03\652242.07003

DDI +44 20 7490 6995

E duncan.o'connor@pinsentmasons.com

26 February 2018

Dear Ms Kopala

**PLANNING ACT 2008
APPLICATION BY TRANSPORT FOR LONDON FOR THE SILVERTOWN TUNNEL
DEVELOPMENT CONSENT ORDER**

This letter contains a response on behalf of Transport for London (TfL) to the following request set out in your letter of 12 February 2018:

Assuming HSE's position remains as that set out in their letter of 10 August 2017, and given the Applicant's view that the determination of Brenntag's 2012 application is unlikely to allow HSE to remove its advice against the development, the Secretary of State would like to ask the Applicant what action could be taken in relation to the Brenntag site to address HSE's concerns.

Implications of a DCO requirement on the terms suggested by the HSE

The HSE has advised against the Silvertown Tunnel scheme on the basis that proposed works to the existing A102 Blackwall Tunnel southern approach road in Greenwich fall within the inner consultation zone for the Brenntag site. The HSE has suggested that the DCO (if made) should contain a requirement which would prevent the tunnel from opening until Brenntag's hazardous substances consent is modified or revoked.

Our letter of 31 January 2018 reiterated TfL's view that there are sufficient grounds for the Secretary of State to override the HSE's advice in this instance and not impose a DCO requirement on the terms suggested by the HSE. TfL acknowledges, however, that the Secretary of State may be reluctant to override the HSE's advice given its statutory responsibilities in assessing and advising on the off-site risks presented by the use of hazardous substances.

If the Secretary of State is not minded to override the HSE's advice and decides to impose a DCO requirement preventing the tunnel from opening until Brenntag's hazardous substances consent has been modified or revoked, there are a number of legal mechanisms by which that

Pinsent Masons LLP

30 Crown Place London EC2A 4ES United Kingdom

T +44 (0)20 7418 7000 F +44 (0)20 7418 7050 DX 157620 Broadgate

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outcome could be achieved. These mechanisms are described in detail in this letter and its appendix.

TfL's concern is that these mechanisms rely on Brenntag's consent being modified by the Royal Borough of Greenwich ('RB Greenwich'), or potentially the Secretary of State, and are therefore outside of TfL's control. Our letter of 31 January explained that such a DCO requirement would therefore present a significant risk to the project.

That risk relates to the timing of TfL letting the PFI contract for the project. If a DCO requirement is imposed in the terms suggested by the HSE, TfL will have to secure the necessary modifications to Brenntag's hazardous substances consent *before* it lets the contract for the Silvertown Tunnel. TfL is confident, however, that such modifications can be made in the near future using the mechanisms described in this letter and its appendix and TfL is in ongoing discussions with RB Greenwich, the HSE and Brenntag to secure this outcome as soon as possible.

What modifications are necessary to address the HSE's concerns?

The HSE's written representation states that if changes were made to the hazardous substances consent for the Brenntag site "*such that the quantities and/or positioning of the hazardous substances were limited ... HSE would review its LUP [land use planning] consultation zones and the advice may change*" ([REP1-080](#), para 6.1).

For RB Greenwich to modify Brenntag's consent the Council will require clear advice from the HSE on what specific modifications are necessary to address its concerns. TfL has been engaging with the HSE since the close of the examination to seek clarification on this point. However, the HSE has advised TfL that it is only able to discuss these modifications with RB Greenwich (as the hazardous substances authority) and Brenntag (as the holder of the consent). TfL is currently seeking to facilitate those discussions.

The HSE is, however, prepared to enter into an agreement with TfL on a commercial basis to assess what the implications would be of specific modifications to the Brenntag consent, but it has advised that TfL must specify what modifications are to be assessed, and it is not able to advise in general terms on what modifications would be necessary to alter its advice in relation to the Silvertown Tunnel scheme.

