

**IN THE MATTER OF
PENZANCE HARBOUR
PROPOSED NEW EXTENSION TO NORTH ARM
AND PASSENGER FACILITIES**

OPINION

1. I am instructed by Cornwall Council in relation to the proposed extension to the North arm of Penzance Harbour (the Harbour) and the creation and erection of other passenger related facilities on other parts of the Harbour, including a new covered walkway on the South Arm and Lighthouse Pier and a new passenger terminal on the quayside (the new works). I am asked for my opinion whether the new works can be carried out pursuant to an existing Harbour Revision Order (HRO) or whether a new HRO and/or other consents would be needed.
2. In the interests of economy (and with appropriate deference to the pre-existing knowledge of my Instructing Solicitor) in relation to the background to these matters, I shall not recount the historical context in which these proposals arise, but shall instead look at the continuing efficacy of the 2007 and 2009 HROs with respect to the new works and then consider what further or alternative consents and authorisations are needed.

The 2007 and 2009 HROs

3. The 2007 and 2009 Penzance HROs authorize the carrying out of the works (as defined in the Orders) until 2017 and 2019 (or such extended period as the Secretary of State may grant) respectively. My

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understanding is that the Council has not exercised the powers these HROs confer (in the latter case because grant funding has not been made available).

4. I have considered carefully whether the new works can be carried out without a new HRO. The description of the works authorized by the 2007 and 2010 HROs respectively does not encompass the new works by reference either to the written description (Articles 4) or the deposited plans in each case; and I am firmly of the view that they do not empower the Council to carry out any part of the North Arm extension.

REQUIRED AUTHORISATIONS AND CONSENTS

5. The proposed North Arm extension is to accommodate a substantial new building which may well involve jurisdictional considerations (particularly if the North Arm extension is situated outwith the low mean water line and the jurisdictional limit of the Council). In these circumstances, an HRO would need to provide for the accretion land to be incorporated within the jurisdictional limits of the Council in order for the Council to have appropriate planning and environmental controls over development in this area once the new works or such part of them has been completed. An HRO would also be needed to make provision for matters similar (if not identical) to those contained in Articles 5-17 (including a provision for a capital dredge and dredging maintenance) and Parts 2 and 3 of the 2009 HRO.
6. A licence will need to be sought from the Marine Management Organisation pursuant to the Marine and Coastal Access Act 2009 (MCAA), section 65 for the proposed works in and above the seabed and in the water. In this regard it should be noted that section 78 of the MCAA anticipates the MMO entertaining an application for an HRO and a license by way of a special procedure.

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7. Thus having regard to the above, there will, in my view, be a need for a new HRO pursuant to section 14 of the Harbours Act 1964 in order to extend the North Arm of the Harbour along with any necessary licenses from the MMO. Permitted development rights would avail the Council in relation to the proposed freight storage facility on the North Arm (and its extension once authorized and executed), the covered walkway and new passenger terminal as they are required for the handling of traffic (GPDO 1995, Part 17, Class B). If such work needs to be carried out prior to the *completion* of the principal works in relation to the North Arm extension, a suitably worded article giving such power to carry out subsidiary works in a new order have the effect of authorizing them, in any event.

8. Notwithstanding anything contained in any such order, or the existence of permitted development rights, there would, in my view, be a need for listed building consent in relation to the construction of the covered walkway on the grade 2* star South Arm and Lighthouse Pier. I am instructed that the proposed walkway will in essence be a cover over part of the width of the South Arm and Lighthouse Pier and along their length to the quayside. In order to make the structure secure enough to withstand overtopping and strong winds it will need to be of substantial construction and be firmly affixed. Assuming that this will involve the equivalent of engineering and/or building works of a substantial and reasonably permanent nature, including works which will necessitate changes to the surface and possibly parts of the substrata of the these buildings, I am of the view that they would be likely to constitute an extension to or alteration of the listed buildings and be likely to affect their character as buildings of special architectural or historic interest.

9. Conservation Area Consent will also be needed for the proposed demolition of the shell shop and café which are, I am instructed, within the Conservation Area.

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10. All listed buildings are considered to be, and are treated as being, of national importance. Thus, in particular cases Parliament has endowed the Executive, the Secretary of State, with the power to make regulations to regulate and prescribe procedures relating to the consent process so that careful control can be exercised (when and where necessary) at the highest level over the processing of applications and their determination in the national, rather than the local, interest.
11. Except as provided in sections 12 to 15 LBA 1990, an application for listed building consent shall be made to and dealt with by the local planning authority¹. S.14 of the LBA 1990 deals with the conduct of LPA's in this respect.
12. LBA 1990, s.12, provides that the Secretary of State may give directions requiring applications for listed building consent to be referred to him instead of being dealt with by the local planning authority; and a direction under this section may relate either to a particular application, or to applications in respect of such buildings as may be specified in the direction. Where a direction is made and applies, an application must be made for listed building consent to the Secretary of State² and the Secretary of State is under a duty to hear representations by the applicant or the LPA³. The Secretary of State's determination will be final (subject, of course, to any error of law on his part). In my opinion, the requirement in section 12 that the application must be made to the Secretary of State pursuant to his directive, is mandatory in nature and precludes LPA's from entertaining applications for listed building consent where the direction applies.
13. Where no direction applies, and the local planning authority (other than a London Borough) is charged with the jurisdiction to determine applications for listed building consent, there is a duty on that local

¹ LBA 1990, s.10

² IBID s.12(3)

³ IBID s.12(4)

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planning authority to notify the Secretary of State of applications⁴. In these circumstances, the Secretary of State may within the period of 28 days beginning with the date of the notification either direct the reference of the application to him under section or give notice to the authority that he requires further time in which to consider whether to require such a reference. Where this applies, the local planning authority shall not grant listed building consent until (a) the 28 days has expired without the Secretary of State directing the reference of the application to him or giving them notice that he needs more time or (b), that the Secretary of State has notified them that he does not intend to require the reference of the application.

14. The Listed Building Regulations 1990, Reg.13 (2) provides that in relation to applications by local planning authorities (as defined in the TCPA 1990) relating to the execution of works for the demolition, alteration or extension of listed buildings or for the demolition of unlisted buildings in conservation areas and it is a local planning authority that requires the consent in respect of a building in its area, the authority shall, subject to paragraph (7) of regulation 13, make application to the Secretary of State for that consent. I am of the opinion that this requirement is mandatory and precludes local planning authorities from determining their own applications.

15. A local planning authority in a non-metropolitan county is defined for the purposes of the listed building regime by reference to the Town and Country Planning Act 1990, s.1 as “the council of the county as county planning authority and the council of a district as district planning authority”. Given the matters set out in paragraph 1 above, Cornwall Council is a local planning authority. Hence reference in Regulation 13 to a local planning authority is a reference in present circumstances to Cornwall Council. Thus, if the Council should be the applicant for LBC in this case, Regulation 13 will apply.

⁴ LBA, 1990 s. 13 (1)

Environmental and Conservation Matters

16. There will be a need, in my opinion, for an environmental assessment pursuant to the Marine Works (Assessment of Environmental Effects) Regulations 2007 in relation to all matters to be covered by the new Order and all licensable activity (including the dredge) given the presence of substantial nature conservation interests in the immediate locality. In more general terms, there will also be a need to consider the effects of the proposals on the setting of the listed buildings and the Conservation Area in my opinion. It would be appropriate for this work to be scoped in conjunction with the MMO.

18th July 2012

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