

Peter Burley
Chief Planning Inspector
The Planning Inspectorate
Room 3/13
Temple Quay House
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Temple Quay
Bristol BS1 6PN

13th March 2013

Dear Mr Burley

Thames Tideway Tunnel development consent application (adequacy of consultation)

I write with reference to the submission to the Planning Inspectorate of the development consent application for the Thames Tideway Tunnel by Thames Water.

1.1 Hammersmith and Fulham Borough Council consider that the Thames Tideway Tunnel development consent application must be rejected on the basis that the consultation of the proposal under s.42, s.47, s.48 and s.49 of the Planning Act 2008 was wholly inadequate. At no stage during the consultation process were all the options open for discussion. There was insufficient environmental information made available by the applicants during the consultation periods. With significant environmental information missing, the public could not effectively participate and as a result the public's views could not be taken fully into account in the environmental decision making process. The above omissions have resulted in clear breaches of Article 6 of the Aarhus Convention. The relevant Article 6 provisions are replicated in the EIA Directive 2011/92/EU and are of direct effect.

1.2. Effective public participation under Article 6.4 of the Aarhus Convention requires early participation when all the options are open. This includes the right of the public to participate in the preparation and consideration of plans and programmes which ultimately determine which options are reasonably available. Article 6.3 of the Aarhus Convention provides for the public to prepare and participate effectively during the environmental decision making process. Article 6.8 requires that in the final decision, due account is taken of the outcomes of public participation.

1.3. If all options are to be considered open, it follows that studies on other reasonable options to the Tunnel have to be made available as part of the consultation process for effective and meaningful public participation to take place. These studies need to be comparable to those that were undertaken to justify the Thames Tunnel option. Regrettably, the consultation process before and under the

Planning Act 2008 did not include comparable studies on other options. In fact, only one option was superficially referred to and dismissed by the applicant, namely the discredited Putney SuDs Study in Appendix E of the Needs Report. The Putney SuDs study cost a mere £12,000 whereas about £5.5 million was used in various studies in support of, and to progress, the Thames Tunnel option.

1.4. The strategic environmental assessment that the Government purported to undertake with regard to the Thames Tunnel proposal, as required by the SEA Directive 2001/42/EC, is invalid for the same reason. At no stage during the pre-application consultation process, or before, was the public able to participate in the Thames Tunnel proposal when all the options were open. The Thames Tunnel option was, at all times, presented as being, the only possible option.

1.5 It further follows, that for effective public participation to take place, the environmental information and resulting report(s) required under the EIA and SEA Directives ought to have been made available to the public at an early stage when all the options were open. Unfortunately, this too did not happen. There was little environmental information made available during Phase 1 Consultation, i.e. the EIA Scoping Report was not available. In Phase 2 Consultation, the environmental information in the Preliminary Environmental Information Report (PEIR) was insufficient for effective participation. For example, there was no information made available on the carbon footprint of the project (arguably the most significant environmental consideration of all). Additionally, there was insufficient information provided on the alternatives to the tunnel and no comparable cost benefit analysis of those alternatives. "Preliminary environmental information" is the information "reasonably required to assess the environmental effects of the development" (regulation 2(1) Infrastructure Planning (Environmental Impact Assessment) Regulations 2009/2263). It must include an estimate of emissions, consideration of the impact on climate, and an outline of the main alternatives together with the main reasons for the applicant's choice. Such information was not provided and accordingly the duty to consult has not been complied with.

1.6. The SEA consultation was carried out separately by the Government between November 2010 and February 2011 as part of the National Planning Policy for Waste Water deliberations. The consultation was not geared to the general public, but to specified consultation bodies. This is a somewhat surprising course of action considering that Thames Water was the designated authority for the Tunnel proposal under the Planning Act 2008 and it would have been more consistent and fair on the public to combine both consultation processes together as suggested under the SEA Directive.

1.7. The creation of two, but very different, consultation processes made effective participation, arguably, even more difficult. For example, very few members of the public would have known about the consultation process or understood the consequences of a project being made an infrastructure project under the NPS for Waste Water rather than remaining an ordinary planning application. As a result of the adoption of the NPS for Waste Water in March 2012, the issue of need for the Thames Tunnel and strategic alternatives/options to the tunnel were purportedly removed from further deliberation making any later 'consultation' on these issues,

during Phase 2, meaningless. In any event, the options were not open in the NPS for Waste Water or the supporting Environmental Report .

