

19 MAY 2006



# BIGGART BAILLIE

S O L I C I T O R S

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Dear Mr Cruickshank,

I am pleased to provide you with a response on behalf of British Transport Police Authority and British Transport Police Force to the Scottish Executive Consultation Document entitled "***Proposals for a New Approach to Delivering Public Transport Infrastructure Developments***" issued in February 2006.

A list of the names of the Partners may be inspected during office hours at each of the addresses given above

British Transport Police Authority was established under Section 18 of the Railways & Transport Safety Act 2003 (the "2003 Act") and has its principle office at The Forum, 5<sup>th</sup> Floor North, 74-80 Camden Street, London NW1 0EG ("the Authority") and British Transport Police Force was established under Section 20 of the 2003 Act and has its headquarters at Camden Point, Camden Road, London, NW1 9LN ("BPT")

BTP is the national, specialist police force for the railways including the London Underground and certain tram systems.

General provision was first made in 1858 for the appointment of Constables to police the construction of canals and railways. Therefore, railway policing has been distinct from civil policing arrangements throughout Great Britain for over 150 years. The current legal basis for BTP's existence, however, is the 2003 Act - which came into force on 1 July 2004 – and which, at Section 31, gives BTP jurisdiction on the railway and purposes connected to, occurring on or in relation to a railway in Great Britain.

Authorised and regulated by the  
Financial Services Authority

The Authority is, by virtue of Section 20 of the 2003 Act, under a statutory obligation to secure the maintenance of an efficient and effective police force (a) to be known as British Transport Police Force, and (b) to police the railways. The Authority is also under a statutory duty to defray the expenses of BTP.



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In structuring this response, I have used the paragraph and question numbering of your original consultation document: -

- **Foreword** – the Authority and BTP support the Minister's stated aims for the transport system as set out in the first paragraph and for the new process as set out in the fourth paragraph.
- **4.5** – as referred to below, promoters should be encouraged to actively engage with prospective objectors in advance of applying to the Minister for an Order and again in advance of initial parliamentary consideration. Equally, in relation to the third bullet point of paragraph 4.5, a ministerial decision should take account of both the terms of objections and the promoter's response to them.
- **Q1** – It would be worth clarifying that the current proposals will apply not only to rail, tram, guided bus ways and inland waterway developments but also people movers, monorails and maglev developments and additionally (lest it fall between two sets of stools) public transport interchange developments.
- **4.14** – the emergency services and industry, economic and safety regulators (specifically the Office of Rail Regulation) should be included in the list of compulsory pre-application consultees. BTP should be amongst these compulsory pre-application consultees.

The Authority and BTP will wish to see that any infrastructure scheme of the nature covered by the proposed new process will:

1. incorporate crime reduction and security measures and procedures;
  2. include appropriate police facilities;
  3. not compromise existing BTP operational capacity and facilities; and
  4. provide the promoter with powers and obligations to make provision for police services.
- **Q2** – A suitable emphasis on efforts to accommodate and resolve concerns of stakeholders in advance of introduction of an Order, rather than merely informing them of outline proposals, is required.

If sufficient time is given for such pro-active steps to be effective, the new procedure could prove itself to be more efficient not only in terms of time and cost but also in terms of quality of output. Whilst it may not be possible for all issues to be resolved, a period of six months would allow reasonable time for effective engagement.

- **4.17** – the emphasis must be upon seeking resolution of issues. The consultation document is disappointingly silent on the standard by which a promoter's efforts will be judged and the consequences of any failure to meet that standard.
- **Q3** – BTP would suggest that if such powers are to be available, they should only be capable of being granted upon a certificate from the Minister being confirmed by a summary application to a Sheriff, to whom the affected owner / occupier should



be entitled to make representations. A balance of convenience test subject to a presumption against the grant of entry would appear appropriate.

