



Department for Transport

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7 FEBRUARY 2023

Dear Sirs,

TRANSPORT AND WORKS ACT 1992: APPLICATION FOR THE PROPOSED RIVER TYNE (TUNNELS) (MODIFICATIONS) ORDER

1. I am directed by the Secretary of State for Transport (“the Secretary of State”) to say that consideration has been given to the application made on 17 February 2022 by your clients, North East Combined Authority (“NECA”), for the proposed River Tyne (Tunnels) (Modifications) Order (“the draft Order”) to be made under sections 3 and 5 of the Transport and Works Act 1992 (“TWA”).
2. The draft Order, if made, would make provision for consequential amendments to the River Tyne (Tunnels) Order 2005 (“the 2005 Order”) reflecting a change in the handling of toll payments. The draft Order does not authorise the carrying out of any works or the acquisition of land (whether compulsorily or by agreement) and accordingly rules 7, and 14(4) and (5) of the Transport and Works (Applications and Objections Procedure) (England and Wales) Rules 2006 (“the 2006 Rules”) do not apply.
3. As the Order does not provide for any development requiring planning permission, NECA did not submit an environmental statement with the Order application or seek a direction as to deemed planning permission from the Secretary of State.

Summary of the Secretary of State’s decision

4. For the reasons given in this letter, **the Secretary of State has decided to make the Order with minor drafting modifications** which do not make any substantial change such as would require notification to the affected persons under section 13(4) of the TWA.

Legal and Procedural Matters

5. In making the application NECA is required to comply with the publicity requirements of the 2006 Rules. This includes serving copies of the application and accompanying documents on the persons specified in those Rules and making the documents available for public inspection. As also required by the 2006 Rules, NECA must display and publish notices giving information about the application and how to make representations.
6. Due to Covid restrictions during the pandemic, NECA applied to the Secretary of State for a waiver direction to disapply certain requirements under Rules 9, 10(1) and 10(2) of the 2006 Rules. NECA put measures in place to ensure that documents were available. These measures included providing a website where application documents could be inspected throughout the objection period, including details of the website on the statutory notices, and providing a telephone number in the statutory notices and on the website so that hard copies of the documents could be requested. The Secretary of State is therefore satisfied that the appropriate procedures under the 2006 Rules were followed.
7. In response to the application, the Secretary of State received one letter of objection from a local resident. There were no letters of support or other representations.
8. The Secretary of State decided that it was unnecessary to hold a public inquiry or hearing to this application as he was satisfied that the issues raised in the objection could be appropriately presented and examined through the TWA written representations procedure. This process is set out in rule 24 of the 2006 Rules. NECA and the objector were notified of the Secretary of State's decision to follow the written representations procedure in the Department's letter dated 29 July 2022. The written representations procedure was concluded on 10 November 2022.

Purposes of the Order

9. The main purpose of the draft Order is to make consequential amendments to the River Tyne (Tunnels) Order 2005 reflecting a change in the handling of toll payments. The change in toll collection was effected through the Tyne Tunnels Byelaws 2021 ("the 2021 Byelaws"), made under the 2005 Order and confirmed by the Secretary of State on 4 October 2021. These bylaws mean that payments are no longer accepted at toll barriers (which have been removed) and are instead collected either by way of electronic payment or by cash at a PayPoint retailer. This change in toll collection was introduced through the 2021 byelaws by TT2 Ltd, who are responsible for the day-to-day management and operation of the Tyne Tunnels, to allow a free-flow traffic system through the Tyne Tunnels to facilitate reduced journey times through them, known as the Tyne Pass Scheme.
10. The Secretary of State notes this draft Order makes consequential amendments to the 2005 Order to reflect the 2021 Byelaws. However, there are several references in the 2005 Order that reflect the original expectation contained in preceding Byelaws

that tolls would be collected at booths, which the draft Order would amend. Additionally, it would provide for toll exemptions for disabled persons to be provided through a scheme for the registration of vehicles for exemption. The Secretary of State notes NECA's description of the present arrangements in its letter dated 29 September 2022, where disabled drivers who claim an exemption have to stop to show their Blue Badge, unlike other vehicle which can use the free flow system. The draft Order also introduces a toll exemption for vehicles used for coastguard purposes and updates and clarifies the types of provisions that can be included in Byelaws, for example in relation to the longstanding pre-payment discount scheme.