1.8. Once the formal consultation periods came to an end under the Planning Act 2008, the general public have been denied any further right to effectively participate despite there being so much unseen and/or missing information. The Environmental Statement that will be submitted alongside the application for development consent is one obvious example as is the Health Impact Statement and the Equalities Impact Assessment. The content of the Environmental Statement is obviously of key importance, but the general public have been denied the possibility of commenting on this vital document until the development consent application has been accepted by the Inspector when *'It is not normally possible for substantial changes to be made to an application or for the public to influence it once it has been submitted'* (PINs Advice Note 8.1.). Because the preliminary environmental information was inadequate, the pre-application consultation was defective and unlawful.

1.9. The Thames Tunnel proposal is probably the largest development proposal in Europe and will have enormous environmental impacts. How will the views of the public and public authorities be taken properly into account, when the options are closed and with so much environmental information missing from the consultation periods? The preamble of the EIA Directive states, *'Development consent for public and private projects which are likely to have significant effects on the environment should be granted only after an assessment of the likely significant environmental effects of those projects has been carried out. That assessment should be conducted on the basis of the appropriate information supplied by the developer, which may be supplemented by the authorities and by the public likely to be concerned by the project in question'*.

1.10 Hammersmith and Fulham Borough Council responded to the consultation phases and raised its concerns about the inadequate consultation process undertaken by the applicant throughout the consultation process. A substantial number of the general public from Hammersmith and Fulham found the consultation process wholly inadequate as evidenced by the summarised consultation responses. Unfortunately, individual responses to the consultations have been summarised by the applicant rather than published as required by the Planning Act 2008. This has undermined effective participation by reducing the impact of each representation made and making it more difficult for people to group together, exchange views and support one another.

1.11 The applicant has a duty under section 47 of the Planning Act to prepare a Statement of Community Consultation (SOCC), and then to conduct its consultation in line with that statement. The important point is that the published SOCC needs to provide sufficient information on the project and its impact on the community to encourage constructive participation, which means the community must know exactly what will be done. The Council would question the limited content of the statement and also considers that the applicant did not subsequently consult in accordance with that statement.

1.12 The Council would like to draw attention to the statement made by Thames Water in their SOCC that all representations will be recorded and made available on

the Thames Water website. This did not happen. Instead extremely brief and inadequate feedback reports were produced which failed to record all representations and failed to give adequate reasons why representations had been dismissed. Further to this, none of the representations submitted by the Council, members of the public or other consultees at Phase 1, Phase 2 or the Section 48 publicity appeared on the Thames Water website prior to submission of the application to the Planning Inspectorate on 28th February 2013.

1.13 The DCLG note to accompany the Planning Act 2008, entitled 'Guidance on pre-application consultation, September 2009' requires that applicants must have regard to relevant responses to publicity and consultation and that consultation should be thorough, effective and proportionate. In particular, the guidance indicates that applicants are not expected to repeat consultation rounds set out in their Statement of Community Consultation unless the project proposals have changed very substantially.

Paragraph 78 of the DCLG Guidance states that:

"Where a proposed application changes to such a degree that the legitimacy of the consultation may be in question, promoters should consult the community again on the new options."

1.14 The Council strongly believes that the proposed application changed to such a large degree, between Phase 1 and Phase 2 consultations, that the legitimacy of the consultation already carried out can be questioned. It is the Council's view that Thames Water should have undertaken further re-consultation on the new proposals introduced at Phase 2 consultation, and should have supplied consultees with sufficient information to enable them to fully understand the nature of the changes and any likely significant impacts.

1.15 During Phase 1 consultation, Thames Water claimed to have undertaken a 'robust and comprehensive' site selection process where sites were assessed in terms of planning, community, engineering and property suitability (Page 7-6 Consultation Report Appendix 5). Subsequently, however, new information on geology and development proposals were cited as reasons for reviewing the whole tunnelling strategy between Phase 1 and Phase 2 consultations which saw a number of sites become main drive sites for the tunnel which had not been previously been identified as such. In fact, the western section of the proposed tunnel, in terms of where the tunnel would be received and driven, was changed significantly. It is indisputable, therefore, that the project was fundamentally different at Phase 1 compared to Phase 2 and, whatever the reasons for the changes, re-consultation of Phase 1 should have been undertaken. Thames Water's failure to re-consult on 'very substantial' changes meant that it was not possible for the Council to influence and become involved with key discussions and consultation arrangements regarding their sites, at the earliest possible stage. The applicant also failed to ensure that the people affected by the proposals at Camwath Road took part in a thorough, accessible and effective consultation exercise at the earliest possible stage. We therefore consider that the pre-application consultation undertaken by Thames Water has failed to comply with s.42, s.47, and s.49 of the Planning Act 2008.

