THAMES TIDEWAY TUNNEL APPLICATION – WW010001

15 NOVEMBER 2013 HEARING TOPIC

Legal submission by Free Trade Wharf Management Company Limited

1. As Free Trade Wharf Management Company Ltd (FTWMCL) is unable to attend the hearing on 15 November 2013, this written submission is being provided to the Examining authority instead.

2. This submission addresses the following point made by the Examining authority:

24.1 Legal options open to the Secretaries of State if an element of the scheme is found not to be justified

The ExA will seek the views of the Applicant and Interested Parties as to the legal options open to the Secretaries of State in the event that they were to conclude that any element or elements of the design and route of the scheme have not been justified but that an alternative to that element, considered by the examination, exists, which could be justified (which will be referred to for clarity as 'scheme options').

The question applies to scheme options that the Applicant does not support as amendments, but which may not amount to amendments to the application that are so substantial as to render the application a new application. The question also applies to scheme options that include land (either in part or whole) which falls outside of the line of the DCO as applied for and/or which would amount to amendments that are so substantial as to render the application a new application.

In giving their answers Parties will be asked to consider whether scheme options could be incorporated lawfully within the examination and determination of this application and any approved DCO, for example by means of a requirement.

Summary

3. The Examining authority may lawfully recommend a scheme option other than that submitted by the promoter. The Secretaries of State may lawfully approve a scheme and make a DCO in a form other than that submitted by the promoter and the Examining Authority has the requisite powers to require information from the promoter and (if necessary) extend the examination timetable to enable it to evaluate scheme options on a like for like basis with the application as made.

Lawfulness of incorporating scheme options

4. The Secretaries of State are clearly legally able to make a decision on an application that is not what was applied for. This is supported by the wording of the Planning Act 2008, which states at section 114(1):

'When the Secretary of State has decided an application for an order granting development consent, the Secretary of State must either— (a) make an order granting development consent ...'

5. The use of the word 'an' in paragraph (a) rather than 'the' indicates that the order that is made does not need to correspond to the order that was applied for. Indeed, in every positively decided application so far, there have been at least four relevant versions of the Development Consent Order:

- the version accompanying the original application;
- the latest version submitted by the applicant during the examination;
- the version recommended by the Examining authority and
- the version decided by the Secretary of State.

6. By definition only the first two of these are supported by the applicant, the last two, and most importantly the version forming part of the decision, are not necessarily supported.

7. The question that remains is therefore whether the changes made by the Secretary of State can consist of changes to the physical works in the application. The submission of FTWMCL is that they can, and the evidence for this is as follows.

a. First, the Act does not distinguish the types of change that may be allowed in s114(1), one must therefore assume that any type of change is permitted by the Act.

b. Secondly, previous orders have made modifications to what land can be used or what can physically be built:

   i. the North Doncaster railway chord DCO removed compulsory purchase powers over an access route (decision letter, para. 22)

   ii. the Ipswich railway chord DCO was amended so as not to allow the applicant to place permanent apparatus on a street (decision letter para. 26)

   iii. the East Northamptonshire Resource Management Facility DCO was amended to add a restriction of the amount of low level radioactive waste that could be disposed at the site (decision letter para. 29)

c. Thirdly, in a letter from then director of operations at the Infrastructure Planning Commission Ian Gambles to Hector Pearson of National Grid dated 22 March 2012, Mr Gambles stated:

   'We agree that the decision maker does have powers under the Planning Act 2008 to grant consent in the manner envisaged' [i.e. where the application contains alternative options for limited elements of the scheme and the decision maker is invited to choose between the alternatives]

   This establishes the principle that the decision-maker can authorise one set of works rather than another, albeit that in that case the alternatives have all been included in the application.

d. Fourthly, in a letter from the then planning minister Bob Neill MP to the then chair of the Infrastructure Planning Commission Sir Michael Pitt dated 28 November 2011, the minister stated:

   'However, from time to time, it may become necessary to make material changes to an application after submission through no fault of the applicant, for example where the regulatory environment changes or information comes to light which could allow the impacts of the scheme to be reduced. Given this, it is important that the major infrastructure regime allows material changes to be made post application in certain circumstances.

   The Examining Authority will be in a better position to determine what is appropriate [for considering material changes to an application] on a case by case basis. Depending on the

circumstances, in accordance with the principles of fairness and reasonableness, and specifically the principles set out in Wheatcroft*, the Examining Authority may need to:*

- *extend the examination period using the power in section 98(4) of the Act to consult interested parties on the effect of the proposed amendments, and allow for time to consider any amendments accepted for examination;*
- *take into account what publicity (if any) the promoter has carried out to ensure people who are not interested parties have an opportunity to make representation;*
- *use the general power to control the examination of an application in section 87(1) of the 2008 Act to make changes to the timetable to allow for representations to be made regarding any such amendments;*
- *exercise its discretion under rules 10(3) and 14(10) of the Infrastructure Planning (Examination Procedure) Rules 2010 to permit representations to be made by people who are not interested parties in cases where it is appropriate to do so.*

e. Fifthly, if it is not possible to change an application against the applicant's wishes, then even an objector who supports the principle of the application but objects to a detail, which may be agreed by the Examining authority to be justified whereas the alternative in the application is not, must resort to opposing the entire application and calling for it to be refused and resubmitted with the scheme option instead, wasting years of time and millions of pounds unnecessarily. This cannot be right as a matter of public policy.

f. Finally, this project is, by definition, nationally significant and as such the views of those other than the promoter as to its design should carry appropriate weight. The applicant's apparently arbitrary decision as to site selection (as demonstrated during Thursday's hearing) should therefore not be the final word. The fact that the promoter is not in favour of scheme options proposed by others (but does concede that they are technically possible) should not be taken in and of itself as a reason not to consider those scheme options.

