London Borough of Tower Hamlets

Thames Tideway Tunnel

Issue Specific Hearing Friday 15th November 2013-11-14

Item 24.

These submissions were delivered in summary orally on Friday 15th November 2013 (Day 5) by Guy Williams of counsel. The oral additions made on that day have been included in these submissions with 'A, B, C...' paragraph numbers.

Legal options open to the Secretaries of a State if an element[1] of the scheme is found not to be justified

1. The question divides 'scheme options', that is potentially justifiable alternative options, into two categories:
   1) Those that amount to an amendment to the application but are not so substantial as to render the application a new application;
   2) Those that include land that 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.

Preliminary

2. The London Borough of Tower Hamlets ("LBTH") supports broadly the distinctions applied within question 24. In particular, it agrees that it is relevant to consider the degree of change to the application brought about by the proposed alternative. It also agrees with the recognition (see "and/or" above) that including additional land does not prevent such a scheme option being considered as an amendment without requiring a new application.

Primary Legislation

[1] Elements of the scheme; a work site, part of a work site or part of the tunnel drive strategy

3. Section 114(1) of the 2008 Act does not limit the scope of amendments to an application for an order granting development consent. It gives power to the Secretary of State to grant or refuse development consent.

4. Section 114(2) empowers the Secretary of State to make regulations to provide a procedure to make amendments to an application. No such regulations have been made. If the Secretary of State makes such regulations then the ability to make material amendments would be subject to such provisions (subject to the particular transitional provisions put in place).

5. LBTH agrees with the analysis in the letter of 28th November 2011[2]: "*It follows from this that the decision-maker has the power under section 114(1) to make a development consent order which is different from that originally applied for, and that no regulations are needed under section 114(2) in order to do so.*"

Scope

6. The above letter refers to the scope of the power to amend being limited by the need to act reasonably and in accordance with the principles of natural justice. LBTH agrees.

7. The letter refers to the principles of *Wheatcroft*, summarised as requiring "*that anyone affected by amended proposals must have a fair opportunity to have their views heard and properly taken into account regarding them*".

8. As a statement of principle, LBTH agrees. It is implicit in the letter that where this principle cannot be met through consultation and further appraisal of scheme options that the amendment should be considered as one that amounts to a new application (see third and final paragraphs).

[2] Bob Neill MP to Sir Michael Pitt

9. LBTH draws attention to the expression of the principle in *British Telecommunications Plc v Gloucester City Council [2002] 2 P&CR 33*. This is relevant because it addressed the permissible scope of amendments to a planning application prior to determination, whereas *Wheatcroft* considered the scope of amendments on appeal, that is following determination. In *BT* a number of amendments had been made over the course of a protracted application process including changes of use of parts of the application site[3] and extensions to the site boundary to include area not previously included[4]. The local planning authority accepted the amendments and granted permission for the revised development scheme. The amendments received extensive publicity and further consultation. For the sake of brevity these submissions identify some key passages of the judgment, although of course the full judgment on what was "Ground 1" should be read:

> "33. *It 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..."*
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> *"34. I would add that of course the interests of the public must also be fully protected when an amendment is under consideration. They were, however, fully protected in this case by the detailed consultation that took place in respect of the amendments."*
>
> ...
>
> *"36. Even where* [the question whether the amendments amount to a new application] *does arise, provided there is a proper opportunity given for adequate consultation, and that any other potentially relevant matters are taken into*

[3] Removal of magistrates' court introduction of cinema and multi0storey car park
[4] The area was increased to include land acquired by the Council for redevelopment purposes

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 affected 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."

"37...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."

10. Thus the question as to whether the change is so substantial as to amount to a new application should be answered taking into account:
    (a) The degree of change to the scheme in the context of the scheme as a whole;
    (b) The extent to which it is possible to consult fairly on the amendments taking into account the extent to which the alternative may already have been considered;
    (c) The interests of the applicant in being able to respond to proposals that have emerged through the consultation, negotiation and examination processes.