TfL has prepared a scope for this assessment, but there is no guarantee that this work will provide a clear answer to what modifications are necessary to address the HSE's concerns. TfL believes the following modifications are likely to achieve this outcome:

- (a) As explained in the HSE's written representation, hydrofluoric acid (the storage of which is authorised by the 1999 deemed hazardous substances consent) dominates the offsite residual risk¹.
- (b) Brenntag's deemed hazardous substances consent from 1999 does not include a location plan and therefore, in principle, allows the substances to be stored anywhere on the site. This is reflected in the extent of the consultation zones drawn around the site. Therefore a condition requiring the substances covered by the 1999 consent to be stored in specified locations may reduce the extent of the consultation zone.
- (c) A condition limiting the maximum container sizes and concentrations of chemicals which may be stored on site may also be necessary. TfL understands that Brenntag operates well below the container sizes and concentrations which the 1999 deemed consent allows.

¹ See REP1-080, paragraph 5.7



TfL is liaising with Brenntag and RB Greenwich on this issue and will seek to ensure that, so far as possible, Brenntag's consent is modified in a way that minimises any impacts on its business operations.

Mechanisms to modify Brenntag's hazardous substances consent

There are a number of legal mechanisms by which modifications can be made to Brenntag's consent to address the HSE's concerns. In summary, these mechanisms are:

Option 1: Determination of Brenntag's 2012 application: RB Greenwich can determine Brenntag's outstanding 2012 application for hazardous substances consent (ref. 12/1247/H) and impose conditions which limit the quantities and/or positioning of the hazardous substances held on the site.

Option 2: Order under s. 14 to modify Brenntag's consent: RB Greenwich can modify Brenntag's existing hazardous substances consent using its power under section 14 of the Planning (Hazardous Substances) Act 1990 ('the 1990 Act'). This provision enables RB Greenwich to modify the consent "to such extent as they consider expedient if it appears to them, having regard to any material consideration, that it is expedient to do so".

Option 3: Modification of consent under section 18: RB Greenwich can modify Brenntag's hazardous substances consent using the power in section 18 of the 1990 Act. By section 17(1) of that Act hazardous substance consent is revoked if there is a change in the person in control of the relevant land, unless an application for the continuation of the consent has previously been made. If the Silvertown Tunnel DCO is made, Brenntag will be required to submit a continuation application in order to prevent its consent from being revoked when TfL acquires part of the site under the powers in the DCO. In determining that application, section 18 provides that RB Greenwich may modify the consent "in any way they consider appropriate or may revoke it".

Option 4: Secretary of State calls in application and modifies consent: The Secretary of State has a power under section 20 of the 1990 Act to give directions requiring applications for hazardous substances consent or continuation applications under section 17(1) to be referred to him instead of being dealt with by hazardous substances authorities. By giving such a direction in relation to Brenntag's 2012 application and/or the continuation application the Secretary of State could modify Brenntag's hazardous substances consent in a way that addresses the HSE's concerns.

Option 5: New DCO provision to modify Brenntag's consent: As a last resort, if none of the options described above are secured, a provision could be added to the DCO to make the necessary modifications to Brenntag's consent. This option would require further consultation with Brenntag and clear advice from the HSE as to what modifications are necessary. Each of these mechanisms is explained in detail in the appendix to this letter.

TfL is in ongoing discussions with RB Greenwich, the HSE and Brenntag to secure the necessary modifications. TfL considers that Options 1 and 3 are likely to be the most suitable means of addressing the HSE's concerns within a timeframe which does not adversely affect the project programme. TfL is currently arranging a meeting with RB Greenwich to seek the Council's support for modifying the consent and discuss the timescales and resource implications for this.

Further update on 2012 application



Our letter of 31 January 2018 sets out TfL's understanding that the determination of Brenntag's 2012 hazardous substances consent application (ref. 12/1247/H) was unlikely to result in a reduction in the extent of the inner consultation zone sufficient to remove the HSE's advice against the Silvertown Tunnel.

