THAMES TIDEWAY TUNNEL

OUTLINE LEGAL SUBMISSIONS ON BEHALF OF THE
LONDON BOROUGH OF HAMMERSMITH AND FULHAM
IN RESPECT OF AGENDA ITEM 24

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1. The ExA seek the parties' views as to (i) 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; and (ii) the legal options open to the Secretaries of State if a changed scheme option is supported by the applicant.

The Council's position in summary

2. It is open to the Secretaries of State to approve a scheme option in the final DCO if:

    a. The requirement to take into account the environmental information, and to consult on the environmental information, in respect of that scheme option has been met;

    b. The requirement to consult any relevant owner in respect of land to be acquired (or in respect of which rights are to be acquired) has been met and the relevant owner has had an opportunity to be heard in respect of that acquisition;

    c. The scheme option does not result in a project so different that it is not a Thames Tideway Tunnel at all.

The legal framework generally

3. Section 114 PA 2008 contains the power to make a DCO. The wording of s 114(1) is important: it provides that when the Secretary of State has decided an application for a DCO, it must either refuse or make "an order granting development consent". It does not say "*the* order". Thus there can be no argument that the Secretary of State is bound to make the order applied for. That this is the proper interpretation of s 114(1) is confirmed by s 114(2), which provides that regulations may be made regulating the procedure to be followed if the DCO to be granted is on "which are materially different from those proposed in the application".

4. There are no such regulations in place, save as relates to compulsory acquisition (see below). Thus the question arises as to what procedure should be followed in such circumstances, and whether there is any restriction on the Secretary of State's power to make a materially different DCO.

5. The first obvious procedural restriction is that development consent may not be granted without taking into account the environmental information (see the regulation 3 of the Infrastructure Planning (Environmental Impact Assessment) Regulations 2009, implementing the EIA Directive so far as it relates to DCOs). That means that the Secretary of State must have before him adequate environmental information about the DCO which he is to make, even if that it is not the one applied for.

6. The second procedural constraint is that the EIA Directive provides for public participation, including consultation on environmental information. That means that if substantive new environmental information is provided after the main consultation processes have been completed, it should be consulted on.

7. The third procedural constraint is the general public law duty of fairness. The public are consulted on the application; if a substantially different DCO is to be granted there must be an opportunity for the public to comment on it.

8. The fourth procedural constraint is that where new interests in land are to be acquired, the landowner must have the opportunity to make representations and to be heard before his land is acquired.

9. Subject to those procedural constraints, the Council submits that the only further restriction on approving a scheme option would be if the scheme option result in a scheme which was not a Thames Tunnel at all – i.e. a different solution altogether. In those circumstances there would be such a disparity between the application and the DCO that it could not properly be said that in making the DCO the Secretary of State was disposing of the application before him.

10. None of these submissions are novel. Moreover, unless scheme options can be considered and disposed of there is a risk of unfairness to all parties. The applicant would not be able to respond to the case made by others. Third parties would only ever be able to argue for the outright refusal of the scheme, rather than for their particular modification. That would frustrate the process and be contrary to Parliament's intent of streamlining the development consent process.

11. There is helpful guidance to the ExA in *BT plc v Gloucester CC* [2002] 2 P. & C.R. 33. In the context of amendments made to a proposal between an application for planning permission and the planning authority's decision on that application, Elias J held:

> "33 …is inevitable in the process of negotiating with officers and consulting with the public, that proposals will be made or ideas emerge which will lead to a modification of the original planning application. It is plainly in the public interest that proposed developments should be improved in this way. If the law were too quick to compel applicants to go through all the formal stages of a fresh application, it would inevitably deter developers from being receptive to sensible proposals for change.
> …
> 36 … There were some changes of significance, but not such as to compel the conclusion that a fresh application should be submitted. Indeed, in many, and perhaps most, cases I would not have thought that it is necessary for the planning authority, or the officer to whom the power to accept amendments is delegated, formally to ask whether or not a fresh application is required. The answer will so obviously be "no" that the issue does not arise. Even where it does arise, 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."

12. It is plain from that case that the primary question for the ExA (and the Secretaries of State) is whether the process of adopting a scheme option can be carried out fairly.

13. A separate point arose at the hearing as to the consequences of including new land within the compulsory acquisition powers to give effect to a scheme option. The Infrastructure Planning (Compulsory Acquisition) Regulations 2010 anticipate precisely these circumstances. Regulation 2(1) defines "additional land" as "land which it is proposed shall be subject to compulsory acquisition and which was not identified in the book of reference submitted with the application as land". It is not expressed to be limited to land which is within the Order limits. The procedure for inclusion of additional land is set out in those Regulations. It should also be noted that those Regulations are expressed to be made under s 114(2) PA 2008 (see the Preamble to the Regulations). Thus it is clear that the powers and procedures governing additional land are in anticipation of the approval of a materially different scheme from that proposed in the application. Thus compulsory acquisition presents no further issue in this regard.

<u>Practical application</u>

14. In practice, the Council would advocate the following approach:

    a. If TW supports a scheme option, it should prepare and consult on a supplementary ES and consult any affected landowner without delay. The intention to promote the option should be publicised. That option can then be reported to the Secretaries of State by the ExA having heard the views of others on the matter;

    b. If the ExA considers that it *may* report to the Secretaries of State that a scheme option is preferable, it should advise TW accordingly. TW can then carry out the necessary work as described above. If it chooses not to, it does so at its own risk that the Secretaries of State may decide to refuse to make the DCO because TW has failed to justify its specific proposals, as required by the NPS;

c. If the Secretaries of State consider that a scheme option is preferable but that it has not been fully assessed or consulted upon, they can so indicate through a "minded to grant" letter, allowing TW to do the further work, or to face refusal.

15. If an extension of the examination is required for any of this process, TW can ask for the same and explain their reasons for so doing.

Richard Turney

Landmark Chambers

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(updated for submission on 26 November 2013)