- **Q4** – Potentially affected parties (i.e. potential objectors) need to be able to better understand the likely impact of the proposed scheme upon their interests. Experience from some Private Bills to date indicates that if the Bill as lodged before the Scottish Parliament and its accompanying papers had contained further detail a number of objections could have been pre-empted. This links back to the pre-application engagement and pre-emption period – if scheme designs including intended mitigation measures are included, the net result would be a more proactive and effective solution for all concerned.

In addition to the items listed in paragraph 4.22, BTP would suggest that provisional scheme designs be included.

To allow the Minister to assess the effort in and effectiveness of the promoter's consultation and resolution efforts, a statement of the level and nature of consultation undertaken and a statement of the alternative or substitute features that have been adopted during the pre-submission period to address concerns with or mitigate possible adverse effects of the proposal should be provided by the promoter.

The extent to which the promoter has made commitments to third parties in relation to any aspect of the proposed scheme or its consequences should also be clearly stated.

The promoter should separately be required to demonstrate the relevance of the proposed scheme to the Scottish Executive, National Transport Agency, Regional Transport Partnership and local authority policies.

The application papers must be a public document - to enable consultees to comment in the event that they feel the promoter has materially misrepresented any matter. Alternatively, such misrepresentation should form a ground for objection.

- **Q5** – A balance needs to be struck in relation to the period for objections – between unduly extending the Order process and allowing potentially affected parties an appropriate opportunity to consider their position, seek to engage with the promoter, take such professional advice and consult with their own stakeholders as necessary and, should they wish, to prepare and lodge an objection.

Given that the Private Bills procedure has a 60 day objection period and it is not intended to realign all other aspects of the Orders procedure with the procedure for roads developments, the question really ought to be if there a justification for reducing from 60 to 42 days.

BTP's experiences of several Private Bills and indicate that to allow either for considered, measured and detailed objections which include indications of the manner in which the objection can be resolved or for agreement to be reached upon terms that resolve the prospective objector's concerns without an objection actually being lodged, the 60 day period should be retained.

There is a possible counter argument that if pre-application obligations upon the promoter to effectively consult and engage with potential objectors are put in place, then there would be no net detrimental effect on potentially affected parties by shortening the objection period.

Whilst accepting that there is a logic to that analysis, my earlier comments in relation to the time necessary to properly prepare and submit objections still apply.

For objectors, as opposed to promoters, the project and its impacts will not be the focus of the normal working day of the personnel concerned. Therefore, there is very often an issue of finding time to consider the proposals (which the promoter will have had an extensive period to prepare), to form a view and to act upon it. If the material which will form the Promoter's application is to be substantially greater in terms of constituent elements, detail and thus volume, affected parties will need to devote more time to considering materials in order to establish how their interests may be affected and thus whether or not they wish to object to the proposed scheme.

In passing the Authority and BTP would record that in that context, seeking external professional support should be seen not as some form of extravagance but as a perfectly reasonable and appropriate step for a potentially affected party to take.

On balance, BTP feel that the 60 day period should be retained.

In any event, whatever the actual number of days concerned, the objection period must comprise meaningful days – the Minister must have discretion to require an extension not only for bank holidays but for seasonal holidays. The objection period for the Edinburgh Airport Rail Link Bill included three bank holidays and just as importantly the schools' Easter holiday period, during which key staff in many organisations were on holiday for a week in addition to several long weekends. This significantly reduced the effective length of the objection period.

- **Q6** – Step 4 raises constitutional issues of the balance of responsibilities and powers between the Scottish Executive and the Scottish Parliament. These are essentially political issues upon which it is not appropriate for BTP to comment.
- **4.45 – 4.47** – in relation to costs, if as part of the preliminary consideration of an application, a public interest test of whatever nature is passed, then that should be accepted by the Scottish Executive as an acceptance that it should bear the cost of mounting the examination, including production of transcripts and any further dissemination of proceedings (such as making materials available on the Internet as with the Private Bills procedure).

