IN THE MATTER OF THAMES TIDEWAY TUNNEL DCO

WRITTEN SUMMARY OF ORAL LEGAL SUBMISSIONS OF LONDON BOROUGH OF SOUTHWARK

FOR ISSUE SPECIFIC HEARING DATED 15 NOVEMBER 2013

1. **Context:**

1.1 The London Borough of Southwark (**Southwark**), along with a number of other objectors, is seeking some changes to the scheme proposed by Thames Water Ltd that is the subject of DCO application number WW010001. These submissions are made by Nathalie Lieven QC and Pinsent Masons. These submissions follow those made orally but have been expanded to cover points made orally and respond to oral submissions made by TW.

1.2 Southwark's position is that the DCO should be amended, in particular to remove Chambers Wharf as a drive site, and make provision for Abbey Mills as a drive site in its place. If TW will not accept an amendment, then the Secretary of State would have no choice but to reject the DCO.

1.3 In this respect, the Examining Authority has in the Agenda for the Issue Specific Hearings of 11 to 15 November 2013 noted that:

"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" and

"24.2 Legal options open to the Secretaries of State if a changed scheme option is supported by the Applicant

In the event that the Applicant decides that it wishes to support a scheme option, Parties will be asked to consider what legal options would be open to the Secretaries of State and in particular whether planning permission might be sought separately under the Town and Country Planning Act 1990 for part of the project.

In giving their answers Parties will be asked to consider and give their views on whether there are any implications for the Environmental Impact Assessment requirements."

There appear to be four issues:

a) Does the Secretary of State have the power to require a scheme option to be further considered, and then if appropriate be adopted as part of the DCO;

b) What is the balance to be applied when the Secretary of State is considering such an alternative;

c) What procedure should the Secretary of State/Ex A adopt;

d) What happens if TW refuse to support such an amendment?

1.4 It makes sense to analyse Questions 24.1 and 2 together, because TW's lack of support for an alternative may arise in different ways.

2. **SoS Power**

2.1 The Secretary of State ("**SoS**") has the power under s114 of the Planning Act 2008 (the "**Act**") to grant a development consent order that differs from that which was applied for by an applicant. TW do not contest this point, but the submission is set out below for completeness.

2.2 Firstly, this is by virtue of the power for the SoS in s114(1) of the Act to grant "an order granting development consent" (i.e. "an order" illustrates that this is not a reference to the application made by the applicant).

2.3 Secondly, there is also a power set out in s114(2) which provides the ability of the SoS to make regulations governing the procedure to follow if he wishes to make an order that is materially different to that applied for. No directly relevant regulations under s.114(2) have yet been made. However, this power exists and if the Secretary of State needs to exercise it (a) to make the consideration of the DCO compliant with European law and (b) to protect against the serious impacts on the community at Chambers Wharf, then he should (and indeed potentially must) do so.

2.4 This clearly illustrates that the SoS can make a different Order to that applied for (both "different" and "materially different").

2.5 This position is also reflected in a letter[1] dated 28 November 2011 from Bob Neill MP (then Parliamentary Under Secretary of State) to the Chair of the Infrastructure Planning Commission (as was). This states that:

"s114(1) clearly places the responsibility for making a [DCO] on the decision-maker, and does not limit the terms in which it can be made. It follows from this that the decision-maker has the power under s114(1) to make a [DCO] which is different from that originally applied for, and that no regulations are needed under s114(2) in order to do so".

2.6 Various of the DCOs granted to date have included amendments being made to the original draft DCO, whether submitted by the applicant, the Examining Authority or

[1] http://infrastructure.planningportal.gov.uk/wp-content/uploads/2011/11/111130_Ltr-from-Bob-Neill-MP-re-s114.pdf

the SoS. We also note correspondence from the Planning Inspectorate alluding to this interpretation of s114 of the Act[2].

2.7 Whatever mechanism is used, the consideration, and where appropriate on the evidence, the requirement for, alternative forms of DCO is a necessary consequence of European law, and the Planning Act 2008 and any provisions made thereunder must be construed to be consistent with European law. Under the Environmental Impact Assessment Directive ("EIAD") there is a requirement at Article 6(4) for the public to given early and effective opportunities to participate in environmental decision making when all options are open. The Planning Act 2008 scheme of DCO consents, can only meet this requirement if there is the genuine option of the DCO being amended to take on board environmentally preferable alternatives.

