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10 April 2024

Dear Sirs

Application by National Highways (Applicant) for development consent for the proposed Lower Thames Crossing Scheme (Proposed Development)

Consultation letter issued by the Secretary of State for Transport, 28 March 2024

Item no 11 - Protective Provisions

> *"The Secretary of State notes at the close of the Examination, Protective Provisions were still to be agreed between the Applicant and Environment Agency, Southern Water, HS1 Limited, Network Rail, Port of Tilbury London Ltd and The Port of London Authority. The Secretary of State asks the Applicant, Environment Agency, Southern Water, HS1 Limited, Network Rail, Port of Tilbury London Ltd and* ***The Port of London Authority*** *to confirm whether agreements on these protective provisions have been reached*."

This response is on behalf of the Port of London Authority (**PLA**) in respect of the Secretary of State's request for information on the status of outstanding protective provisions. The PLA's representations are as follows:

1. Progress on protective provisions generally

1.1. Outstanding matters in respect of protective provisions for the benefit of the PLA, at Part 8 of Schedule 14 to the draft Development Consent Order (**dDCO**) were set out in detail at section 3 of representations submitted by the PLA at Deadline 9A [REP9A-141].

1.2. Since that date, and close of the examination, the PLA has had no contact with the Applicant to resolve outstanding matters on the protective provisions and the position remains as set out in REP9A-141. While the PLA remains concerned about all the matters summarised at Deadline 9A, there is one matter in particular where the Applicant's engagement with that matter has only been to say that no change is needed, as explained below.

2. Paragraph 99(6) – referral of arbitration to Secretary of State

2.1. Paragraph 99(6) of the PLA's protective provisions allows referral of arbitration of a dispute between the Applicant and the PLA to the Secretary of State (**SoS**) where the dispute relates to the design and construction of tunnelling works under the river Thames (**river**). There is already an arbitration process included in paragraph 99 to enable the parties to resolve disputes; what paragraph 99(6) does is enable the Applicant to 'jurisdiction shop', so that if at any point during arbitration the Applicant does not like the direction of travel, it can instead transfer the dispute to the SoS. The PLA's position remains that such a provision, in addition to being unprecedented, is unacceptable in allowing the Applicant to unilaterally override the arbitration process which is ostensibly included in paragraph 99 to enable the PLA to protect the existing and future use of the river. Including this provision would set a highly undesirable precedent for harbour authorities which is likely to weaken the position of harbour authorities in relation to Applicants for these sorts of major infrastructure schemes.

2.2. This had been a cause of concern for the PLA for some time. Unlike other points of disagreement, which have been negotiated with the Applicant, before and during the examination process, this matter of referral to the Secretary of State is one on which the Applicant has consistently refused to any amendment which would address this particular concern.

2.3. This point was the subject of extensive submissions by the PLA at Issue Specific Hearing 14 on 28 November 2023 (**ISH14**) (see [REP8-162] for details of the PLA's submissions at ISH14). Further, at ISH14, the Examining Authority (**ExA**) noted the potential difficulty with "complicated provisions" such as those included in the drafting of paragraph 99(6) and queried also the necessity of the drafting, given its unprecedented nature (see page 38, line 23 to page 39, line 19 of the published transcript of ISH14 [EV-088e], attached as **Appendix A**). The ExA encouraged the Applicant to look rather at precedents from energy projects.

2.4. In addition, following discussion at ISH14, the PLA made detailed written submissions [REP8-161] which offered a drafting solution to the issues identified with the drafting of paragraph 99(6), based on the precedents from energy projects as suggested by the ExA. The PLA's submissions consisted of suggested amendments to the DCO to include a schedule referred to as the Arbitration Rules as is common for other recent DCOs, as well as a detailed explanation of the DCO precedents.

2.5. In each case – that of the ExA querying the drafting, and the PLA proposing alternative, precedented drafting – the Applicant has refused to alter its position. The Applicant has sought to defend its position in respect of the imposition of this provision in [REP9-275], and the PLA's response to those submissions is also at [REP9A-141].

2.6. The PLA wishes to emphasise to the Secretary of State, in terms of his request for information in this matter, the unacceptability of the drafting of paragraph 99(6) of the PLA's protective provisions; that the idiosyncrasy of its inclusion was particularly noted by the ExA in hearings; that the PLA offered a well-precedented drafting solution ready to be inserted into the DCO; and that the Applicant has refused to substantively engage with this drafting or to move on any point.