The Secretary of State's consideration and decision

11. The Secretary of State notes the purpose of the draft Order as set out in paragraphs 11 and 12 and that negotiations took place with Mr Doran, who was the sole objector to it. The initial objection dated 9 March 2022 was split into two parts. The first part relates to the amendment in article 2(2)(g) of the draft Order which would substitute a new paragraph (3) into article 41 of the 2005 Order, enabling Byelaws to include provision "specifying vehicles or journeys in respect of which tolls are to be paid and requiring payment to be made by or on behalf of the registered keeper of a vehicle or another specified person with responsibility for a vehicle or journey". The second part of Mr Doran's objection related to the display of signs, which he believed would allow NECA to "legitimise inadequate signage".
12. The Secretary of State notes that, following initial discussions between NECA and Mr Doran, the second part of the objection, which related to the display of signs, was withdrawn in his letter dated 7 June 2022. However, the Secretary of State notes the first part relating to the amendment in article 2(2)(g) remains outstanding. Accordingly, on 29 July 2022 officials from DFT wrote to NECA and Mr Doran explaining that the written representations procedure, as prescribed by rule 24 of the Rules was going to be used to address the issues raised by this application.

Breakdown of outstanding objection

13. The outstanding part of the objection received from Mr Doran on 9 March 2022 relating to the proposed amendment in article 2(2)(g) can be broken down into the following key elements:
 - (1) That the proposed amendment "would create a perverse situation unique in English law. It would seek to create joint and several liability for a criminal offence under Byelaws." Mr Doran states that "this is contrary to basic common law".
 - (2) That "the effect [of the amendment] is that a [registered keeper] of a vehicle will be held criminally liable for a breach of byelaws by another person and will have no recourse to transfer liability [to that other person]". Mr Doran states "TT2/NECA have declared that they do not allow transfer of liability".
 - (3) That "byelaws are specific to a locale, yet the registered keeper can be held criminally liable despite never having been in the locale".

- (4) That “the only other regulations that create a binding liability on the [registered keeper] are those relating to decriminalised parking”. Mr Doran argues “this is perfectly acceptable as it has underlying regulations and in particular a binding Code of Practice to protect the registered keeper from abuse of process; the most important aspect is an ‘independent final adjudicator’.” Mr Doran further states that “the enforcement regime at TT2 has no such protections built in.”
- (5) That “speeding ticket[s] issued by the police are issued to the [registered keeper], but [they] have the ability to name the driver”. Mr Dolan argues that the proposed amendment “will not make this an option for [registered keepers]”.
- (6) "In the ‘private parking arena’ ... the [registered keeper] can be held liable but with two important differences. They can transfer the liability by naming the driver, and it is merely a civil matter.” Mr Doran states “TT2 are enforcing byelaws and criminal liability attaching”.

First Round of Written Representations

14. NECA commenced the written representations procedure via letter dated 22 August 2022, submitted by Ward Hadaway on their behalf. Adopting the same numbering as in paragraph 13 its response to Mr Doran’s objection dated 9 March 2022 can be summarised as follows:

- (1) NECA asserted that the proposed draft Order does not in itself create any joint and several liability beyond that already established under paragraph 63(2) of the 2021 Byelaws, where joint and several liability has already been introduced lawfully in accordance with the previous changes to the byelaws. Nonetheless, NECA went on to explain that the change introduced by the 2021 Byelaws was required because the conversion to the Tyne Pass Scheme meant that it now charges for journeys by vehicles, rather than impose a charge on drivers. Liability, for purely practical reasons, focuses on the person who is registered as the keeper of the vehicle in question, although the expectation is that the driver will pay. NECA maintained that under a free-flow scheme it is not possible to continue with the previous process that relied on driver identification and payment. The enforcement intention is not to pursue the registered keeper in circumstances where they are clearly not responsible, but their view was that the operator has to retain the ability to pursue the registered keeper since there is no clear way of identifying the driver under a free-flow scheme.

