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London
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Our reference: DC9916

26 February 2016

Dear Ms Peto,

**The Harbours Act 1964
The Dover Harbour (Constitution) Revision Order 2016**

1. The Marine Management Organisation (“MMO”) informs you that consideration has been given to the application for the Dover Harbour (Constitution) Revision Order 2016 (“the Order”) for which you applied on behalf of Dover Harbour Board (“the Board”), under Section 14 of the Harbours Act 1964 (“the 1964 Act”) on 6 January 2015.

Summary of Decision

2. The MMO has authorised the making of the Order with amendments and modifications which it considers necessary and appropriate.
3. The Order amends the constitution of the Board. It provides for the Board to consist of a body of nine members with experience in relevant matters. Three members will be appointed by the Secretary of State, one of whom will be appointed as the chair. Four members will be appointed by the Board, two of whom will be appointed as having particular knowledge or experience of, or ability in, the position of the port within the local community and local economy. The remaining two members will be the chief executive and one other senior officer of the Board. Provision is also made for the Board to consult the two advisory bodies known as the Port & Community Forum and the Dover Port Users Group.
4. The Order does not authorise a project for the purposes of Council Directive 85/337/EEC which is codified by Council Directive 2011/92/EU on the assessment of the effects of certain public and private projects on the environment and accordingly an environmental statement was not required.

Context

5. The Board is the statutory harbour authority for the Port of Dover (“the Port”).



6. The Port is a trust port established and governed by its own local legislation collectively known as the Dover Harbour Acts and Orders 1954 to 2014.
7. Modernising Trust Ports [second edition] (“MTP2”) issued by the Department for Transport (“DfT”) represents a code of good practice and trust ports should do all they can to comply with the guidance contained in it.
8. MTP2 describes a trust port as *“a valuable asset presently safeguarded by the existing board, whose duty it is to hand it on in the same or better condition to succeeding generations. This remains the ultimate responsibility of the board, and future generations remain the ultimate stakeholder”*.
9. The Board is responsible for the administration, maintenance, management and improvement of the Port. Under the current constitution most Board members are appointed by the DfT on behalf of the Secretary of State.
10. The Board currently consists of a chairman and four other members appointed by the Secretary of State, the chief executive officer and a further executive officer with the Board having discretion to appoint a further member.
11. On 9 April 2014 the Parliamentary Under-Secretary for Transport, Stephen Hammond MP (“the Minister”), delivered a speech at the Port which laid out the steps he considered were required to *“ensure an enduring and shared future for the Port and the local community”*. Those steps included community involvement, commercial development and regeneration.
12. The Board was successful in obtaining a harbour revision order in 2014 to provide modern and flexible financial powers which enable them to improve and expand further maximising the potential of the Port and community and contribute to regeneration.
13. The application for the Order continues the implementation of the Minister’s plan and would modernise the Board’s constitution facilitating the appointment of two directors who will be appointed as having particular knowledge or experience of, or ability in, the position of the port within the local community and local economy (“the community directors”).
14. The Order is sought to achieve objects 1 and 17 as specified in Schedule 2 to the 1964 Act:

Object 1

“Reconstituting the harbour authority by whom the harbour is being improved, maintained or managed or altering their constitution, or establishing, as the harbour authority, in lieu of the existing one, an existing body designated in that behalf or a body constituted for the purpose.”

Object 17

“Any object which, though not falling within any of the foregoing paragraphs, appears to the [MMO] to be one the achievement of which will conduce to the efficient functioning of the harbour.”

15. In summary the Order would make changes to the constitution of the Board enabling the implementation of the Minister's plan which is considered to be in line with policy and conducive to the efficient and economical operation, maintenance, management and improvement of the Port.

Application procedure

16. On 6 January 2015 an application for the Order was submitted by the Board to the MMO.

17. Notice of the application for the Order was advertised in the London Gazette on 8 January 2015 and in the Dover Express on 8 and 15 January 2015.

18. In addition the MMO consulted directly with:

- DfT;
- Dover District Council (DDC);
- Dover Town Council (DTC);
- South East Local Enterprise Partnership (SELEP);
- MP for Dover and Deal;
- Chamber of Shipping;
- Royal Yachting Association (RYA);
- Trinity House; and
- British Ports Association (BPA);

19. The MMO received five objections and four representations during the statutory 42 day period provided for in Schedule 3 to the 1964 Act.