3. Negotiation of property agreement

3.1. Negotiation of an agreement between the Applicant and the PLA for the acquisition by agreement of the land required in the river for the Proposed Development has been

intermittently ongoing since the Applicant's offer of £50 for the required rights in March 2022. The primary reason that it has not been possible to reach agreement on the form of a property agreement lies in the positions of the respective parties as to the quantum of consideration due.

3.2. The matter was raised specifically by the PLA at Compulsory Acquisition Hearing 3 on 17 October 2023 (**CAH3**), at which the ExA noted the efficacy of completing a property agreement, even if quantum could not be agreed, given that other matters needed to be secured by such an agreement and the issue of compensation could be "ring-fenced" and dealt with separately by the Upper Tribunal (Lands Chamber) if necessary. The ExA concluded by urging progress on completion of a property agreement, reserving the matter of quantum (see page 27, line 3-34 of the published transcript of CAH3 for this discussion [EV-055], attached as **Appendix B**.)

3.3. Negotiations continued between the parties on a without prejudice basis in respect of a property agreement shortly after the close of examination. However, the Secretary of State is asked to note that negotiations have since been terminated by the Applicant, following an email dated 13 February 2024 from the Applicant's agent to the PLA's agent on this matter which states that:

National Highways has concluded that, as we are still far from agreeing the 'existing use value' (which underpins the 10% agreement fee), then it would not be an efficient use of public funds to try to progress this agreement further for the time being, unless and until that figure is agreed.

(For the avoidance of any doubt, although discussions as to the potential content of an agreement were without prejudice, the Applicant did not send that particular email on a without prejudice basis, and could not have done so in any event because the email was not sent in a genuine attempt to settle a dispute).[1]

3.4. The Applicant appears to have taken the position that, because the issue of quantum cannot be agreed, it "would not be an efficient use of public funds" to settle the remainder of the agreement. This is in direct opposition to the stated position of the ExA at CAH3, as set out above. It also deviates from Planning Act 2008 guidance which advocates that interests in land should be acquired by agreement wherever possible.

3.5. Further, if the Applicant is taking decisions to disregard guidance and cease engagement with interested parties on the basis that engagement is not a "good use of public funds", the PLA wonders where such an approach will lead in terms engagement throughout the authorisation and construction of a project. Should an Applicant be able to override any requirements to engage with third parties solely with the justification that, in its view, such engagement is not a "good" use of public funds?

Yours faithfully,

Winckworth Sherwood LLP

[1] Communication around a without prejudice document is not in itself without prejudice; the without prejudice rule applies where statements are made in a "genuine attempt to settle an existing dispute" (*Rush & Tompkins Ltd v Greater London Council [1989] AC 1280*) so could not be said to apply to this statement of the Applicant in which the Applicant declines to attempt to settle a matter.

Appendix A – extract from the published transcript of ISH14 [EV-088e]

about ensuring timely determination of disputes through arbitration, then it's open to the applicant to suggest to you, and all interested parties, adding to the DCO by way of some rules.

So I just make those points in addition. But we absolutely support the PLA here and see no justification whatsoever for this completely unprecedented addition to these protective provisions, which, as you know, have been largely precedented in this form for decades. The only other point I would wish to make, sir, regards article 65, and that concerns appeal provisions, you may recall. And we note the wide-ranging ambit of this article, but in particular, that it would apply, it does apply, to street authorities, giving consent under article 12, which deals with the temporary closure, alteration, diversion and restriction of use of streets. That would include the undertaker using the powers of article 12 in the port.

And it's the Port of Tilbury's position that article 65 should not apply to the Port because this is a matter that should be dealt with through the protective provisions. That's the purpose of protective provisions, essentially, and as part of what would be termed 'specified functions', to which POTL should be allowed to give its consent. So we will be – subject of course to the dispute resolutions in the protective provisions themselves – so we will be making this point to the applicant when we next meet them. But I thought I would just, for completeness, wish to mention that now. That concludes all my submissions, sir.

MR SMITH: Thank you very much, Mr Owen. It's actually an interesting observation that arbitration provision on highways orders have tended to be relatively calm and quiet. We have been through an essentially half-decade period in the evolution of such provisions, typically in energy and offshore energy orders, where some very, very detailed sets of, essentially, arbitration processes and rules have been included in specially formed schedules. Some of those, frankly, have become distinctly over-complicated, and there have been instances in which examining authorities have recommended, and Secretaries of State have decided, to cut away over-complex provisions. So there is a measure of care needed with these.