8. In the light of the above, if information that comes to light during the examination of an application reveals that part of the application is not justified whereas an alternative alignment is (that would not render the entire application effectively to be for a new project), then it would, in the submission of FTWMCL, be open to the examining authority to examine the scheme option, using the *Wheatcroft* principles, and come to a decision on whether to recommend it in preference to the application scheme.

Methods for incorporation

9. There are four methods laid down in the Planning Act 2008 regime available to the Examining authority that it can either adopt or adapt, as appropriate:

a. the issuing of requests for information under Rule 17 of the Examination Procedure Rules[1];

b. consultation on further environmental information under Regulation 17 of the Environmental Impact Assessment Regulations[2];

[1] Infrastructure Planning (Examination Procedure) Rules 2010 (SI 2010/102)

[2] Infrastructure Planning (Environmental Impact Assessment) Regulations 2009 (SI 2009.2263)

c. incorporation of additional land under the Compulsory Acquisition Regulations[3]; and

d. the holding of issue-specific and compulsory acquisition hearings.

Rule 17 requests

10. In common with other examinations, the Examining authority has the ability to issue several requests for information under Rule 17 of the Examination Procedure Rules. This could be the principal method by which the Examining authority receives information about scheme options from the applicant and others, including environmental information, so that they can be subject to proper scrutiny.

Regulation 17 procedure

11. The Secretaries of State are obliged to consider the environmental impact of any decision they take for a project that is above the thresholds in the EIA Directive such as this one, and this should clearly also be the case for the Examining authority for it to be able to make a legitimate recommendation to the Secretaries of State.

12. At the present time, some of the scheme options suggested by those making representations have been subject to varying degrees of environmental impact assessment by the applicant. For those where a high level of EIA has been undertaken, the Examining authority may need to do little more than request of the applicant, by means of a Rule 17 request, to collate the environmental impact assessment of a scheme option already in its possession into a single document. FTWMCL submits that the Heckford Street and Park option enjoys this status, having been thoroughly assessed when deciding between the alternative ways to intercept the North East Storm Relief CSO in the site selection documentation, and extensively extended and amplified by the applicant's answers to questions 4.53 and 14.9 to 14.15. The applicant was able to produce a large amount of new material in a short space of time (e.g. noise contours) and so should have no difficulty in preparing such a document.

13. For other scheme options where less environmental information is available, the Examining authority may be able to request completion of the environmental material through further Rule 17 requests.

14. Although the environmental information necessary to assess a scheme option is in addition to that provided with the application, it would not render the original ES was inadequate, which would have automatically triggered Regulation 17 of the EIA Regulations. Nevertheless, FTWMCL submits that the Examination authority could require the applicant to adopt the procedure in Regulation 17 to allow any additional environmental information to be adequately publicised. This would mean subjecting the information to a consultation period of at least 28 days. Such a period could be accompanied by a corresponding suspension of the examination but need not be – other elements of the examination could proceed as planned.

Compulsory acquisition

15. FTWMCL repeats its submission made in advance of the Preliminary Meeting that scheme options affecting land outside the Order limits as applied for may be examined in compliance with the

[3] Infrastructure Planning (Compulsory Acquisition) Regulations 2010 (SI 2010/104)

Infrastructure Planning (Compulsory Acquisition) Regulations 2010, which would provide a full opportunity for landowners affected by the scheme option, in satisfaction of the *Wheatcroft* test.

Hearings

16. If, following the current issue-specific hearings on site selection, the Examining authority wishes to investigate scheme options further, it may require the applicant and others to provide the necessary information under a Rule 17 request, and to consult upon it by adopting the processes in Regulation 17 of the EIA regulations and the Compulsory Acquisition Regulations. Once this has been completed, the Examining authority may hold one or more further issue-specific hearings (and if requested, a compulsory acquisition hearing) at which existing and newly-affected parties would have an opportunity to participate.

Other methods of implementation

17. If the Examining authority prefers not to include incorporation of a scheme option within the examination, then it could recommend that the application is consented as applied for (or, rather, as in this case, as changed and currently supported by the applicant), save that a requirement is included that the relevant part of the works cannot be constructed until specified changes to the project are promoted using the process set out in the Infrastructure Planning (Changes to, and Revocation of, Development Consent Orders) Regulations 2011. At present the process for making material changes is akin to the promotion of a new application, but FTWMCL understand that this may be modified in the light of the government's 2014 Review of the Planning Act 2008 regime.

18. If this process is followed, or something like it, then all relevant parties will have had an opportunity to participate in the issue and the Examining authority should be free to decide whether or not to propose the relevant change in its recommendation.

Bircham Dyson Bell LLP
12 November 2013