2.8 That there is a genuine ability to amend the DCO to allow such environmental issues to be taken properly into account follows from s.104 of the Planning Act 2008 which requires the Secretary of State to determine the application in accordance with any NPS unless subsections (4) to (8) apply. These cover inter alia breach of any international obligation (which would include the EIAD to the degree there is any inconsistency); breach of any statutory duty (which would include the duty under Article 8 of the Human Rights Convention to protect local residents private life i.e. residential amenity); and that the adverse impacts of the proposed development would outweigh its benefits.

3. The balance to be struck

3.1 TW's position, as articulated by Michael Humphries QC, seems to be that they accept that there is a power in the Secretary of State to amend the DCO, but that in considering any alternative the balance must simply be between the adverse effects of the proposed development (e.g. the significant impacts on residential and educational amenity at Chambers Wharf) as against the need for the scheme as a whole.

3.2 This is plainly incorrect. The NPS notes at 2.6.34 that: "It would be for Thames Water to justify in its application the specific design and route of the project that it is proposing, including any other options it has considered and ruled out". It is therefore not open to TW to rely on the national need for TTT as a whole, in order to persuade the Secretary of State to refuse to amend the DCO to make provision for alternative designs within the project as a whole.

3.3 If this approach was correct then para 2.6.34 would be meaningless.

3.4 The legal approach to the consideration of alternatives follows the same analytical steps as that for the grant of planning permission, as set out in a line of case law and encapsulated in *Trusthouse Forte Hotels v Secretary of State for the Environment* 1986 53 P&CR 293. If there is a need for the development, which is established here by the NPS, then where the proposed development is bound to have an adverse environmental effect, alternatives are necessarily a material consideration in the determination of any application.

3.5 The correctness of this traditional approach is made clear by applying an Article 8(2) balance. The interference with the residents' private life at Chambers Wharf (through 6 years of continuous work, including night time work) with the consequent impacts

[2] see for example http://infrastructure.planningportal.gov.uk/wp-content/ipc/uploads/projects/general/Non-Case%20Related%20Enquiries/22-03-2012%20-%20Hector%20Pearson%20-%20Enquiry%201145933/120222_Letter%20from%20Nat.%20Grid%20to%20IPC-Letter%20from%20IPC%20to%20Nat.Grid.pdf

on noise, traffic, daylight/sunlight etc, might be proportionate if it was the only way to achieve the public environmental benefits of TTT (those benefits being set out in the NPS). However, where there is an alternative, i.e. using Abbey Mills as a drive site, which removes a large proportion of that interference and has much lesser impacts, it would not be possible to say that the interference with Article 8 was proportionate – and therefore compliant with the Human Rights Act - at CW.

3.6 In essence 2.6.34 of the NPS is saying the same thing – it is for TW to justify individual elements of the scheme, and in doing so it will necessarily have to consider whether there are alternatives. That does not mean there is a "beauty parade" and the best outcome must be achieved at every point. It does mean that there were there is an otherwise unacceptable impact, which is obviously the case at CW being used as a drive site, less harmful alternatives must be considered and where appropriate adopted.

4. The procedure to be adopted

In terms of the procedure to be adopted, three elements are relevant:

4.1 The Examining Authority's power to set procedure under the Examination to require further environmental information and adequate consultation on it:

4.1.1 The Infrastructure Planning (Environmental Impact Assessment) Regulations 2009 (the "EIA Regulations") contain a prohibition on the SoS making a DCO unless he has first taken the "environmental information" into consideration. The alternative element(s) of the scheme proposed by LB Southwark (and others) would be such that if it was consented by the SoS, environmental information (for example by way of an addendum to the applicant's Environmental Statement) would be likely to be required to assess the likely significant environmental effects of that element of the scheme incorporating the alternative element(s) of the scheme.

4.1.2 As such, a procedural approach in order to allow the SoS to grant an alternative element(s) of the scheme would be as follows:

(a) The Examining Authority to provide a preliminary indication during the Examination that the ExA considers that further work on alternatives should be undertaken. This would be on the basis that the ExA has significant concerns in respect of this part of the project, including that without such further information it will not be open to the Examining Authority or to the SoS to properly consider alternative elements of the scheme. Without such consideration of such alternative elements, the Examining Authority would not be in a position to properly assess the application or recommend grant. It is within the powers of the ExA to give such an indication without any risk of allegation of predetermination, just as it is within the powers of a judge in the course of hearing a case in court.