20. Two supporting representations were made by the DfT and the BPA.

21. The remaining objections and representations were received from:

- A member of the public;
- RYA;
- DTC;
- DDC;
- Mr Elphicke MP;
- Dover Peoples Port Trust; and
- Dover Harbour Board Unite Shop Stewards Committee.

22. Following the expiry of the period for objections set out in the 1964 Act, the Board engaged with the DfT and with those who had responded to the consultation in an effort to resolve the concerns which had been raised.

23. Following extensive discussions between the parties a revised draft Order was submitted by the Board to the MMO.

24. As a consequence of the discussions between the parties and the modifications to the Order a number of objections and a representation were withdrawn. The

objections and opposing representation which remain for consideration by the MMO in its determination are those made by:

- RYA;
- DTC; and
- A member of the Public

25. The remaining objections and opposing representation can be summarised as follows:

DTC

26. DTC responded within the statutory period provided by the 1964 Act to object to the Order highlighting three areas of concern. Those areas of concern related to the composition of the Board, the appointment of directors (in that it was felt that the draft at the time did not establish an open and transparent arm's length process for the appointment of directors), and the lack of true community involvement.
27. Following a series of discussions and subsequent modifications to the proposed Order outlined above, DTC wrote to the MMO on 15 January 2016 indicating that they were keen to see reform of the body move forward with "community directors" taking their seats on the Board.
28. The letter, which was in response to a letter from the MMO dated 6 January 2016 seeking comments in respect of the modifications made to the Order, makes clear by virtue of its content, that the points of objection as originally submitted within the statutory period were no longer an issue. However DTC now raised two new points which, if met, would allow DTC to withdraw their objection to the Order as drafted.
29. The two new points related to Secretary of State's proposed appointments to the Board following the Order coming into force. Specifically, confirmation was sought that the directors appointed by the Secretary of State would not be those who had served immediately before the new constitution date. The other point related to the appointment of the Chairman, though this was subsequently accepted by DTC in their correspondence to the Secretary of State on 5 February 2016.
30. It appears from the new points raised that DTC consider the existing members of the Board would remain in the majority for at least 2 more years allowing them to obstruct further reform and development of a stronger relationship with the community.
31. Whilst the MMO considers the two new points were not made within the time period for making objections, it has had regard to them when making its determination.

MMO response

32. The MMO notes the content of a letter dated 5 February 2016 from DTC to Robert Goodwill MP in which DTC acknowledges and accepts his support for the Order. The proposed appointment by the Secretary of State of the new chair and two directors whose appointments end on 12 June 2018 was accepted by DTC. The letter also accepts the proposed appointment of the two new community directors

but reiterated that DTC remained opposed to the reappointment of the two directors whose terms end on 23 May and 30 September 2016 respectively.

33. DTC seek assurance that neither of those two directors will be reappointed or have their terms extended beyond the expiry of their agreed terms of office in autumn 2016.
34. The MMO notes the content of the DfT's letter to the MMO dated 27 January 2016 and in particular reference to the Minister's firm support for the Order as drafted, specifically, the structure of the Board in terms of appointments to be made by the Secretary of State and those to be made by the Board and the two community directors.
35. Further, the MMO notes that the DfT itself supports the approach adopted in section 4 of the Order whereby current Board members continue until the expiry of their existing appointments, stating that *"such an approach allows for the continuity and for succession to the Board to be managed in an orderly way as Board members appointments come to their agreed expiry date"*.
36. The Order as drafted appears to the MMO to reflect the guidance set out in MTP2. This includes relevant principles of the UK Corporate Governance Code (UKCGC) which are referred to and adopted within the standards contained within the MTP2.
37. All directors are required to abide by the Nolan principles governing public life.
38. The MMO notes that directors are eligible for reappointment although reappointment is not automatic. Paragraph 10 of the schedule to the Order "Incidental provisions relating to the Board" states *"any person who has held office as a director is eligible for reappointment in accordance with any guidance issued by the Secretary of State from time to time"*.
39. In this regard paragraph 3.3 of MTP2 sets out the guiding principles of appointment and paragraph 3.4 deals with length of term and reappointment:

"Subject to continued eligibility, each board member may be appointed for a maximum of three terms (i.e. reappointed twice), although reappointment for the third term should be only in exceptional circumstances. Reappointment should never be automatic. No board member should be reappointed for a second or third term unless the chairman is satisfied that the board consider not only that the member in question has performed satisfactorily during the current term of office and has a good attendance record, but also that a new appointee would be unlikely to offer greater value to the board. This test must be emphatically passed in the exceptional event of a board member being reappointed for a third term. In such an event the board should also have the option to consider the incumbent against a wider selection of candidates through a more formal selection process."

