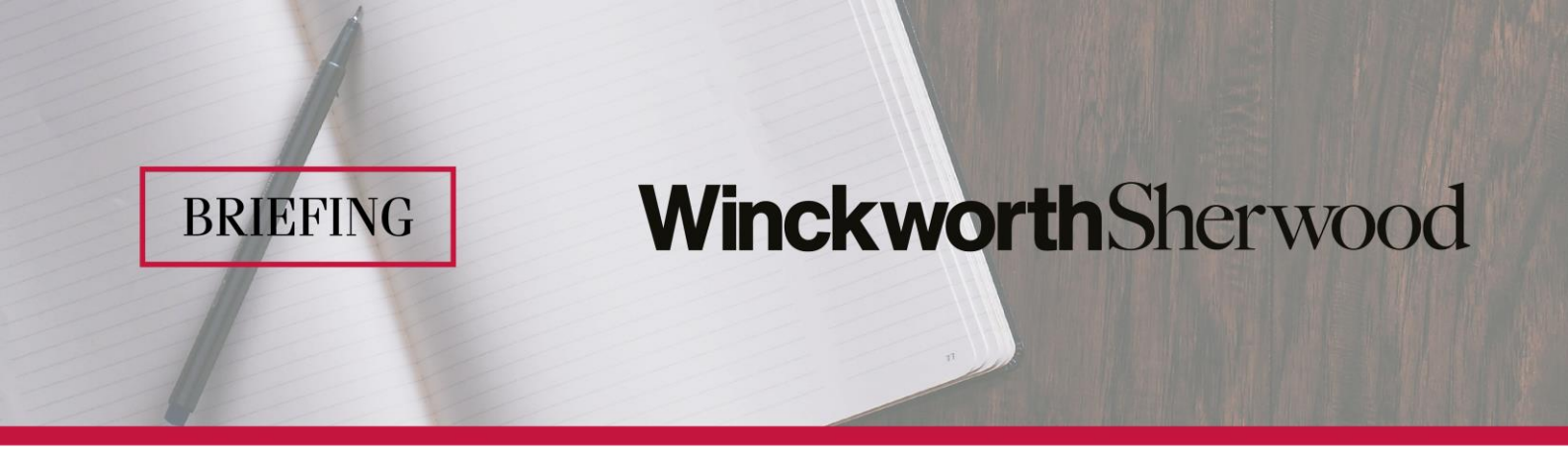

Harbour Development – A Practical Guide

Introduction

This note is intended to be a practical introduction to the process of authorisation of port or harbour schemes in England[1].

It is aimed at potential developers and/or consultants who are new to the subject and outlines the permissions required, as well as some of the issues to be considered, when bringing forward a scheme that includes a harbour.

The note focuses on applications for orders under the Harbours Act 1964 ("the 1964 Act"), which remains the relevant consenting process for any port and harbour developments (including marinas[2]) that do not meet one of the thresholds for nationally significant infrastructure. The note also mentions some relevant policy matters that potential developers should be aware of. Finally, it describes the key skill-sets that will be required in the project team in order to put together a compliant application.

Definition of a harbour or port – is there any difference between the two terms?

A harbour is a sheltered area on a coast, where sea-going vessels can take refuge from adverse conditions, whereas a port is a man-made site for the loading and unloading of vessels. However, the two terms are frequently used interchangeably. Section 57 of the Harbours Act 1964 defines a harbour as "any harbour, whether natural or artificial, and any port, haven estuary, tidal or other river or inland waterway navigated by sea-going ships, and includes a dock, a wharf, and in Scotland a boatslip being a marine work"[3].

For the purposes of this note, we shall use the word "harbour" to cover all aspects of a port/harbour development.

Why are special powers required to bring forward a new harbour development?

New harbour development is inevitably at the interface between terrestrial and marine planning regimes. In general, coastal local authorities only have jurisdiction to determine planning applications over land down to the low water mark[4]. A promoter of a new harbour scheme will require consent not only for the development above the low water mark, but also covering those elements of the development below the low water mark, together with control over an area of sea adequate to enable the operation and maintenance of the harbour and its facilities.

That last point is fundamental. The promoter of a harbour development will require statutory authority in order to override rights of public navigation and the harbour order confers authority over an area of sea within prescribed (and therefore enforceable) limits as well as all necessary powers to construct, operate and maintain the harbour structures and to control the activities of vessels within those seaward limits.