The situation has changed since our previous letter was written. TfL understands the current position to be as follows:

- (a) The HSE advised RB Greenwich in January 2018 against granting the consent. This advice was given on the basis of the potential risks the consent would present to the Studio 338 nightclub at Tunnel Avenue which has recently re-opened following a fire in August 2016.
- (b) The HSE has advised that Brenntag's 1999 hazardous substances consent now needs to be amended due to the off-site risks presented by those substances to the Studio 338 nightclub.
- (c) RB Greenwich is therefore seeking to impose additional conditions on the 2012 consent so as to further control the substances covered under the 1999 consent. RB Greenwich has requested that Brenntag engage with the HSE to agree these conditions.

TfL continues to liaise with the HSE, RB Greenwich and Brenntag to seek to coordinate the resolution of these issues. However, the determination of the 2012 application is ultimately a matter for RB Greenwich, following advice from the HSE.

Given the delays that the 2012 application has already been subject to, TfL understandably remains concerned that this mechanism may not result in the HSE's advice against the Silvertown Tunnel being removed by the time TfL is ready to let the contract for the scheme.

Next steps and further information required

In view of the significance of this issue for the determination of the Silvertown Tunnel DCO application, TfL considers it would be helpful for the Secretary of State to seek clarification from RB Greenwich and the HSE on the following matters:

- (a) the current position in respect of Brenntag's 2012 application for hazardous substances consent and, in particular, what conditions the HSE is now advising RB Greenwich should be imposed on Brenntag's 1999 consent via the determination of the 2012 application in order to address the off-site risks presented to the Studio 338 nightclub;
- (b) whether the HSE considers that the determination of the 2012 application is likely to result in conditions being imposed which will address the HSE's concerns regarding the Silvertown Tunnel;
- (c) if not, what further modifications to Brenntag's hazardous substances consent the HSE considers would be necessary to remove its advice against the scheme; and
- (d) whether the council would be minded to modify Brenntag's 1999 hazardous substances consent using the powers under section 14 or 18 of the 1990 Act set out above in order to remove the HSE's advice against the Silvertown Tunnel.

TfL will update the DfT in due course on the outcome of its discussions with RB Greenwich, the HSE and Brenntag and on any further progress on the matters set out in this letter.



Yours sincerely



Duncan O'Connor
Senior Associate
for Pinsent Masons LLP



APPENDIX

MECHANISMS FOR MODIFYING BRENNTAG'S HAZARDOUS SUBSTANCES CONSENT

1. OPTION 1: DETERMINATION OF BRENNTAG'S 2012 APPLICATION

1.1 As noted in the HSE's written representation (REP1-080 para 6.7), the determination of Brenntag's 2012 application for hazardous substances consent, and any conditions which RB Greenwich may impose on that consent, has the potential to reduce the risks and the extent of the consultation zones around the Brenntag site. The determination of the 2012 application is therefore one of the means by which the HSE's concerns could be addressed.

1.2 The 2012 application (ref. 12/1247/H) seeks consent to the store 199te of sodium hypochlorite in bulk tanks and in moveable containers at the Brentag site. The 2012 application was necessary due to the reclassification of sodium hypochlorite as a product which required such consent.

1.3 The relevant powers of the hazardous substance authority in respect of the application are set out in sections 9 and 10 of the Planning (Hazardous Substances) Act 1990 ('the 1990 Act'). Section 9(1) provides that the hazardous substance authority may grant consent "subject to such conditions as they see fit".

1.4 Section 9(3) provides that, in dealing with such applications, the hazardous substance authority shall have regard to any material considerations and, in particular:

- (a) *to any current or contemplated use of the land to which the application relates;*
- (b) *to the way in which land in the vicinity is being used or is likely to be used;*
- (c) *to any planning permission, permission in principle or development consent that has been granted for development of land in the vicinity;*
- (d) *to the provisions of the development plan; and*
- (e) *to any advice which the safety regulator (i.e. the Health and Safety Executive) has given ...*

1.5 Section 10(1) further provides that without prejudice to the generality of section 9(1) the hazardous substance authority may grant consent subject to conditions with respect to a number of specific matters including "how and where any hazardous substance to which the consent relates is to be kept or used"

2. OPTION 2: ORDER UNDER SECTION 14 TO REVOKE OR MODIFY CONSENT

2.1 The second mechanism by which the consent for the Brenntag site could be modified is by RB Greenwich exercising its general power under section 14 of the Planning (Hazardous Substances) Act 1990.