40. Compliance with MTP2 will be monitored by DfT.

41. Paragraph B.3 of the UKCGC in relation to 'Appointments to the Board' states:

"The board should satisfy itself that plans are in place for orderly succession for appointments to the board and to senior management, so as to maintain an

appropriate balance of skills and experience within the company and on the board and to ensure progressive refreshing of the board.”

42. The MMO notes that the directors in question are effectively in their first and second terms respectively and as such would be, subject to the policy set out in MTP2, available for reappointment under the current constitution upon expiry of their terms in any event. The MMO also notes that were the Order not to be made the “community directors” could not be appointed to the Board and the status quo would be maintained.
43. In this context and taking into account all the circumstances the remaining two points of objection appear to the MMO to be inconsequential or “trivial” for the purposes of the 1964 Act.
44. In conclusion the MMO is satisfied that the eligibility of directors for reappointment are matters which more appropriately fall to the Board to be determined in accordance with the existing policy framework.
45. The MMO is satisfied for the reasons set out that there are sufficient safeguards in place to ensure an open and transparent process when the term of the two individuals (or indeed any of the Board members) comes to an end and that it would be inappropriate to usurp the function of the Board in this regard.

RYA

46. The RYA responded within the statutory period provided by the 1964 Act to object to the Order stating that it wished to be satisfied that the proposals would not adversely affect recreational boating interests.
47. The objection was based on three main grounds which can be summarised as follows:
 - Recreational boating activities should be listed as a board competence in the Order;
 - Although there was an obligation to create an alternative bodies (Port User Group (PUG) and Port & Community Forum (PCF) there was no specific obligation to maintain or create an alternative body in the event the PUG ceased to exist; and
 - The wording which related to consultation with advisory bodies was not appropriate in the form proposed. The RYA proposed alternative wording which related to consultation of advisory bodies.
48. Following discussions between the RYA and the Port modifications to the wording of article 9 of the Order were proposed.
49. The RYA wrote on 4 August 2015 to provide an update in respect of their position at that stage. The letter stated that agreement had been reached on most aspects of article 9 but that the extent of the Board’s obligation to consult with its advisor bodies remained unresolved.

50. In January 2016 the MMO wrote to the RYA seeking comments in respect of the modifications contained in a revised Order submitted following discussions with DfT and bodies who had made representations during the statutory period.
51. The RYA responded in a letter dated 20 January 2015 confirming their satisfaction with all modifications to the Order with the exception of those made to article 9(1), specifically, that the wording “*in the Boards reasonable opinion could significantly affect*” which they considered was inadequate.
52. In support of their position the RYA have provided a list of precedents demonstrating the use of alternative wording in a number of previous harbour revision orders.

MMO response

53. The MMO notes that the remaining ground of objection relates to the wording of article 9(1) and in particular the circumstances in which the Board are required to consult the advisory bodies.
54. The MMO notes the agreement of the Board to the extent that it accepts the use of the word ‘substantial’ in place of the word ‘significant’ where it appears in article 9(1) on the basis that it may better convey that the statutory duty should be confined to important matters.
55. Further, the MMO has regard to the concerns of the Board that a requirement to consult extensively on multiple topics would seriously constrain the Boards ability to run the Port effectively and that the alternative text proposed by the RYA may lead to an expectation that most matters would be consulted on which could give rise to ongoing dispute as to whether the statutory duty has been complied with.
56. Section 1.5 of MTP2 considers the role of stakeholders and consultation. Section 1.5.2 and 1.5.3 respectively state:

“We expect trust ports to identify their stakeholders and to include them in formal consultation on significant decisions. Stakeholders should also be consulted on the possible forms and extent of any stakeholder benefit that the board proposes....”

“The Department does not seek a position whereby trust port boards are faced with multiple irreconcilable demands from stakeholders, or that each and every decision must be consulted on in depth. Boards must be free ultimately to make decisions on all issues facing the port, having weighed the various representations and advice received....”