Requisite powers are likely to include "works powers" such as, for example, powers to construct physical works, to dredge channels for vessels to

[1] Welsh Ministers have responsibility for most harbours in Wales and applications for harbour orders are handled by the Welsh Government. Ports policy is also devolved in Scotland with Scottish Ministers determining applications north of the border.
[2] A marina is a harbour with moorings specifically for pleasure craft and small vessels.
[3] This is not the full extent of the definition as it differs where used with reference to a local lighthouse authority and, where relevant, has the same meaning as in the Merchant Shipping Act
[4] In some cases, the administrative area of a local authority may extend further seaward depending on the coastal formation or because it is also a statutory harbour authority.

follow and to provide for lights on tidal works; and other powers conferring functions on the developer to control vessels, impose charges on users of its facilities, to make bye-laws for the orderly operation of the harbour and so on. This may require the creation of a new statutory harbour authority to carry out those functions. With those powers come responsibilities which also need to be prescribed. It may also be necessary to include powers of compulsory acquisition over third party land and property. For all this, the developer will need the express consent of the Secretary of State for Transport.

With regard to planning permission, the Town and Country Planning (General Permitted Development)(England) Order ("GPDO") 2015 consolidates the GPDO 1995 and confers planning permission for certain classes of development, including development by statutory harbour authorities, without the need for a planning application. Thus, where a development is authorised by harbour order, it automatically has planning permission.

Further, the effect of the GPDO is that any land within the order limits becomes operational land for the purposes of the Town and Country Planning Act 1990, meaning that the harbour authority has continuing permitted development rights to carry out operational development upon that land, subject to the need to comply with the Environmental Impact Assessment (EIA) and Habitats Directives.

A little historical background

As explained above, a promoter of a harbour scheme must have specific authority to develop within, and use, part of the sea extending outward from the coastal (terrestrial) development. Prior to the introduction of the Harbours Act 1964, new harbour development required authorisation by Act of Parliament (a so-called "local Act"). Where changes were required to existing statutory powers, those also required a local Act.

The Harbours Act 1964 ("the 1964 Act") substituted a process of delegated (secondary) legislation for these local Acts by which the Secretary of State would make orders to create, and confer powers on statutory harbour authorities, to authorise harbour development, to amend existing powers or constitutions of statutory harbour authorities and, occasionally, to close harbours. Although the 1964 Act has been amended over the last 50 years (mainly in relation to the submission of environmental information), the procedure continues to be effective and relatively inexpensive.

The Planning Act 2008 ("the 2008 Act") established a separate regime of Development Consent Orders for those harbour developments exceeding specified statutory thresholds, as described below. It also provided for the preparation and publication of a National Policy Statement ("NPS") for Ports to establish a framework for decision-making relating to major port proposals. Save in certain prescribed circumstances, applications for port development under the 2008 Act must be determined in accordance with any current NPS. The current NPS for ports is dated January 2012.

In 2010, following the coming into force of the Marine and Coastal Access Act 2009, the functions of the Secretary of State under the 1964 Act were delegated to the newly established Marine Management Organisation ("MMO")[5]. It is now the MMO, rather than a Government Minister, that determines applications for harbour development.

Harbour Empowerment Orders and Harbour Revision Orders

The types of harbour order most relevant to development schemes are:

- *Section 16 Harbours Act 1964 – Harbour Empowerment Orders ("HEOs")*

  HEO's create entirely new statutory powers where none existed before; for example, to create a new harbour authority and to authorise the construction, operation and maintenance of new harbour facilities.

- *Section 14 Harbours Act – Harbour Revision Orders ("HROs")*

  HROs are used to extend or amend existing statutory powers to the extent that it is desirable to do so in the interests of securing the improvement, maintenance or management of the harbour in an efficient or

[5] The Harbours Act 1964 (Delegation of Functions) Order 2010 (S.I. 2010/674).

economical manner or of facilitating the efficient or economical transport of goods or passengers by sea. An application for a HRO can be made by the harbour authority concerned or by a person having a substantial interest in the harbour. The objects of the order must fall within those described in Schedule 2 of the 1964 Act, namely:

- Reconstituting the harbour authority;
- Regulating the constitutional arrangements of the harbour authority;
- Varying or abolishing the duties or powers of the harbour authority;
- Imposing or conferring new duties or powers on the harbour authority;
- Transferring harbour properties and relevant powers and duties to or from a harbour authority;
- Settling or altering the harbour limits;
- Conferring powers to acquire land;
- Interfering with public rights of way;
- Interfering with public rights of navigation;
- Authorising justices of the peace to appoint or dismiss constables and conferring powers on such constables, (e.g. to enforce bye-laws);
- Enabling the closure of all or part of the harbour;
- Enabling the harbour authority to divest itself of land no longer required for its operations;
- Enabling land not required for the purposes of the harbour to be developed with a view to its disposal;
- Permitting the delegation of certain functions of the harbour authority;
- Conferring borrowing powers on the harbour authority;
- Conferring, varying or abolishing powers to levy harbour charges;
- Securing the efficient collection of harbour charges;
- Securing proper financial management;
- Varying or extinguishing exemptions from harbour charges;
- Securing the welfare of the harbour authorities employees, e.g. pension arrangements;
- Extending or fixing time limits for the taking of measures by the harbour authority;
- Imposing or conferring duties or powers on the harbour authority (including powers to make byelaws) for the conservation of the natural beauty of all or any part of the harbour or of any of the fauna, flora or geological or physiographical features in the harbour and all other natural features; and
- Any other object which appears to the MMO to be conducive to the efficient functioning of the harbour.

Applying for a harbour order

The procedure for obtaining a HEO or HRO is set out in Schedule 3 to the 1964 Act[6]. The schedule has changed over time to take account of European legislation concerning environmental impact assessment including, most recently, the EIA Directive 2014.

No application can be made until the promoter of the scheme has formally notified the MMO of the intention to make the application, and the MMO has responded.

Environmental Impact Assessment

If the proposed order is a works order, it is highly likely that an EIA will be required. If so, the notice of the proposed application must include certain environmental information to enable the MMO to determine, having consulted with relevant bodies with environmental responsibilities, whether an EIA is required and, if so, what it should cover. It is incumbent on a prospective applicant to canvas the views of all such bodies, and other relevant interested parties such as local wildlife trusts, before giving the MMO formal notice, and to take their feedback into account when explaining the proposal to the MMO.

As a full EIA takes time, and is likely to include seasonal surveys, it is therefore essential to allow ample time for both assessment and reporting to be completed in good time before the formal application for powers is submitted.

It is worth noting that there are currently 91 designated Marine Conservation Zones (“MCZ’s”) within English and Welsh territorial and UK offshore waters. These are intended to give protection to species and habitats of national importance, with management measures being put in place by the MMO. Natural England is responsible for giving conservation advice relating

[6] See section 17 of the 1964 Act, which introduces Schedule 3.

to marine protected areas within English in-shore waters.

Special sites and Habitats Regulations Assessment ("HRA")

When consulting relevant bodies, the prospective applicant will also need to ascertain whether the scheme is likely to affect a European site or a European marine site ("EMS")[7]. EMS's give protection to species and habitats of European importance. If so, an appropriate assessment will be required in accordance with the Conservation of Habitats and Species Regulations 2017. The assessment will establish whether, taking into account mitigation, the proposed scheme is likely to adversely affect the integrity of the protected site. If so, the project can only be approved if there are imperative reasons of overriding public interest for carrying out the project.

Consultation

Objections to a proposed scheme (especially where a works order involves compulsory powers) are almost inevitable. The best way of avoiding or reducing objections is to engage at a very early stage with potentially interested parties, and the general public, to explain the scheme and to seek to allay concerns; for example, by incorporating appropriate environmental or noise mitigation into the design of works or other measures such as reducing or amending land take.

Application documents

The key application document is the draft Order. The statutory harbour authority will only have powers to the extent that they are included in the authorising statutory instrument. This will require drafting by specialised lawyers, usually Parliamentary Agents. The draft Order will be shared with the MMO in advance of the application, leaving enough time for the MMO to comment on the content of the draft, should it wish to do so.

Although not a statutory requirement, it is good practice for the draft Order to be accompanied by an explanatory note (akin to the explanatory memorandum submitted in an application for a Transport and Works Act Order), This will be expected by the MMO and should set out the meaning and purpose of every article in the draft Order and refer to precedents where it would be helpful to do so. Where a novel provision is proposed, particular attention will be needed to the justification for the proposed powers. The other documents formally required are a statement explaining the reason for the application and for the precise powers being sought; setting out the policy context and how the requirements of the 1964 Act have been met and the environmental statement. Six copies of each document will be required.