11. LBTH submits that this approach applies to the DCO application process. Even more so than a planning application the DCO process is an iterative process which has raised alternatives for consideration at a number of stages before and after the submission of the application, and which the Examining Authority must consider in line with paragraph 2.6.34 of the NPS. The Examining Authority is required to consider the alternatives before it and the justification for those chosen. This is consistent with European and

domestic legislation relating to the environmental assessment of projects. It is accordingly an inherent part of the preparation and assessment of the application that alternatives be considered. It is in the interests of the public and the applicant that where that process discloses that alternatives previously considered are more justified the process allows such alternatives to be included within the consent.

11A. At the outset of the hearing of item 24.1 Michael Humphries QC for TW raised a number of matters relating to the assessment of alternatives within the NPS and in planning law more generally. LBTH comments as follows:

(a) Item 24 addresses the options available to the Secretary of State to make amendments to the draft DCO. The points made by Mr Humphries QC go largely to the question of the acceptability of the scheme in the absence of the amendments sought. This is a separate question.

(b) TW accept, however, that the consideration of alternatives is a material consideration. This is certainly correct. This is as a result of general principles of planning law (*Trusthouse Forte Hotels Ltd v SSE* (1986) 53 P&CR 293. Given the harm caused by the scheme, including as far as LBTH is concerned through the development at KEMP, it is relevant to consider whether there may be an alternative which would cause less harm. It is not correct to portray this requirement as a 'beauty parade'. This is not a scenario where rival sites are seeking to meet a limited need such as a motorway service area or superstore development. Rather, this is a situation where policy requires TW to justify the specific routes and sites chosen by reference to alternatives it has ruled out. Whilst the information in relation to alternatives may not be full it is sufficient to allow a conclusion to be reached as to whether the alternative site (Heckford Street in relation to LBTH) may be less harmful. In certain cases the burden lies on TW (see *Trusthouse Forte, p301*). LBTH submits that where the alternatives relate to variants on the same scheme proposal to meet an identified need that justifies substantial adverse effects it is necessary for the Secretary of State to consider whether the alternatives may deliver the scheme in a less harmful way. This is the case *a fortiori* in relation to the exercise of compulsory purchase powers

(*Trusthouse Forte p300)*. Section 104(7) of the 2008 Act is entirely consistent with this analysis. Section 104 requires the application of the NPS, including paragraph 2.6.34, and requires the balancing of the adverse impacts of the proposed scheme, which includes on the above principles the consideration of whether alternatives may be less harmful. Therefore planning law and policy requires alternatives to be considered to ascertain whether the need may be met in a less harmful way.

(c) In relation to LBTH, therefore, the starting point is the adverse impacts of the KEMP proposals and then it is necessary to consider whether Heckford Street would deliver the scheme in a less harmful way.

Options

12. If the Secretary of State concludes that an element of the scheme is not justified then:
    (a) If the alternative is a non-material amendment he may grant the DCO for the scheme as so amended;
    (b) If the alternative is a material amendment he should consider whether the amendment can be considered fairly and appropriately through additional consultation bearing in mind the interests of the parties and potentially interested members of the public. If so, he should request (unless the Applicant volunteers) that such steps are taken. Once that process has been undertaken and the responses considered, and any additional environmental information provided, it is open to the Secretary of State to grant the DCO;
    (c) If the amendment is so substantial applying the above tests that it amounts to a new application then the amendment cannot be made and the DCO as amended cannot be granted.

13. In the above scenarios (a) and (b) it is accordingly open to the Secretary of State to grant or refuse the DCO as applied for or as amended. In scenario (c) it is open to the Secretary of State to grant or refuse the DCO as applied for. In all three scenarios it would be open

to the Secretary of State to issue a 'minded to' decision indicating whether further promotion, consultation or assessment of an alternative was considered necessary.