This is because, as is set out above, the NPS at 2.6.34 states: "It would be for Thames Water to justify in its application the specific design and route of the project that it is proposing, including any other options it has considered and ruled out". Without a proper consideration of alternative elements of the scheme and an ability to amend the DCO to incorporate such alternatives, it is submitted that the specific design and route of the project cannot be

adequately tested and resolved upon and the SoS cannot properly determine in accordance with s104 of the Act whether the requirements of the NPS have been met and whether the adverse impact of the proposed development would outweigh its benefits;

(b) The Examining Authority would therefore require, as further information under Rule 17 of the Infrastructure Planning (Examination Procedure) Rules 2010 (the "**Procedure Rules**") and exercising its general power to decide how the application is examined under s.87 of the Planning Act, the applicant to provide a supplemental report to its Environmental Statement in order to allow the SoS to grant consent for the alternative element(s) of the scheme that has been suggested by LB Southwark and others as appropriate.

N.B. It is considered appropriate for the requirement for further information to be made pursuant to Rule 17 of the Procedure Rules on the basis that the other avenue, i.e. pursuant to Regulation 17 of the EIA Regulations would only be cited if the SoS regards the current Environmental Statement for the application submitted by the applicant as being deficient (in which case the SoS must suspend the consideration of the application whilst such Regulation 17 EIA Regulations further information is provided). Rather, in this case, the information would be sought under Rule 17 on the basis that the SoS would be requiring further information to allow consideration of the alternative options being suggested by third parties, failing which the DCO may well need to be refused.

It seems to have been accepted at the hearing that rule 17 is the appropriate route to go down.

(c) The Examining Authority would also indicate to the applicant that it should advertise such an ES addendum in accordance with the provisions of regulation 17 of the EIA Regulations, in order to ensure that no third party is prejudiced by any SoS decision to grant a DCO for the alternative element of the scheme sought by LB Southwark. This should also include adequate consultation of the local community regarding the changes. The only relevance of Regulation 17 here then is to provide a model for the procedure applying. The requirement to apply the procedure would be made by the ExA under Rule 17.

(d) This process would allow Newham and residents at Abbey Mills, to make any representations about the impacts at AM. Therefore their rights would be fully protected.

4.2 **The Examining Authority's powers to require consultation of relevant property interests arising from any changes to the redline of the application boundary**

4.2.1 S42 and s56 of the Act require consultation/notification of parties falling within Categories 1 to 3 as defined in s44/s57 of the Act.

4.2.2 It is not clear whether the use of Abbey Mills as a drive site would involve an amendment to the redline boundary of the development applied for by the DCO, nor whether any third parties would be affected. There are

various possibilities which TW should be asked to set out in writing. These would appear to be;

(a) If an "all by road" option is adopted for the drive site at AM, then it may well be the redline would not have to change;

(b) If the barging option were adopted the redline would probably extend into parts of the Channel, but it is not clear whether the land in question is owned by TW;

(c) Even if it is not owned by TW, it may be owned by the Crown (in which case the land cannot be compulsorily acquired in any event) or by the PLA. It is therefore not at all clear that any compulsory acquisition would be required, rather than simply an agreement reached. Clearly if the CA is not required it fails the legislative test of necessity.

4.2.3 On the assumption, in TW's favour, that the redline does need to be extended, a process should be followed whereby the applicant notifies those with property interests affected by the proposed revised redline boundary that an alternative element of the scheme is being suggested. This notification process should mirror that set out pursuant to s42/s56 of the Planning Act 2008. Again the ExA would require that process to be applied under Rule 17.

4.2.4 The Planning Inspectorate would then, if necessary, use its discretionary powers under s.87 of the Planning Act 2008 and Rule 14 of the Examination Procedure Rules to allow such persons to make representations during the Examination going forward. The legal concern is that any person potentially prejudiced by such an amendment to the red line has a proper opportunity to make representations, and therefore their rights are protected.

4.2.5 That further land can be included in the DCO is expressly contemplated and dealt with in the Infrastructure Planning (Compulsory Acquisition) Regulations 2010 regulations 2 and 4 which make provision for land to be added under the CPO powers. The existence of these regulations shows beyond doubt that there is power to extend the compulsory purchase powers post application, and that provided that the relevant procedure in the Regulations is followed, there is no unfairness in doing so.