2.2 Section 14(1) provides that a hazardous substance authority may by order revoke a hazardous substance consent or modify it to such extent as they consider expedient if



it appears to them, having regard to any material consideration, that it is expedient to do so.

2.3 Section 14(2) provides a power to revoke a hazardous substance consent if it appears to the hazardous substance authority that any of the following conditions have been met:

- (a) *that there has been a material change of use of land to which a HSC relates; or*
- (b) *that planning permission or development consent has been granted for development the carrying out of which would involve a material change of use of such land and the development to which the permission or development consent related has been commenced; or*
- (c) *in the case of a HSC which relates only to one substance, that that substance has not for at least five years been present on, over or under the land to which the HSC relates in a quantity equal to or exceeding the controlled quantity; or*
- (d) *in the case of a HSC which relates to a number of substances, that none of those substances has for at least five years been so present.*

2.4 Any order made by a hazardous substances authority under section 14 only takes effect once it has been confirmed by the Secretary of State².

2.5 TfL considers that in the present circumstances there are clear material considerations which would justify RB Greenwich using the power in section 14(1) to modify Brenntag's hazardous substances consent. Material considerations are not defined in the legislation but, as the National Planning Practice Guidance acknowledges, "the scope of what can constitute a material consideration is very wide"³.

2.6 The factors listed in section 9(3) of the 1990 Act which are relevant when determining an application for hazardous substance consent are also likely to be relevant in this context. In the present circumstances, a number of these factors are engaged including:

- (a) the land in the vicinity of the Brenntag site is currently used for purposes which are not compatible with the terms of the 1999 consent which does not define the locations in which the substances must be stored. These existing uses include the A102 Blackwall Tunnel Southern Approach road and the Studio 338 nightclub;
- (b) works on land adjacent to the Brenntag site are contemplated as part of the Silvertown Tunnel scheme – a use which has been safeguarded since 1995;
- (c) the Silvertown Tunnel is supported by the RB Greenwich Local Plan: Core strategy⁴; and
- (d) the HSE has advised against the Silvertown Tunnel scheme on the basis of the terms of the 1999 Brenntag consent, but has also

² Section 15, 1999 Act.

³ Paragraph: 008 Reference ID: 21b-008-20140306

⁴ See Policy IM3 (Critical Infrastructure).



advised that modifications to that consent could result in the extent of the consultation zones being reduced.

- 2.7 TfL has liaised with RB Greenwich over the use of section 14(1) to modify Brenntag's consent. TfL understands that RB Greenwich has concerns that making such a modification could expose the council to a compensation liability⁵. For this reason, it appears that RB Greenwich's preferred approach is to impose controls on the quantities or positioning of the hazardous substances through conditions imposed via the determination of the 2012 application, rather than by making a modification order under s. 14(1).
- 2.8 There do not currently appear to be grounds for RB Greenwich to revoke Brenntag's consent under s. 14(2), although this may change if development consent for the Silvertown Tunnel was granted and implemented. However, it would appear that the HSE's concerns could be addressed without a revocation being necessary.

3. **OPTION 3: MODIFICATION UNDER SECTION 18**

- 3.1 If the Silvertown Tunnel DCO is made, an opportunity to modify Brenntag's consent will arise as a result of TfL exercising compulsory acquisition powers over part of the Brenntag site. The draft order contains a power for TfL to use and acquire part of Brenntag's site to provide the landing point for the replacement Boord Street foot and cycle bridge.

- 3.2 Section 17(1) of the 1990 Act provides that:

A hazardous substance consent is revoked if there is a change in the person in control of part of the land to which it relates, unless an application for the continuation of the consent has previously been made to the hazardous substances authority.

