

Martello Quays

Development of a Marina at Pembroke Dock

Supporting Statement for the Milford Haven (Martello Quays) Harbour Revision Order

1 Background

Milford Haven is a very extensive natural haven in Pembrokeshire. It is extensively used by sea-going vessels as well as vessels which remain within the haven. It contains artificial docks for the oil and natural gas industry, for ferries to Ireland and for general cargo, fishing harbours at Pembroke Dock and Milford Haven town, as well as marinas at Milford Haven town and at Neyland, and yacht moorings at various locations.

Martello Quays Ltd (“MQ”) has obtained planning permission to develop a marina by impounding an area of Milford Haven at Pembroke Dock. The structure will comprise a retaining wall and lock, retaining the impounded water at near high water level. Floating mooring pontoons will then be anchored within the impounded area and moorings will be provided alongside the quays within the impounded area. The proposed marina will comprise a new artificial harbour and will comprise a significant improvement to facilities within the haven for sea-going vessels as well as vessels remaining within the haven.

The site comprises an area of water and foreshore below Mean High Water Springs, which is owned by the Crown Estate, from whom MQ have obtained an exclusive long lease granting them power to undertake the development and operation of the proposed marina, and various shore-side properties which MQ have acquired or are in the process of acquiring from Pembrokeshire County Council and a range of other owners. The area of water comprising the site of the structure and impounded water is shown on the plan attached to this Statement as Appendix One.

MQ propose to carry out the development as leaseholders of the land and are concurrently applying to the Welsh Assembly Government for marine works consent under Section 65 of the Marine and Coastal Access Act 2009.

Full Environmental Impact Assessments were required for the purpose of the planning application and for the marine works consent application.

The Milford Haven is a port for the purposes of the Harbours Act 1964, with the Milford Haven Port Authority, constituted under the Milford Haven Conservancy Acts 1958 and 1975 and the Milford Haven Port Authority Act 2002 as the harbour authority. The Milford Haven harbour currently extends to all that area within Milford Haven up to mean high water springs, and therefore includes the area of the proposed marina.

The proposed harbour revision order is necessary, in order to enable MQ to secure the improvement of facilities within the Haven effectively by the development of the proposed marina, by –

- a. securing the extinguishment of the public right of navigation over the area comprising the proposed new marina, so that the development is not an unlawful obstruction of the navigable waters of the haven, and
- b. by removing the new marina from the jurisdiction of the Milford Haven Harbour Authority, so that MQ may construct and operate the marina commercially, in fair competition with other marinas within the haven.

No other person has powers to carry out the proposed development, as MQ has obtained an exclusive lease of the area of the proposed marina from the freeholder, Crown Estates, and the only relevant statutory authority, Milford Haven Port Authority, does not have either the land ownership or the statutory powers to carry out the proposed development.

2 Right of navigation

At common law, there is a public right of navigation over the water area of Milford Haven below Mean High Water Springs, and obstruction of that right is an actionable nuisance, unless the obstruction has statutory protection. Further, if any person suffers damage as a result of an unauthorised obstruction, they have a right of action for damages against the person responsible for that obstruction.

The statutory consents required to enable the development have changed with successive legislation. So the present position is as follows -

2.1 Planning permission – Town and Country Planning Act 1990

MQ has obtained planning permission for the development, but this does not over-ride the need for other statutory consents.

2.2 Coast Protection Act 1949

Section 34 of the Coast Protection Act 1949 (“COPA”) provided that no person shall construct or alter any works below Mean High Water Springs (or deposit or dredge any materials) if the operation causes or is likely to cause obstruction or danger to navigation, unless they have obtained a license from the Board of Trade.

This provision was repealed from 6th April 2011 by the Marine and Coastal Access Act 2009 (see below)

2.3 Harbours Act 1964

Under Section 16 of the Harbours Act, where any person is desirous of securing -

- a. The improvement, maintenance or management of a harbour, whether natural or artificial, navigated by sea-going ships (not being a fishery harbour or a marine work) or of a port, haven, estuary, tidal or other river or inland waterway so navigated (not being a fishery harbour or a marine work); or
- b. the construction of an artificial harbour navigable by sea-going ships or an inland waterway so navigable, other than a harbour or waterway which, in the opinion of the Minister and the Secretary of State, will, on completion, be a marine work

but neither he nor any other person has powers, or sufficient powers, to secure it, or to do so effectively, he may make a written application to the Minister for the making by him of an order conferring on the applicant, some other designated person or a body to be constituted for the purpose by the order (according as may be specified in the application) all such powers (including,

in particular, power to acquire land compulsorily and to levy charges other than ship, passenger and goods dues) as are requisite for enabling that object to be achieved.

By Section 16(5), the Secretary of State shall not make a harbour empowerment order unless he is satisfied that the making thereof is desirable in the interests of (facilitating the efficient and economic transport of goods or passengers by sea or) in the interests of the recreational use of sea-going ships.

By Section 16(6), a harbour empowerment order may include all such provisions as appear to the Minister of the Crown by whom it is made to be requisite or expedient for giving full effect to any provision included in the order by virtue of the foregoing provisions of this section and any supplementary, consequential or incidental provisions appearing to him to be requisite or expedient for the purposes of, or in connection with, the order.