4.3 Relevant case law in the planning application context

4.3.1 In the case of *Bernard Wheatcroft v SoS for the Environment [1981] 1 EGLR 139,* Forbes J stated that the relevant test regarding the changes that could be made to the scheme that was consented, compared to the scheme that was applied for was:

"Is the effect of the planning permission to allow development that ***is in substance not that which was applied for****? . . . The main, but not the only criterion on which that judgment should be exercised is whether* ***the development is so changed that to grant it would be to deprive those who should have been consulted on the changed development of the opportunity of such consultation****"*

4.3.2 The case of *British Telecommunications plc and another v Gloucester City Council [2001] EWHC Admin 1001* considered what changes could be made

by an applicant to its application for planning permission once that application had been submitted to the local planning authority. There Elias J held at paragraph 36 that:

"provided there is a proper opportunity given for adequate consultation, and that any other potentially relevant matters are taken into account, such as whether the amendment requires the modification of an environmental impact statement, it is difficult to see in most cases what prejudice is suffered by permitting the change to be effected by way of amendment. ***No doubt there will be cases where the amendment is so far reaching that it is not sensible or appropriate simply to consult over the changes themselves. This will be the position, for example, where the original consultation exercise is, as a consequence of the amended proposals, of little or no value. The appropriate approach then is simply to start again****... Exceptionally the distinction between an amended application and a fresh one will have wider significance even where there is full consultation over the amendments. It may be that legislation has been introduced which would catch a fresh application but not an amendment…Even then, in my judgment* ***the question remains whether the change is so substantial that the application can only be considered fairly and appropriately, bearing in mind both the interest of the applicant and potentially interested members of the public, by requiring a fresh application to be lodged****. If the planning officer considers that it can be fairly and appropriately considered by an amendment, and that is not an unreasonable conclusion in the circumstances, the courts should not interfere".*

4.3.3 Provided that the above approach is adopted by the SoS, the process would be within the bounds proscribed by planning case law on this subject.

4.3.4 Applying the *Wheatcroft/BT* approach this is plainly not a situation where the amendment sought would require a fresh DCO application. The Abbey Mills alternative does not result in a new construction site being required. The overall project remains the same. In addition, and critically, the amendment sought is to the construction of the project and makes no difference whatsoever to the final form of the development.

4.3.5 The Ex A raised a question over the previous IPC decision on Brig y Cwm EfW facility. That was a case where the IPC accepted that there was a power to amend, but found that it was a substantial change within the *Wheatcroft* principle and there would potentially be prejudice to members of the community being denied an opportunity to participate.

4.3.6 In the present case any such problem can be entirely overcome by a notification and consultation process that allows any person, or body, concerned about potential impacts at Abbey Mills to make representations to the DCO process. Also the materiality of amendment required is quite different in the context of the overall scheme from that considered in Brig y Cwm in the context of its proposed scheme.

4.4 **The timing of the process and TW's attitude**

4.5 In the event that the further information and consultation suggested above cannot be undertaken within the lifetime of the currently envisaged Examination process, then the Examining Authority should approach the SoS to propose that he extends the Examination using his power under s98 of the Act).

4.6 If the ExA consider that there is an unacceptable impact on residents at CW with a drive site there, but that this could be mitigated by moving the drive site to AM, then the fact the timetable for the DCO might have to be extended, cannot possibly be a consideration which outweighs that impact/harm. The relevant factors are:

a) The severity and duration of the impact at CW;

b) The lessening of that impact if the drive site moves to AM;

c) The fact that although there is a national need for TTT, that need has existed for over two decades since the Urban Waste Water Treatment Directive was passed in 1991, and it is not reasonable that the residents at CW should suffer the impacts for 6 years, because it has taken so long to bring the project forward.

d) The amount of time required to take the appropriate steps. This is not clear at present. If the all by road option is adopted at AM then further environmental information is limited (traffic noise impacts) and there is no reason why the process should take more than 3-6 months. If the barging option is taken then it is accepted this would take longer, because of the environmental information needed, but it is not at all apparent why this should be more than 12 months. TW have given no evidence as to why such periods should delay the critical path of the scheme, particularly as the works at Abbey Mills already appear to be in advance of programme, given that Shaft G is already being constructed.

5. **Procedure if TW refuse to support the amendment**

5.1 If TW refuse to support the amendment then ultimately the Secretary of State might have to hold the threat of refusing the DCO, or amending to remove CW as a drive site, and allow TW to make a further application. But in reality this scenario seems unlikely.

5.2 An option may be for the SoS to grant a DCO for the scheme as proposed by the applicant and then impose a requirement that certain works are not to be carried out until elements of the scheme are changed pursuant to the Infrastructure Planning (Changes to, and Revocation of, Development Consent Orders) Regulations 2011. However, this would not seem necessary in light of s114(1) of the Act as above. It, however, could be considered if required. If this situation arose then Southwark accept the Secretary of State would have to be confident to a high degree that AM could serve as a drive site. There is no problem with this given that there has been no suggestion that the all by road option is not technically possible, and the type and scale of environmental impacts is already known.

6. London Borough of Southwark reserves the right to make more detailed submissions on this matter including in its 2 December materials, and intends to make further submissions addressing the points raised by the Panel at the hearing on 15 November.

26 November 2013