Such an approach would be consistent with statements elsewhere in the consultation document (for example paragraph 4.39, which states "the most important and complex schemes will generally have been considered in the context of the National Planning Framework").

In passing, BTP would observe that the consultation does not seek to address the issue of objector's expenses. The Private Bill procedure is clear that the Scottish Parliament is not in a position to award expenses against the promoter and that, save insofar as forming a legitimate head of claim for compulsory purchase





compensation purposes, the promoter will not be liable for objector's expenses unless the promoter agrees to the contrary as part of a compromise agreement.

Please refer to my comments at Q5 above in relation to affected parties seeking professional support. In addition to those considerations and to the equality of arms arguments which have been put in the context of review of the Private Bills procedure, BTP would suggest that consideration is given to either the Reporter or the Minister being empowered to require the promoter to reimburse or contribute towards an objector's expenses in the event that an objection is held to be substantiated or that a promoter has failed to adequately engage with the Objector to seek to resolve the objection with amendment to the scheme (whether by adjustment to the drafting of the Order or the introduction of reasonable and practicable mitigation measures).

- **4.53** – The question of whether affirmative order process is sufficient or whether a super-affirmative process is required is again a constitutional and political issue concerning the balance of the roles of the Scottish Ministers and the Scottish Parliament and something upon which BTP do not feel comfortable commenting.

As a general observation BTP would suggest that there should be greater clarity as to the distinction in purpose and relationship between Pre-Application consultation and the Objection Period. A clear statement of what is expected of both a promoter and of consultees at the Pre-Application stage is, BTP would suggest, necessary. Equally, the consequences of failure to meet those expectations should be spelt out.

In the case of a promoter, that might be rejection or delay of the application, or liability for expenses if the consultee subsequently objects and is held to be justified in doing so. In the case of a consultee, the consequences may be loss of the right to object.

I return the Respondent Information Form relating to the consultation paper and this response, duly completed.

Yours sincerely



PP Neil Amner  
Partner  
Infrastructure, Environment and Transport Department  
Biggart Baillie, Solicitors.

namner@biggartbaillie.co.uk

**Annex G - RESPONDENT INFORMATION FORM: Scottish Transport - Review of special parliamentary procedure provisions**

Please complete the details below and return it with your response. This will help ensure we handle your response appropriately. Thank you for your help.

Name: Neil Amner (On behalf of British Transport Police Force and British Transport Police Authority)

Postal Address: Biggart Baillie, Dalmore House, 310 St Vincent Street, Glasgow, G2 5QR

1. Are you responding: (please tick one box)

(a) ~~as an individual Y/N go to Q2a/b and then Q4~~

(b) on behalf of a group/organisation ~~Y/N~~ go to Q3 and then Q4

**INDIVIDUALS**

2a. Do you agree to your response being made available to the public (in Scottish Executive library and/or on the Scottish Executive website)?

Yes (go to 2b below) Y/N

No, not at all Y/N We will treat your response as confidential

2b. Where confidentiality is not requested, we will make your response available to the public on the following basis ( please tick one of the following boxes)

Yes, make my response, name and address all available Y/N

Yes, make my response available, but not my name or address Y/N

Yes, make my response and name available, but not my address Y/N

**ON BEHALF OF GROUPS OR ORGANISATIONS:**

3 The name and address of your organisation will be made available to the public (in the Scottish Executive library and/or on the Scottish Executive website). Are you also content for your response to be made available?

Yes ~~Y/N~~

~~No Y/N We will treat your response as confidential~~

**SHARING RESPONSES/FUTURE ENGAGEMENT**

4 We will share your response internally with other Scottish Executive policy teams who may be addressing the issues you discuss. They may wish to contact you again in the future, but we require your permission to do so. Are you content for the Scottish Executive to contact you again in the future in relation to this consultation response?

Yes ~~Y/N~~

~~No Y/N~~