14. For the avoidance of doubt LBTH submits that the proposed alternative at Heckford Street would fall within 12(b) above. The Panel at this stage is well aware of the history and substance of the alternatives. LBTH considers it relevant that:

    (a) TW considered Heckford Street as an alternative to its KEMP proposals and so considered it as a potential amendment to the scheme;

    (b) The scheme should be seen as the project as a whole;

    (c) The public consultation exercises have involved consideration of Heckford Street as an alternative to the KEMP proposals in considerable detail and with detailed information as to the likely effects of such an amendment;

    (d) In its Regulation 48 response of 4th October 2012 LBTH in addition to representing that Heckford Street should be taken forward as the preferred option in place of KEMP submitted that in the alternative: "*the Council proposes that you also set out the Heckford Street alternative in your draft development consent order so that both options can be explored in the examination of the development consent order. This approach is in your own best interest as it will avoid delay in the event that the examining authority prefers the Heckford Street alternative*". In the circumstances, any difficulties for Thames Water arise from their failure to do so.

15. LBTH does not consider it appropriate to address material amendments by way of requirements.

16. The legal principles are the same whether an amendment is supported or not by the Applicant. The difference is one of practicalities. In terms of public and private interest, it is not in the public interest for this issue to be dictated by the unwillingness of an Applicant to accept the recommendations of the Examining Authority, and it is submitted it is not in the applicant's interest for an application that could be improved with amendments already debated to be refused. If an amendment is not supported by the Applicant then either it will have to be persuaded to support it through a 'minded to' letter or through a request from the Examining Authority for further information[5] or further environmental information[6] so that the authority can recommend accordingly to the Secretary of State.

16A. The particular power used will depend upon the basis for the Examining Authority's view that more information is required. Regulation 17 will only be appropriate if the existing environmental information is considered deficient. Rule 17 will be of broader application. If the Authority reaches the view that it requires further information in order to reach a view on the acceptability of the scheme in light of alternatives considered then it may use rule 17 to seek the further information required. It may choose to provide reasons for seeking this information which TW may wish to take into account in forming a view on whether or not to promote an amendment to the application.

16B. In relation to the Secretary of State there is no express statutory power to issue a 'minded to' decision. This does not prevent such a letter being issued, as is routinely done in practice in recovered and called in planning applications. It is a power that is ancillary to the Secretary of State's decision-making power.

16C Reference was made to the *Brig Y Cwm* decision of 14 July 2011. This decision pre-dated the letter of Mr Neill MP referred to above. In any event the decision does not apply any

[5] R.17 Infrastructure Planning (Examination Procedure) Rules 2010
[6] R.17 Infrastructure Planning (Environmental Impact Assessment) Regulations 2009

principle that is in substance different from the *Wheatcroft* tests. For the reasons given above the principles in *BT* apply. In relation to the present application there is no reason, having regard to the factors set out in paragraph 10 above, that adequate consultation cannot be undertaken. It is not necessary for this to be consultation under statutory provisions which applied to earlier stages of the process. A considerable amount of information is in the public domain in relation to the alternatives under consideration. A non-statutory consultation process is readily capable of allowing for adequate consultation.

17. LBTH recognises that if amendments are proposed there will be consequential changes/supplements to the environmental statements, and procedural consequences as set out in the letter of 28 November 2011 referred to above. This includes, potentially:

    (a) The Secretary of State extending the examination (s98(4));
    (b) The Examining Authority using section 87(1) to make changes to the timetable;
    (c) The Examining Authority exercising its discretion under rules 10(3) and 14(10) of the Infrastructure Planning (Examination Procedure) Rules 2012 to permit representations to be made by persons who are not interested parties;
    (d) The application of the procedures contained within the Infrastructure Planning (Compulsory Acquisition) Regulations 2010 in relation to any additional land to be acquired. (LBTH considers this likely to be the case in relation to Heckford Street);

17A. In the circumstances that apply to Heckford Street and KEMP it is not considered that a free-standing planning application outside of the DCO regime would bring any advantage over the measures that can be deployed within the DCO regime.

Guy Williams

21 November 2012.

Landmark Chambers