NECA insisted that whilst the 2021 Byelaws created joint and several liability, they did not create joint and several criminal liability. Byelaw 63(2) creates a joint and several liability for payment of the toll. This makes the registered keeper liable for the toll. It is then the registered keeper who could potentially be liable for any consequential charges and, ultimately, the criminal offence of not paying. Therefore, NECA refute this element of the objection to the Draft Order.

- (2) For similar reasons as in (1) above, NECA refuted this element of the objection. NECA maintained that the registered keeper would only be liable to an offence for their own failure to pay. That liability to pay is indeed joint and several, but

the registered keeper is not sanctioned for someone else's failure to pay. NECA accepted Mr Doran's assertion that the process does not afford the registered keeper the ability to 'transfer' the liability but stated that is because the obligation remains with the registered keeper to take responsibility for the use of the vehicle.

(3) NECA refuted this element of the objection on the grounds that the location of the registered keeper makes no difference. It asserted the 2021 Byelaws clearly state that the registered keeper is liable for the toll if the driver doesn't pay, since the toll attaches to the vehicle when it transits through the tunnel. The toll is payable no matter who was driving the vehicle at the time and whether or not the registered keeper was in the locale.

(4) This element of the objection was also refuted by NECA, who considered it a complaint against the process chosen by it to charge and enforce charges (i.e. a toll system, rather than a road user charge system), which does not contain an element of independent adjudication to prevent what Mr Doran described as "an abuse of process". NECA claimed that Mr Doran's grievances appear to be with the existing powers under the 2005 Order to operate toll collection, the enforcement process and the lawful operation of the existing byelaws. It considered Mr Doran's assertion that NECA should adopt a road user charging scheme instead of the tolling scheme provided for under the 2005 Order is irrelevant to the Order applied for.

(5) NECA stated this was not a separate objection, but an extension of number (2) above, and it therefore refuted it.

(6) Similarly, NECA deemed this element to be an extension of numbers (1) and (2) above, and it was therefore also refuted.

15. On the 8 and 9 September Mr Doran, offered his rebuttal (drafted by Mr Murray-Smith and dated 5 September) to the letter written by NECA on 22 August 2022. Again, adopting the same numbering as paragraphs 13 and 14 above, the responses can be summarised as follows:

(1) That "there is a clear trend, which has been established over decades, of removing minor traffic matters from the scope of the criminal law". He questioned why NECA required a criminal law remedy, whilst recognising that this is a political issue and not a legal point. Citing existing road user charging schemes, he stated that "Granting NECA these criminal law powers against registered keepers would be an unwelcome anomaly against this national picture."

(2) That imposing "a criminal liability on a registered keeper for a failure of some other person to pay a toll would be disproportionate, draconian, and there is no justification given as to why NECA should have a criminal law remedy when all other toll collecting authorities across the country do not have such criminal law powers."

(3) That the 2021 Byelaws “are already problematic because ultimately authority for these laws come from the Tyne and Wear Act 1976, which is a local Act of Parliament and is therefore not part of the general law of England & Wales. For a local Act of Parliament to impose a criminal liability on a person who might have never been the location where that Act has effect would be, as far as Mr Doran is aware, unprecedented.”