- 3.3 Section 18 provides that when a continuation application is made under section 17, the hazardous substances authority may modify the consent "in any way they consider appropriate or may revoke it"⁶.

- 3.4 In dealing with an application, the hazardous substances authority must have regard to any 'material consideration' and in particular to the matters listed in section 9(2) of the 1990 Act cited above, and any advice which the HSE has given⁷.

- 3.5 The hazardous substances authority has 8 weeks from the date of receipt to determine the continuation application (subject to the time periods set out for the receipt of representations). If no decision is made within that time, the continuation application is deemed to be granted. There is no requirement for a decision to be confirmed by the Secretary of State – it is simply taken by the hazardous substances authority and comes into effect upon its grant.

- 3.6 Section 19 of the 1990 Act provides that where a hazardous substances authority modifies or revokes an HSC following a continuance application, that authority must pay to the person who was in control of the entirety of the land before the change of control "compensation in respect of any loss or damage sustained by him and directly attributable to the modification or revocation".

⁵ Where a consent is modified or revoked by a hazardous substances authority under section 14(1), section 16 provides that compensation is payable by that authority in respect of any depreciation of the value of the land or disturbance suffered by the holder of that consent.

⁶ National Planning Policy Guidance states that "it should rarely be appropriate to impose more onerous conditions or revoke a consent". (Paragraph: 059 Reference ID: 39-059-20140306) In this instance it appears there would be justification for imposing such conditions.

⁷ See section 18(2) of the 1990 Act



3.7 Under an agreement entered into between TfL and Brenntag, the continuation application, Brenntag is required to submit its continuation application to RB Greenwich no later than 20 working days (four weeks) after the Silvertown Tunnel DCO is made.

4. **OPTION 4: SECRETARY OF STATE MAKES SECTION 20 DIRECTION**

4.1 Section 20(1) of the 1990 Act provides that:

The Secretary of State may give directions requiring applications for hazardous substances consent or applications under section 17(1) to be referred to him instead of being dealt with by hazardous substances authorities.

4.2 Section 20(2) adds:

A direction under this section—

- (a) *may be given either to a particular hazardous substances authority or to hazardous substances authorities generally; and*
- (b) *may relate either to a particular application or to applications of a class specified in the direction.*

4.3 The Secretary of State therefore has the ability to call in the outstanding 2012 application relating to the Brenntag site, and could also call in the continuation application submitted by Brenntag under section 17 (if the DCO is made). In determining those applications the Secretary of State could make the necessary modifications to address the HSE's concerns.

4.4 The National Planning Practice Guidance states that section 20 directions "will be very much the exception, for example where an application raises issues of more than local importance"⁸. In the event that the DCO is made with a requirement preventing the tunnel from opening until the Brenntag consent is modified, Brenntag's 2012 application and any application made under section 17 for a continuation of its existing consent would clearly raise issues of more than local importance. The Silvertown Tunnel scheme is a nationally significant infrastructure project whose opening would be contingent on the modification of Brenntag's consent.

5. **OPTION 5: PROVISION ADDED TO DCO TO MODIFY BRENNTAG'S CONSENT**

5.1 As a last resort, if none of the options described above are secured, a provision could be added to the DCO to make the necessary modifications to Brenntag's consent. This option would require further consultation with Brenntag and clear advice from the HSE as to what modifications are necessary.

5.2 If this option proved necessary, TfL could provide the Secretary of State with proposed drafting.

5.3 TfL consider such a provision falls within the scope of sections 120(3) or 120(5) of the Planning Act 2008 which provide that:

120(3) An order granting development consent may make provision relating to, or to matters ancillary to, the development for which consent is granted.

120(5) An order granting development consent may...

⁸ Paragraph: 050 Reference ID: 39-050-20161209



- (c) *include any provision that appears to the Secretary of State to be necessary or expedient for giving full effect to any other provision of the order.*