

INFRASTRUCTURE PLANNING

THE INFRASTRUCTURE PLANNING (EXAMINATIONS PROCEDURE) RULES 2010

THE PORT OF TILBURY (EXPANSION) ORDER

Port of London Authority's submissions following the ISH on the DCO 28 June 2018

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The following are the submissions of the Port of London Authority (“**PLA**”) following the Issue Specific Hearing (“**ISH**”) on 28 June 2018 on the Applicant’s (Port of London Tilbury Limited (“**PoTLL**”)) draft Development Consent Order (“**dDCO**”).

GENERAL

- 1.1 Most of the PLA’s concerns with the dDCO stemmed from the fact that:
 - 1.1.1 the DCO would authorise works in the river, so the PLA requires protective provisions, but the protective provisions in part 3 of schedule 10 as originally proposed were more limited than in other comparable schemes; and
 - 1.1.2 the DCO would extend PoTLL’s existing powers in Tilbury docks to the river, where PLA has powers and it is vital that the overlap of the functions should be dealt with clearly and correctly.
- 1.2 The PLA has continued to work with PoTLL to address these issues. As regards 1.1.1, these discussions have resulted in agreed amendments to the PLA’s protective provisions, as shown in Revision 3 of the dDCO.
- 1.3 The PLA explained at the ISH that 1.1.2 remains the subject of discussions on substantive issues. The details outlined to the ExA are set out below.
- 1.4 These are the only issues remaining between the PLA and the Applicant on which it is necessary to make submissions on this occasion. The PLA hopes and expects all other remaining issues to be resolved through further discussions with the Applicant..

ARTICLE 3

- 2.1 The PLA has three substantive points on article 3.

Exercise of statutory functions

- 2.2 Paragraph (7) would prevent the PLA from granting or varying a river works licence under section 66 of the 1968 Act or a dredging licence under section 73 of that Act without PoTLL’s consent. Revision 3 of the dDCO adds an express statement that in deciding whether to give consent PoTLL will be “acting in exercise of its functions”. As explained to the Panel at the ISH, and confirmed on PoTLL’s behalf, this is intended to be a regulatory function of PoTLL acting in its capacity as statutory harbour authority. Any decision should accordingly be made on that basis, which is completely separate from PoTLL’s commercial interests acting in exercise of its other function as commercial operator of the Port of Tilbury. To address this point the PLA requested that the end of paragraph (7) should be amended to read “(acting in exercise of its statutory functions)”. The PLA has now received confirmation in writing that this amendment is agreed.
- 2.3 Section 66(1)(b) of the 1968 Act provides that a river works licence relating to land owned by the PLA is deemed to confer rights for the licensee to implement the licence. Paragraph (8) would provide that as respects licences for works in land in which PoTLL has a proprietary interest, that deeming provision should not apply unless PoTLL agrees that it may. Paragraph (8) does not state the capacity in which PoTLL would be acting when deciding whether to agree, but in correspondence the PLA has been told PoTLL’s view that, as such licence rights might interfere with PoTLL’s property interests, PoTLL must have absolute discretion whether the rights should be agreed.

This would leave PoTLL free to decide the issue by reference to its commercial interests.

- 2.4 Insofar as PoTLL's commercial interests might in theory be affected by the grant of a river works licence, PoTLL will be fully protected by the general law of landlord and tenant as applying to its lease of the river bed from the PLA (which is what has been agreed to be PoTLL's proprietary interest in the PLA land it seeks). This prohibits a landlord from taking action that would derogate from the grant of the lease i.e. would substantially interfere with the leased land so as to render it less fit for (in the present case) PoTLL's use as a harbour. The ExA will also appreciate that any specific terms will be a matter for private contractual agreement in the lease between the PLA and PoTLL. Both these protections are irrelevant to the DCO, which is to deal with the creation and regulation of the expanded port.
- 2.5 So far as the DCO is concerned, both the PLA and PoTLL will hold their respective property interests in their respective capacities as statutory harbour authorities. The PLA and PoTLL must each therefore assess the proposed impact of statutory functions (in this case deemed rights under section 66(1)(b)) by reference to the interests of their respective statutory undertakings. It follows that when deciding whether to agree under paragraph (8), PoTLL must exercise a statutory function, and that should be stated in article 35. Consistent with this, the Applicant has now agreed with the PLA that paragraph (9) should apply to both consents under paragraph (7) and agreements under paragraph (8). At the ISH it was confirmed on behalf of the Applicant that the principle of statutory functions was agreed by PoTLL in relation to paragraphs (8), (9) and (10) and the PLA has now received confirmation in writing that its amendments relating to this issue are agreed.

Consent etc. not to be unreasonably withheld or delayed

- 2.6 As a matter of general law, any statutory function must be exercised reasonably and without delay. Express provision to this effect such as paragraph (9) is therefore standard. As appearing in Revision 3 of the dDCO paragraph (9) applies only to consents under paragraph (7). It follows from paragraph (8) also being an exercise of statutory functions that PoTLL's paragraph (8) decisions should also be subject to paragraph (9). The PLA has now received confirmation in writing that an appropriate amendment is agreed.