The application will inevitably be accompanied by relevant maps, plans and sections and, where appropriate, the HRA. It is possible that a Design and Access Statement will be provided to explain and describe the overall development proposal. The application will also be accompanied by evidence that statutory notices of the application have been published and provided to interested parties, including affected landowners, tenants and/or occupiers, where relevant.

Notices, including site notices, will also be required where there is any interference with a public right of way, such as a temporary or permanent stopping up and/or diversion of a road, bridleway or footpath. Although not a statutory requirement, the application should also be accompanied by a report explaining the consultation undertaken and any changes to the proposals resulting from stakeholder or public engagement.

There are further requirements where there is an existing statutory harbour authority and the applicant is not that statutory harbour authority.

Fees

There is a fee payable upon submission of the application. The fee is relatively modest, ranging from £2000 if the sole purpose of the order is to amend the borrowing powers of an existing authority to £10,000 where there is a works order requiring an EIA.

Notices

The proposed application must be published by notices in the London Gazette and local press. Copies of the application may also be required to be sent to specific stakeholders and public/site notices will also be required in particular

[7] Also called Natura 2000 sites.

circumstances. These notices must contain very specific, prescribed information and are best drafted by specialists in legislative compliance (who need not be legally qualified but can be expected to form part of the Parliamentary Agent's team). The notices will include details of where the application documents can be inspected throughout the objection period (see below).

Opportunities to object

There is a minimum 42 day objection period following submission of the application. If there are any objections, it is imperative that the applicant engages with the objector to see whether it is possible to secure the withdrawal of the objection. This may well involve the provision of legally binding undertakings or agreements or the drafting, and potential inclusion in the draft Order, of protective provisions for specified bodies. It is to be hoped that early engagement with interested parties through the consultation process will have flushed out potential objectors and that such negotiations with either be settled or well-advanced before the application is submitted; however, it is possible to seek to amend the draft Order to introduce changes that do not substantially affect the content of the Order at any time after the application is submitted until it is determined. Where more substantial changes are proposed, or a change would introduce a new interference with private land interests or public rights, it will be necessary to re-advertise the application and to have another six week period for objections or representations. Such a scenario is to be avoided if at all possible.

Public inquiry

Where there are outstanding objections that cannot be resolved, the MMO will hold an Inquiry. An Inspector will be appointed by the MMO and, once the Inquiry has been held, will report to the MMO, who will then determine whether to make the Order and, if so, whether to make any modifications to the applicant's proposed draft. The applicant is responsible for all the inquiry arrangements and for meeting the costs of the inquiry and Inspector, together with the Inspector's fees of holding the inquiry and preparing a report.

Once an order is made

The MMO will write a decision letter to the applicant, which will also be published upon its website. There are various post-determination procedures that will need to be carried out by the applicant, including publicity to the making of the Order and the provision of notices (in prescribed form) including, in particular, to those subject to powers of compulsory acquisition.

Once the decision to make the Order has been reached, the proposed statutory instrument must be laid before both houses of Parliament for a period of 40 days. This is known as the negative resolution procedure. If there is no objection to the making of the order, it will automatically come into force on the designated date.

Other consents

Marine licences are obtained from the MMO and will usually be required for activities connected with the construction and operation of works in or over the sea or on or under the seabed and deposits at sea. Licences are usually required for dredging too, save where powers to dredge are included in the harbour order. It is worth noting that marine licences do not confer planning consent or statutory authority for the works concerned. However, if the developer so desires, the MMO will seek to hear and determine all the consents together. This is obviously desirable.

There may also be a need for protected species licences from Natural England.

The Planning Act 2008 thresholds

Where a proposal meets certain criteria for a large scale harbour, set out in section 24 of the Planning Act 2008 (i.e. where it is expected to be capable of handling the embarkation or disembarkation of at least the relevant quantity of material per year), it is regarded as being a Nationally Significant Infrastructure Project and will require a Development Consent Order ("DCO") under that Act, rather than a harbour order. The relevant quantity[8] is:

a) in the case of facilities for container ships, 500,000 TEU;

[8] For the purposes of the relevant provision: "cargo ship" means a ship which is used for carrying cargo; "container ship" means a cargo ship which carries all or most of its cargo in containers; ro-ro ship" means a ship which is used for carrying wheeled cargo; TEU" means a twenty-foot equivalent unit; "unit" in relation to a ro-ro ship means any item of wheeled cargo (whether or not self-propelled).

b) in the case of facilities for ro-ro ships, 250,000 units;
c) in the case of facilities for cargo ships of any other description, 5 million tonnes;
d) in the case of facilities for more than one of the types of ships mentioned in paragraphs (a) to (c), an equivalent quantity of material.