1.16 The Council strongly believes that Thames Water did not carry out a genuine consultation exercise under section 48 of the Act. Section 48 refers to 'publicising' the application, but the section is clearly part of the pre-application consultation process and should be treated as such. Indeed, the DCLG guidance at the time stated at paragraph 65: *'Promoters are required to publicise their proposed application under section 48 of the Act. Regulation 4(2) of the Infrastructure Planning (Applications: Prescribed Forms & Procedure) Regulations 2009 sets out the detail of what this publicity must entail. This publicity is an integral part of the local community consultation process...'* The same text has been carried forward into the revised guidance published in January 2013 (paragraph 41).

1.17 In contrast to this guidance, Thames Water sought throughout to differentiate the publicity under section 48 from the concept of consultation. By doing so, it failed to comply with the pre-application consultation requirements of the Act and the application ought, therefore, to be rejected. Although Thames Water carried out previous rounds of consultation on the project, pre-application consultation under section 48 is the only formal opportunity the general public (rather than statutory consultee bodies, affected landowners, and people living in the vicinity of the project) has to influence the application before it is made, and such an opportunity is clearly the intention of the Planning Act 2008.

1.18 Thames Water 'publicised' the application from 16 July to 5 October 2012. Far from describing this as a consultation exercise, it stated that consultation was finished, that the proposals accompanying the publicity were 'finalised' and that this was to be contrasted with the earlier rounds of consultation that had been carried out.

The evidence for this is as follows:

- a). on its own website, Thames Water launched the section 48 publicity with the headline 'Finalised plans published', suggesting that there was no possibility of changing them;
- b). in the materials published under section 48, a contrast was drawn between the requirements of this section and 'consultation', although the material did say that 'views on the published material' would be taken into account; and;
- c). press comment made when Thames Water launched its 'publicity' under section 48 of the Act suggested that the consultation process had finished.

1.19 Knowledge about the section 48 exercise would have also arisen from the press, where the message was promulgated that consultation had finished. If anyone, nevertheless, wished to know more and viewed the project website (www.thamestunnelconsultation.co.uk), the front page advised them that finalised plans had been published, thereby giving the impression that changes were not possible and discouraging further responses. If they continued and read the 'publicity' material, they would have seen the attempt to differentiate it from consultation at paragraph 1.1.2 of the introductory document.

1.20 The Council considers that it is not sufficient to invite responses to the publicity if the impression has already been given that the project has been finalised and that consultation is already over. Case law on consultation emphasises that consultation

should be undertaken when the proposal is still at a formative stage (e.g. *R v. Brent London Borough Council ex parte Gunning* (1985) 84 LGR 168). Thames Water gave the impression, whether it was the case or not, that the proposals were not at a formative stage, and that there was, therefore, no point in responding to the consultation. Even if Thames Water did genuinely intend to take responses into account and, in fact, did so, it is likely that potential respondents did not choose to respond given this impression. A greater number of responses would have been likely if the consultation had been undertaken properly.

1.21 A key consideration in pre-application consultation is equality and making sure that consultation has been undertaken in accordance with the Equality Act 2010. The applicants have failed to provide an Equalities Impact Assessment, to date, and have not made any reference in their consultation statement to how equality has been considered in the pre-application consultation. This is a further example of insufficient information being provided to consultees and residents at the earliest possible stage. Further in the absence of such information it is not clear how the decision-maker will be able to discharge its own duties under the Equality Act 2010.

1.22 Ultimately, the Planning Inspectorate must be satisfied that Thames Water has properly complied with the pre-application requirements of the Planning Act before it can accept the application. For all the above reasons, we conclude that the pre-application requirements of the Planning Act were not followed appropriately and, therefore, the application for development consent must be rejected.

1.23 The applicant and or the Government needs to carry out adequate and comparable studies on other options so that when consultation is undertaken in the future, all the options will be open with sufficient environmental information available so that the representations from the public consultations can be properly taken into account, when the options are still open.

I look forward to your response.

Yours sincerely



Councillor Nicholas Botterill
Leader of the Council