But there is useful reference, as Mr Owen suggests, to practice outside the highways field, in terms of how one – if it is a concern as to how timely an

arbitration will be, on what terms it will operate, when it will report, etc, then there are plenty of precedents for provisions that do that job. Now, one of the questions that I have typically put to energy applicants who are seeking complicated arbitration provisions, has been, essentially, to ask them to turn their mind to the mischief that they seek to resolve. Why are these complicated provisions being sought when there are, again, as Mr Owen has proposed, there's a lot of experience of quite simply drafted general provisions that work?

And so the challenge that I'm going to throw back to the applicant, in this instance, is that, given that we have, in general terms, a simple arbitration provision, but we do have this reservation out to the Secretary of State, well, what mischief are you trying to resolve? What problems have emerged before that lead you to the conclusion that you need to be able to essentially shop jurisdiction and move from the jurisdiction of an arbitrator to the Secretary of State? And if that is the simple matter of not being clear about how, not being clear about when, not being clear about deliverables, remit, etc, then yes, maybe do give consideration to some of the energy precedents because those matters are dealt with there.

Now, we do need, before we close this item out, to go back onto land and ask for observations from Gravesham Borough Council.

MR BEDFORD: Thank you, sir. Michael Bedford, Gravesham Borough Council. I saw that Mr Owen, I thought, wanted to come back on your arbitration point. I'm perfectly happy to defer to that if that completed the –

MR SMITH: Mr Owen, did I miss your re-raised hand? Apologies.

MR OWEN: That's perfectly fine, sir. Thank you very much. Just very briefly, Robbie Owen for Port of Tilbury London Ltd. I think, sir, I entirely agree with what you've said. These precedents are predominately, if not entirely, in the field of energy DCOs, but I don't think that changes the point of principle. The only point I wanted to add, though, is that it's entirely conceivable, I would suggest, that there would be a greater chance, particularly with an arbitration rules schedule of timely determination of an arbitration than there would be under the applicant's approach of a timely response from the Secretary of State, given how busy Secretaries of State are. And therefore, I would just pitch that point in as well, but thank you very much.

Appendix B – extract from the published transcript of CAH3 [EV-055]

take a different view. But I don't think that is holding up agreement on any of the other matters.

MR SMITH: Okay, right. Well, Ms Dillistone is obviously listening to this conversation and will have her reply at the end of it, and I will only make the remark that it does feel, to me, to be necessary to perhaps build a kind of pale fence around the question of quantum, recognising that that may remain completely disputed between the parties, but that there are still other matters that we need to deal with that don't need to be disputed just because quantum is outstanding. So quantum alone should not be seen as the barrier in circumstances where there is a separate tribunal to test that.

MS TAFUR: Isabella Tafur, for the applicant. Understood, sir. Yes, I think we're following the very approach that you're encouraging us to follow.

MR SMITH: Okay, well, unless you've got anything further to say, I should return to Ms Dillistone, who will probably have some observations, but – Ms Dillistone.

MS DILLISTONE: Thank you, sir. Alex Dillistone, for the Port of London Authority. We do recognise that the applicant has been very clear that the applicant will not move on the valuation. The quantum is going to remain at issue. But it does feel, from our point of view, though there is space for negotiating, or at least trying to reach agreement as to the other matters, regards to a property agreement. A property agreement is not purely about the quantum.

MR SMITH: And furthermore, as you have emphasised in very clear submissions, it's also advised – it's supported by the guidance. And so there's every reason for you to, during the tenure of this examination.

MS DILLISTONE: Quite. So that is what we are hoping, and we would hope that the applicant can – that there is space for the applicant to find the time, albeit that we are getting very close to the end of the examination, to at least progress matters more than they have been to date.

MR SMITH: Well I think we can – we've heard your submission on that; I've seen Ms Tafur nodding, who knows as well as you do that, fundamentally, there can be a pale fence put around the quantum disagreement and you can still make progress on the other matters, as long as both of your negotiating teams approach this from a standpoint of the quantum matter being understood to be reserved and not an impediment to other matters. So I would just urge progress, as fast as possible, between the pair of you on that basis.