

Appendix 6

Legal analysis in relation to putting the project on hold

- 1 If elements of the project are placed on hold (for example, from York Place to Newhaven), there are likely to be associated costs (for example, making good any work commenced on this section) to be taken into account. This will include the costs of compliance with the Edinburgh Tram (Line One) Act 2006 and Edinburgh Tram (Line Two) Act 2006 ("the Tram Acts").
- 2 The Tram Acts contain identical provisions (save for some minor distinctions as to the work scope envisaged by each Act and some minor landscape and habitat management plan in the Line One Act). Both Acts confer powers on the "...*authorised undertaker*..." which is defined as: "... *the Council, or any other person who by virtue of an agreement made under section 68 (Powers of disposal, agreements for operation, etc) may exercise any power conferred by this Act...*". In the present case, that definition would be interchangeable with tie.
- 3 Therefore, regardless of how the parties chose to terminate their relationship, it may be necessary to consider placing large parts of the ETN into a frozen state; that is to say, "*on hold*", until a further solution can be considered. It will then be necessary to consider the likely period for such stasis.
- 4 Clearly, if the period is a short one (say, a period to put in place a replacement contractor) then it may well be that CEC/tie considers small measures such as temporarily asphaltting over rails and erecting security fencing. However, if the period is of any significance (be it a much longer period or even a near permanent mothballing of the ETN) then other considerations may apply.
- 5 In order to undertake such an operation before assessing the likely costs of placing the ETN "on hold", it is necessary to consider the relevant provisions of the Tram Acts to understand how they address abandonment (be that short term or long term/semi-permanent).
- 6 The relevant provisions of the Acts are as follows:

Section 1(1): "*The authorised undertaker may construct and maintain the scheduled works or any part of them, as specified in schedule 1.*" The "*scheduled works*" are the details of what construction work is required to construct Lines One and Two and are listed in Schedule 1 of each Act."

Section 1(5): "*The authorised undertaker may remove any works constructed by it pursuant to this Act which have been constructed as temporary works or which it no longer requires.*"

Section 11: *"If the authorised undertaker permanently ceases to operate any of the authorised road tramways ("the discontinued road tramway"), it shall as soon as reasonably practicable and unless otherwise agreed with the road works authority-*

(a) *remove from the road in which the discontinued tramway is laid the rails and any other works, equipment and apparatus that have become redundant, and*

(b) *restore, to the reasonable satisfaction of the road works authority, the portion of the road along which the discontinued tramway was laid"*

Section 68 (1): *"The authorised undertaker may sell, lease, excamb or otherwise dispose of, on such terms and conditions as it thinks fit, the whole or any part of the authorised works and any land held in connection with them or the right to operate or maintain the authorised tramway under this Act."*¹

Section 68 (2): *"Without prejudice to the generality of subsection (1), the authorised undertaker may enter into and carry into effect agreements with respect to all or any parts of the authorised works, authorised tramway and tramway premises, concerning--*

(a) *their construction, maintenance, use and operation, by any other person,*

(b) *other matters incidental or subsidiary to or consequential on them, and*

(c) *the defraying of, or the making of contribution towards, the cost of (a) or (b) by the authorised undertaker or any other person."*²

7 In the first instance, there is nothing in Tram Acts which expressly prevents the CEC/tie from placing the ETN project on hold or, for that matter, mothballing the project, subject always to the limitation cap placed upon the legislation (which may be extended in any event). Indeed, a key observation from the above is that it is not mandatory for the Council/tie to construct the ETN (section 1(1)). Both Acts contain provisions which only bite in a scenario where CEC/tie has decided to construct the ETN.

8 Section 1(5) gives the CEC/tie power to remove works: *"...which it no longer requires..."*. The only obligations on the CEC/tie, should it decide to mothball the ETN, are set out in section 11 which are simply defined as: (i) removing redundant ETN apparatus/equipment and thereafter (ii) reinstating the roads by removing the rails and finishing to the satisfaction of the local authority.

¹ This is actually section 69 in Edinburgh Tram (Line One) Act).

² Again, this is actually section 69 in Edinburgh Tram (Line One) Act).

- 9 Undoubtedly, the carrying out of such work is not straightforward as it will involve such operations as the removal of the existing (defective) trackwork along Princes Street, which of itself may be an unpopular and difficult logistical exercise (given the usual embargoes).
- 10 Depending upon the length of the intended "freeze" it may be that CEC/tie has to consider the dismantling and/or demolition of major structural items. For example, there may be a benefit in removing a newly-completed bridge (which may have had a significant build price) when weighed against the on-going maintenance costs and third-party liabilities to the public.
- 11 It will also be necessary to consider which contractor will be undertaking such work as this is highly likely to affect price. For example, it may well be the case (depending upon the nature of the separation) that the existing members of Infraco agree to undertake the work as part of a settlement; alternatively, they may refuse outright to co-operate. Similarly, if CEC/tie were to employ another to dismantle and render safe the works completed by Infraco, this may well inflate the price as the result of the new contractor's unwillingness to warrant earlier work, or in terms of claims for unforeseen problems in dealing with another's work.
- 12 However, whilst that exercise may be difficult in terms of scope, tie has undertaken a preliminary exercise, as part of its report, to predict the costs of placing the ETN on hold. tie has assessed the potential cost of putting on hold the section of the network from York Place to Newhaven as c. £4.5m [*this figure is being reviewed by tie*]. The potential cost of putting on hold all of the project has been assessed at c. £11.9m [*this figure is being reviewed by tie*].

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