57. The MMO notes the specific references in MTP2 to consultation on “*significant decisions*” and the clear steer that the DfT does not seek a position where “*each and every decision must be consulted on in depth*”. The MMO recognises that what is significant will no doubt differ between stakeholders but considers that the Board is ultimately best placed to consider matters in the context of the entire undertaking and to do so balancing the potentially conflicting interests of a wide range of stakeholders.

58. Further the MMO accepts that the Port of Dover is a Port of national significance of a scale and magnitude of its own. The MMO considers this fact sets it apart from those detailed in the list of precedents provided by the RYA and notes there are other examples of other ports such as Port of Tyne, Shoreham and Poole where the wording suggested is not applied.

59. The MMO is satisfied for the reasons set out that the article as drafted and containing such modifications as the MMO considered necessary, is appropriate in the interests of the efficient functioning of the Port.

A member of the Public

60. A member of the public responded within the statutory period provided by the 1964 Act making representation in respect of the Order on a number of grounds. These grounds can be summarised as followed:

- The method of selecting “community” directors;
- The appointment of two “community” directors is inadequate and should be increased to four; and
- Community directors should be elected by the community itself by local ballot.

61. The MMO notes the content of the DfT’s letter to the MMO dated 27 January 2016 and in particular reference to the Minister’s firm support for the Order as drafted, specifically, the structure of the Board in terms of appointments to be made by the Secretary of State and those to be made by the Board and the two community directors.

62. Further, paragraph 3.3 of MTP2 sets out guiding principles for appointments to trust port boards. In particular paragraph 3.3.3 sets out the basic process which should be adopted to provide a simplified, consistent, open and accountable system for board appointments. That process specifies that the appointment of board members should be by a panel and makes clear alongside paragraph 3.3.2 that the Board has a duty to ensure the correct balance of skills and competencies across the board:

“No appointment will be made to any board to provide representational rights for specific groupings or interests. All appointments must result from an open and competitive selection process operated by a panel containing at least one member independent of the port.”

“The objective is to obtain a board that is independent and fit for purpose rather than representative of particular interests. The intention is to open up the process to allow trust ports to range wider to locate the expertise that they need to function effectively”.

63. The MMO is satisfied for the reasons set out that the Order as drafted in respect of the number and method of appointment of directors, including “community” directors, is in accordance with the relevant policy framework.

MMO consideration

64. Section 14 (1) of the 1964 Act provides for an order to be made under this section (“a harbour revision order”) in relation to a harbour which is being improved, maintained or managed by a harbour authority in the exercise and performance of statutory powers and duties for achieving all or any of the objects set out in Schedule 2 to the 1964 Act.
65. By virtue of section 14 (2)(a) a harbour revision order may not be made in relation to a harbour unless the MMO is satisfied that an appropriate written application has been made by the authority engaged in improving, maintaining or managing it or by a person appearing to it to have a substantial interest or body representative of persons appearing to it to have such an interest.
66. By virtue of section 14(2)(b) a harbour revision order shall not be made in relation to a harbour unless the MMO is satisfied that the making of the order is desirable in the interests of securing the improvement, maintenance or management of the harbour in an efficient and economical manner, or of facilitating the efficient and economical transport of goods or passengers by sea or in the interests of the recreational use of sea-going ships.

MMO’s decision

67. The MMO is satisfied that the Order meets the requirements of section 14(1) and 14(2)(a) of the 1964 Act.
68. The MMO is satisfied for the reasons set out by the Board in their statement of support and summarised above that the making of the Order is desirable for the purposes of section 14(2)(b) of the 1964 Act and should be made
69. The MMO authorises the making of the Order with amendments and modifications which it considers necessary and appropriate.

Challenge to decisions

70. Information on the right to challenge this decision is set out in the Annex to this letter.

Yours sincerely



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Annex

Right to challenge decisions

Right to challenge orders made under sections 14 and 16 of the Harbours Act 1964

Any person who desires to question the making of the Order on the ground that there was no power to make the Order or that a requirement of the Harbours Act 1964 was not complied with in relation to the Order, may within 6 weeks from the date on which the Order becomes operative make an application for the purpose to the High Court or the Court of Session, as the case may be.

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