Milford Haven is a "harbour" as defined in Section 57 of the Harbours Act 1964, being "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." The marina which MQ propose to construct will constitute an improvement of Milford Haven providing an artificial harbour within Milford Haven providing secure and sheltered facilities for use by sea-going leisure vessels and leisure vessels using Milford Haven.

Whilst MQ have secured a long lease of the area of the proposed marina from the Crown Estates, and so will be able to rely on the ordinary powers of a landowner for its power to construct and operate the proposed marina, it is currently unable to do so **effectively** by reason of the public right of navigation over the area, which would make the construction of the marina and any denial of navigation an actionable nuisance.

2.4 Transport and Works Act 1992

The Transport and Works Act 1992 was introduced to provide a simpler procedure for the authorisation of works such as railways, docks and harbour works which previously required a private Act of Parliament. Had the works been authorised by an order under the Transport and Works Act 1992, that order can dis-apply the prohibition under the Coast Protection Act on the construction of works in navigable waters. The Transport and Works Act procedure is available for a range of works, as defined in the Regulations made under Section 4 of the Transport and Works Act 1992, namely the Transport and Works (Descriptions of Works Interfering with Navigation) Order 1992 (SI 1992/3230), as amended by the Transport and Works (Descriptions of Works Interfering with Navigation) (Amendment) Order 1997 (SI 1997/2906). The range of works defined in these regulations include a "barrage", which is defined in the Regulations as including a dam, weir, barrier, embankment, breakwater and any other structure for impounding, or diverting or controlling the flow of, water."

However, Section 3(2) of the Act states that "The Secretary of State shall not make an order under this section if in his opinion the primary object of the order could be achieved by means of an order under the Harbours Act 1964." Accordingly, MQ cannot apply for an order under the Transport and Works Act 1992 in respect of the proposed marina.

2.5 Marine and Coastal Access Act 2009

From 6th April 2011, the Marine and Coastal Access Act 2009 replaced the requirement for a license to deposit any material in the sea under Section 5 of the Food and Environment Protection Act 1985 ("FEPA") with a requirement for a marine consent under Section 65 of the 2009 Act, and extended the range of controlled marine activities to include the construction or alteration of any works within the sea, and any dredging activity. MQ are, concurrently with this application, applying to the Welsh Assemble Government for a marine works license for the construction of the marina.

Section 314 and Part II of Schedule 22 to the 2009 Act repealed the prohibition on construction of works in navigable waters previously contained in Section 34 of the Coast Protection Act 1949 and introduced a new prohibition, contained in a new Section 82A of the Energy Act 2008. Under the new provision, Section 82A(1) provides that a person must not, without the written consent of the Secretary of State, carry out in the regulated zone any operation to which this subsection applies. Subsection 82A(2) provides that this prohibition does not apply if a marine licence under Part 4 of the Marine and Coastal Access Act 2009 is needed to carry out the operation.

Whilst a marine works license under the 2009 Act both permits and disapplies the prohibition on the construction of works which may obstruct the public right of navigation, it does not actually authorise the obstruction of the public right of navigation, so that the works, even though authorised by the marine works license, would remain an obstruction to the common law right of navigation.

2.6 Conclusions

Even if a marine works license is obtained by MQ for the construction of the proposed marina, the marina works would be an obstruction of the common law right of navigation.

Whilst an order under the Transport and Works Act 1992 would normally provide a route by which the right of navigation might be extinguished over the area of the proposed marina, this route is not available where the same result can be achieved by a harbour empowerment order under Section 16 of the Harbours Act 1964.

Accordingly, MQ can only effectively construct and operate the proposed marina if the public right of navigation is extinguished over that area which will comprise the marina and working space during its construction.

3 Exclusion of the Marina from Milford Haven Harbour

The proposed marina lies within the area of the port of Milford Haven in accordance with the Milford Haven Conservancy Act 1983 and Part 3 of the Milford Haven Port Authority Act 2002. Under these provisions the Milford Haven Port Authority can give directions to vessels, levy port dues and require the removal of obstructions, or enter and remove the obstruction at MQ's expense, in a manner which could be incompatible with the construction and operation of the proposed marina.

In ordering the cessation or removal of the works, MHPA would have to act reasonably, for the benefit of the harbour and not for any ulterior purpose.

Accordingly, if MQ are to construct and operate the proposed marina effectively, it is necessary to amend the statutory limits of the Milford Haven port to exclude the area of the proposed marina.

Section 16(6) of the 1964 Act provides that a harbour empowerment order may include all such provisions as appear to the Minister of the Crown by whom it is made to be requisite or expedient for giving full effect to any provision included in the order by virtue of the foregoing provisions of this section and any supplementary, consequential or incidental provisions appearing to him to be requisite or expedient for the purposes of, or in connection with, the order." Accordingly, a harbour empowerment order may amend the definition of the port of Milford Haven in the Milford Haven Conservancy Act 1983 to exclude the area of the proposed marina.

Peter Keith-Lucas
For Bevan Brittan LLP
On behalf of Martello Quays Ltd.

Appendix One