For the purposes of calculating (d), facilities are capable of handling an equivalent quantity of material if the sum of the relevant fractions is one or more. The relevant fractions are:

a) to the extent that the facilities are for container ships:

$$\frac{x}{500{,}000}$$

where x is the number of TEU that the facilities are capable of handling;

b) to the extent that the facilities are for ro-ro ships:

$$\frac{y}{250{,}000}$$

where y is the number of units that the facilities are capable of handling;

c) to the extent that the facilities are for cargo ships of any other description:

$$\frac{z}{5{,}000{,}000}$$

where z is the number of tonnes of material that the facilities are capable of handling.

Policy matters to be aware of - the Coastal Concordat

In marine areas, local planning authorities are required[9] to work with the MMO to ensure that policies across the land/sea boundary are aligned. Paragraph 166 of the National Planning Policy Framework (NPPF) provides that, in coastal areas, planning policies and decisions should take account of the UK Marine Policy Statement and marine plans. Integrated Coastal Zone Management should be pursued across local authority and land/sea boundaries to ensure effective alignment of the terrestrial and marine planning regimes. This means that coastal planning authorities will take into account any relevant marine policy statement and national policy statement and marine plans relevant to the area in which a proposed scheme is situated.

The Coastal Concordat 2014 is an agreement between the Department for Food and Rural Affairs, Department for Housing, Communities and Local Government, Department for Transport, MMO, Environment Agency, Natural England and the Local Government Association which sets out key principles for coordinating the consenting process for coastal development to enable sustainable growth within the coastal zone. It is intended to benefit applicants and responsible bodies by reducing regulatory duplication, streamlining assessments and increasing transparency and consistency of advice.

The concordat approach can be applied to applications for harbour projects[10] that are on the coast or in the intertidal area in estuaries and require multiple consents, including both a marine licence for the off-shore works and planning permission for the on-land element of the development. A key principle is that there should be a single lead authority for co-ordinating the EIA/HRA and, at the pre-application stage, the local authority and MMO should agree the likely EIA requirements and habitats assessment requirements. This coastal concordat has been adopted by a number of coastal local authorities, so it is worth discussing with the MMO and local planning authority at an early stage.

The Natural Capital Committee advises Government on the sustainable use of natural capital. On 14 May 2019, it published advice to the Government on management of the marine environment and makes recommendations for how to protect and grow natural marine capital. One key point in its report is that holistic natural capital thinking should be applied when implementing marine regulation and decision making. It recommends the extension and expansion of the UK's marine protected areas and the banning of disruptive activities such as dredging and dredge spoil dumping in order to allow greater recovery of

[9] Section 110 (Duty to co-operate in relation to planning of sustainable development) Localism Act 2011

[10] Excluding DCOs.

fish stocks and other natural capital. It suggests that the MMO should formally incorporate natural capital thinking into decision making, and that net gain principles should be applied to marine activities via the planning and licencing process. Developers of harbour schemes will want to bear this report in mind as, at the least, it suggests the direction of movement on marine management and regulation.

Specialist advice

The process under the 1964 Act outlined above is not unduly complicated but is nevertheless one that requires expert input and strong leadership. A well-managed project team is essential and should be established as early as possible. It will usually comprise the following:

- Parliamentary agents (or other lawyers) who specialise in the drafting of legislation and promotion of infrastructure schemes are best placed to provide the holistic advice needed to ensure an efficient and cost-effective application, to draft the requisite legislation and supporting information, to review other documents prepared by the project team in support of the application, to ensure legislative compliance, to advise on third party management (including negotiating agreements with, or undertakings to, objectors and drafting of protective provisions) and to attend any public inquiry.

- Specialist engineers and marine engineers to work up the design of the proposed harbour scheme to at least the outline stage for the purposes of preparing the draft Order, EIA and any planning or marine licensing applications and to identify all land necessary to implement the scheme.

- Where the order includes works, specialised consultants will be required to advise on, carry out, and report, the EIA and HRA and to obtain any necessary protected species licences.

- Where the order is to include compulsory powers, specialist land referencing consultants will usually be necessary to identify land parcels and property interests and to identify any special category land such as open space or land belonging to statutory undertakers.

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