(4) In conclusion, Mr Doran highlighted what he perceived to be the advantages of the road user charging regime under the Transport Act 2000, asserting that penalty charges under that Act are civil debts but are dealt with by the Traffic Penalty Tribunal (or London Tribunals for London authorities) rather than the civil courts. Mr Doran considered that this carried a number of advantages, including that “the tribunal is cheap (there are no case fees or costs for motorists, irrespective of the outcome), informal, there are no formal pleadings and no need for legal representation.”

16. With regard to points (1) to (4), Mr Doran recognised that they were a political issue, rather than legal points, and requested the Secretary of State to exercise his political judgment and refuse to grant the criminal law powers.

17. On the 9 September a supplementary document was received from Mr Doran in which he stated: “I would be happy to withdraw my objection, without any requirement for NECA to write any policies or customer charter, if NECA were to instead agree to use best endeavours to replace the current tolling regime with a new Road User Charging scheme.”

18. The Secretary of State notes that there was no formal response from Mr Doran to elements (5) and (6) of NECA’s response dated 22 August 2022. He agrees with the statement put forward by NECA that the points raised were an extension of points already made under numbers (1) and (2) and has not considered them further for the remainder of the written representations procedure.

Second round of written representation

19. On 29 September NECA responded to the points raised by Mr Doran in his letter dated 8 September 2022. Its rebuttal follows the same numbering as paragraph 15 above.

(1) NECA reaffirmed that the use of criminal law sanctions is already a feature of the Tyne Tunnel Byelaws (confirmed by the Secretary of State) and the draft Order is seeking no change to that.

(2) NECA observed that the main thrust of Mr Doran’s argument is that there is no justification as to why NECA should have a criminal law remedy. It considered this irrelevant to the proposed changes to the 2005 Order since those changes are not seeking to introduce a criminal liability, and therefore submitted that the representations did not move the debate on this element of the objection forward.

- (3) NECA asserted that the 2021 Byelaws are lawfully in force and discussion of them is not appropriate in relation to the changes to the 2005 Order that are proposed. Again, NECA submitted that the further representations made were irrelevant to this process.
 - (4) NECA accepted that representations put forward on behalf of Mr Doran described very well the difference between NECA's tolling system and the sort of civil enforcement regime used for parking offences and other bridge and tunnel schemes. NECA again pointed out that the 2021 Byelaws are lawfully in force and discussion of the principles of enforcement is not appropriate in relation to the changes to the 2005 Order that are proposed, making Mr Doran's further representations irrelevant to this process.
20. With regard to points (1) to (4), NECA asserted that Mr Dolan's objection is to the use of the criminal law and noted his admission that this objection is a political issue. NECA submitted that this objection was irrelevant to the changes proposed by the Order.
21. On the 17 October 2022, Mr Doran formally responded to the letter dated 29 September 2022 from NECA, enclosing representations drafted by Mr Murray-Smith. Again, points raised follow the same numbering as those adopted in paragraph 18 above.
 - (1) That based on the lack of a rebuttal from NECA to Mr Doran's request that it switch to a Road User Charging Scheme, it must be concluded that this is "due to NECA's own inertia".
 - (2) That NECA's assertion that objection 2 "is not relevant to the proposed changes to the 2005 Order since those changes are not seeking to introduce a criminal liability", is incorrect. Mr Dolan asserted that "the proposed changes would make a whole category of persons (specifically registered keepers) potentially subject to criminal sanctions in circumstances where they could not at present be liable for any such sanctions (unless they happened to also be the drivers of the vehicles concerned, which may or may not be the case)."
 - (3) That NECA's argument that the Byelaws are lawfully in force is not a reason for that instrument to remain in force. Mr Doran stated, "the 2005 Order is not special or exceptional in this regard and his ultimate objective is for the 2005 Order to be revoked."
 - (4) That in the absence of any substantive rebuttal to Mr Doran's summary of the benefits of road user charging schemes, "it appears NECA accepts that the civil system Mr Doran would like to see put in place has significant advantages over the existing 2005 Order". Mr Dolan adds, "The fact that the existing by-laws are lawfully in force does not in itself amount to a good public policy reason to keep them in force indefinitely."
22. Within the representations made on behalf of Mr Doran on 17 October 2022 it was indicated that he would offer "to drop his objections in exchange for NECA

exploring, on a best endeavours basis, the viability of implementing a Road User Charging Scheme under the Transport Act 2000". Mr Doran proposed that:

"a) The 2005 Order be amended in the terms requested by NECA.

b) A sunset clause be inserted into the 2005 Order, under which the 2005 Order would expire after a period of 12 months.

c) NECA be given liberty to apply for a 6 month extension to the 2005 Order if (and only if) it is able to justify to the Secretary of State why a Road User Charging Scheme cannot be implemented within the original 12 month deadline."

Final response from applicant

23. On 27 October 2022 a final response was received on behalf of NECA stating it had nothing further to add with regards to their draft Order application but wanted to stress that this does not mean that it agreed with the issues raised by Mr Doran in his reply dated 17 October 2022. Additionally, NECA wished to make it clear that where Mr Doran indicated that it accepted any of his arguments, that this was strongly refuted.

Secretary of State's overall conclusions and decision

24. The Secretary of State notes that the stated purpose of the draft Order application is to make provision for consequential amendments to the River Tyne (Tunnels) Order 2005 reflecting a change in the handling of toll payments provided for by the 2021 Byelaws and to provide for toll exemptions for disabled persons to be provided through a scheme for the registration of vehicles for exemption, which will allow those vehicles to use the free flow system. It also provides for toll exemptions for vehicles used for Coastguard purposes and updates and clarifies the types of provisions that can be included in Byelaws, for example in relation to the longstanding pre-payment discount scheme.
25. Having had regard to all the arguments put forward by both Mr Doran and NECA during negotiations and the written representation process the Secretary of State agrees that the purpose of the draft Order is stated correctly and is satisfied that the objections as presented is not relevant in relation to the changes to the 2005 Order that are proposed. The Secretary of State acknowledges Mr Doran's position with regards to the introduction of a Road User Charging System, however it is not an issue that is relevant to consideration of the draft Order. The Secretary of State notes the current arrangements for disabled persons who claim an exemption and have to stop to show their Blue Badge and agrees that the draft Order will allow them to share the benefits of the free flow system. He also agrees that Coast Guard vehicles should be exempted from the payment of tolls.
26. The Secretary of State has had regard to all matters set out above and has determined in accordance with section 13(1) of the TWA to make the Order under sections 3 and 5 of the TWA, subject to minor drafting amendments which do not

make any substantial change in the proposal such as would require notification to the affected persons under section 13(4) of the TWA.

Notification of determination

27. This letter constitutes the Secretary of State's notice of his determination to make the Order, with modifications, for the purposes of section 14(1)(a) and (2) of the TWA. Your clients are required to publish newspaper notice of the determination in accordance with section 14(4) of the TWA.

Challenges to the Decision

28. The circumstances in which the Secretary of State's decision may be challenged are set out in the note at Annex A to this letter.

Distribution

29. Copies of this letter are being sent to those who appeared at the inquiry and to all statutory objectors whose objections were referred to the inquiry under section 11(3) of the TWA but who did not appear.

Yours faithfully,

Natasha Kopala

ANNEX A

RIGHT TO CHALLENGE ORDERS MADE UNDER THE TWA

Any person who is aggrieved by the making of the Order may challenge its validity, or the validity of any provision in it, because

- it is not within the powers of the TWA; or
- any requirement imposed by or under the TWA has not been complied with.

Any such challenge may be made, by application to the High Court, within the period of 42 days beginning with the day on which notice of this determination is published in the London Gazette as required by section 14(1)(b) of the TWA. This notice is expected to be published within 3 working days of the date of this decision letter.

A person who thinks they may have grounds for challenging the decision to make the Order is advised to seek legal advice before taking action.