Matters to be considered - paragraph (10)

- 2.7 Paragraph (10) is a list of the matters PoTLL must consider when deciding whether to give consent under paragraph (7) or agree under paragraph (8). The PLA considers that the regulatory question for PoTLL must be whether it needs to prevent significant interference
- 2.7.1 with the works comprising the authorised development,
 - 2.7.2 access and egress to and from the works,
 - 2.7.3 the use by PoTLL of the works or the land within the extended port limits for the purposes of PoTLL's statutory functions, or
 - 2.7.4 the performance of any of PoTLL's statutory functions.

This represents a small but substantive difference from Revision 3 of the dDCO.

- 2.8 The Applicant has agreed most of the amendments proposed by the PLA to deal with this issue but discussions continue regarding interference with the use of the works.
- 2.9 The PLA is content with the other Revision 3 amendments of article 3.

ARTICLE 4

- 3.1 The PLA's outstanding issue is with the practical treatment and operation of overlapping statutory functions. Section 4 of the PLA's WRs sets out the concerns. The ExA will have noted in particular the examples of practical problems identified in paragraph 4.2 of the WRs. The first two have not yet been addressed satisfactorily.
- 3.2 The proposal in article 4(6)(c) to operate through protocols was suggested by the PLA as a device for dealing with the practicalities of PoTLL's exercise of its functions riverside, recognising that these are issues that will emerge from practice but which cannot reliably be identified or legislated for now. However, this compromise is not the most certain way of proceeding and the PLA and PoTLL cannot agree as to how the concept should be translated into detailed provision in the DCO. The PLA has therefore concluded that protocols could not be made to work.
- 3.3 The Applicant has now agreed to a more straightforward approach. . Article 3(7) of the DCO proposes that the PLA's exercise of sections 66 and 73 of the 1968 Act (which are the PLA powers that are intrusive so far as PoTLL is concerned) must be with PoTLL's consent. It is consistent with this for the exercise of PoTLL's powers that may affect the river outside the extended port limits to be subject to the PLA's consent. There needs to be a procedure for the PLA to identify the PoTLL statutory functions which might be intrusive and notify PoTLL. Once notified, the exercise of those powers that may affect the river outside the extended port limits would be subject to the PLA's consent, not to be unreasonably withheld or delayed. The Applicant has agreed most of the PLA's proposed amendments to deal with this issue but discussions with the Applicant are continuing as to the precise detail of some of the necessary amendments.

ARTICLES 6(2) AND 41

- 4.1 At the ISH there was lengthy discussion about the planning permission that article 6 would give for among other things, ancillary works similar to some of the things that article 41 would authorise in relation to the operation of PoTLL's harbour undertaking. The Applicant was asked to explain whether this amounted to duplication.
- 4.2 The PLA has a direct interest in this matter being dealt with correctly because the legal treatment of works and dredging in the river will be determined by the way the DCO works. There would otherwise be a risk of the PLA finding that its decisions, whether under the DCO or the 1968 Act, were vulnerable to challenge.
- 4.3 Article 6 of the DCO will give development consent for the development consisting of the authorised development as defined in the DCO. This not only removes the need for planning permission (Planning Act 2008, section 33(1)(a)), so that the DCO will operate as a grant of planning permission. It also replaces (in the present case) an order under the Harbours Act 1964 (section 33(2)(a)) with provision in the DCO (see 2008 Act section 120(4)) and Schedule 5 e.g. paragraphs 14, 15, 30A, 31 and 32). This gives the

DCO the separate function of also authorising (i.e. legalising) the stated activities. Planning permission does not by itself give such authorisation.

- 4.4 Statutory authorisation will enable the construction of works and the exercise of functions which would otherwise be illegal e.g. as obstructing the public navigation or otherwise constituting a public nuisance. The PLA's protective provisions in Part 3 of Schedule 10 set out procedures for, amongst other things, approval of the detailed plans of the works as they are to be built. If the authorised development were not authorised in the DCO in this way the PLA would be obliged either to require the works and dredging to be licensed under the 1968 Act or to remove unlicensed works and take steps to prevent other unauthorised, and therefore unlawful, activities in the river.
- 4.5 The position is the same as regards the continuing operation of PoTLL's harbour undertaking. The PLA recognises that works and activities of the sort described in section 41 may from time to time be required as part of the operation of the harbour undertaking of which the authorised development will form part. This, too, requires statutory authorisation on the same basis as outlined in paragraph 4.4.
- 4.6 The PLA has no difficulties with the article 6/41 proposals. However, it would be concerned if that standard regime for infrastructure works were in any way disrupted because of the resulting impacts on the PLA's exercise of its statutory functions as outlined in paragraphs 4.2 and 4.4.

CONCLUSION

- 5.1 Revision 3 of the dDCO otherwise includes amendments agreed with the Applicant. As a result, the PLA has no further issues to mention to the ExA.