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CLLS PLANNING AND ENVIRONMENTAL LAW COMMITTEE RESPONSE TO THE DCLG NSDP CONSULTATION

The City of London Law Society ("CLLS") represents approximately 15,000 City lawyers through individual and corporate membership including some of the largest international law firms in the world. These law firms advise a variety of clients from multinational companies and financial institutions to Government departments, often in relation to complex, multi jurisdictional legal issues.

The CLLS responds to a variety of consultations on issues of importance to its members through its 19 specialist committees. The attached response in respect of the DCLG consultation "Nationally significant infrastructure planning: extending the regime to business and commercial projects" has been prepared by the CLLS Planning & Environmental Law Committee.

THE CITY OF LONDON LAW SOCIETY

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Consultation response form

How to respond:

The closing date for responses is Monday 7 January 2013.

This response form is saved separately on the DCLG website.

Responses should be sent preferably by email:

Email response to **majorinfrastructure@communities.gsi.gov.uk**

Written response to:

Alison Cremin

Department for Communities and Local Government

Infrastructure and Environment Team

Zone 1/J6 Eland House

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Telephone 0303 4441619

About you

i) Your details:

Name:	

Position:	
Name of organisation (if applicable):	
Address:	
Email:	
Telephone number:	

ii) Are the views expressed on this consultation an official response from the organisation you represent or your own personal views?

Organisational response

iii) Please indicate which best describes you or your organisation:

District Council

Metropolitan district council

London borough council

Unitary authority/county council/county borough council

Parish council

Community council

Non-Departmental Public Body

Planner

Professional trade association

Land owner

Private developer/house builder

Developer association

Voluntary sector/charity

Residents' association

Other

(please comment): City of London Law Society

iv) What is your main area of expertise or interest in this work?

(please comment):

Representative body for Solicitors in the City of London practising in (among other areas) Major Development, Planning, Environment and Infrastructure fields

v) Would you be happy for us to contact you again in relation to this questionnaire?

Yes

We would very much welcome a meeting to discuss the issues we have raised.

Consultation Questions

Please refer to the relevant parts of the consultation document for narrative relating to each question.

1 **Q1 DO YOU AGREE THAT THE PROPOSED LIST OF DEVELOPMENT TYPES SET OUT IN ANNEX A SHOULD BE PRESCRIBED IN REGULATIONS IN ORDER TO MAKE THEM CAPABLE OF A DIRECTION INTO THE NATIONALLY SIGNIFICANT INFRASTRUCTURE REGIME?**

1.1 **Yes/No**

Yes

1.2 **Comments**

General

1.2.1 We agree with the legal proposition that direction by regulation is required to provide the "prescribed" descriptions of business or commercial projects to enable the mechanisms currently proposed by the Growth and Infrastructure Bill ("GIB")/Planning Act 2008 to apply.

List should not be exhaustive

1.2.2 We do not, however, consider that the list of development types within Annex A to the Consultation Paper should be exhaustive.

1.2.3 To limit the categories of development to which the regime may apply by reference to an exhaustive list would be unnecessarily restrictive. Problems to this effect have already been encountered under the current Planning Act regime. By way of example, the Thames Tunnel, required in order to meet UK obligations under European legislation did not fall within any category of development originally prescribed within the Planning Act. Promotion of a specific Statutory Instrument was necessary in order to enable the provisions of the Act to apply. This was unnecessarily cumbersome and, for a time, created avoidable and unnecessary delay and uncertainty.

1.2.4 We therefore suggest a catch all provision within the proposed regulations to enable the Secretary of State to specify any other form of development, being a business or commercial development, not falling wholly within a category (or threshold) already prescribed, which he considers to be of "National Significance".

1.2.5 Alternatively, the prescribed list of development types should be very significantly extended.

Development types within the list plainly falling within existing use classes should be identified by reference to those classes

1.2.6 The above having been said, there is a view that the categories of development so far as prescribed in Annex A should be prescribed more precisely. On this basis, in the proposed Regulations, it would be important to tie the first three categories (offices and research and development facilities; manufacturing and processing proposals; and warehousing, storage and distribution) to the relevant classes (B1(a) and (b); B1(c) and B2; and B8) in the Town and Country Planning (Use Classes) Order 1987. This is hinted at in footnote 6 to Annex A but should be

made explicit to provide certainty. For example, the Use Classes Order includes the expression "industrial process", which is a well understood and defined term.

Important for future flexibility to make consequential amendments to GPDO to accommodate rights to modify business and commercial developments carried out under a DCO

1.2.7 In order to provide future flexibility, where development is undertaken under a DCO and permitted development rights under the Town and Country Planning (General Permitted Development) Order 1995 would apply to development of that description, it should be made clear that permitted development rights will apply equally to development carried out under a DCO. This would naturally be simpler if the suggestions at 1.2.6 above are accepted.

Important for Housing and Retail development to be capable of benefitting from the new procedures

1.2.8 Large scale housing and retail development can each help achieve or support growth in a manner no less capable of being of national significance than other categories of development proposed to be prescribed.

1.2.9 Housing development could, for example be essential to supporting a major new R and D or manufacturing plant yet on current proposals could not even benefit from "associated development" provisions of the proposed Planning Act extension.

1.2.10 It is odd that it is proposed to prescribe leisure and tourism proposals of appropriate scale yet not retail proposals. The planning issues and potential contribution to growth and the national economy are similar in each case.

2 Q2 DO YOU THINK THAT THRESHOLDS SHOULD APPLY AND IF SO, WHETHER THOSE IN COLUMN 2 OF THE TABLE AT ANNEX A ARE APPROPRIATE? IF NOT, HOW SHOULD THOSE BE CHANGED?

2.1 **Yes/No**

Yes

2.2 **Comments**

Thresholds seem unduly high

2.2.1 We agree that there should be thresholds. These should not, however, be set too high such as to exclude smaller projects which are still of national significance.

2.2.2 It is important to bear in mind that it will not be the case that all projects which exceed the threshold will become subject to the development consent procedure. First, it is for the developer to decide whether to make a request and, in many cases, a request will not be made. Secondly, if a request is made, the Secretary of State may only make the direction if he thinks that the project is of national significance.

40,000 threshold seems arbitrary

2.2.3 The use of 40.000 as a benchmark threshold across a variety of proposed types of development seems anachronistic and arbitrary – especially when applied to stadium seats in one instance as well as to gross internal floorspace metrage in another. A benchmark threshold at this level would be capable of excluding some

types of development which one would expect to be included yet including some which one would be surprised to see excluded.

2.2.4 A previous government accepted that the Brighton and Hove Community Stadium at Falmer (less than 30,000 seats) comprised development of national significance sufficient to displace national park policy, whereas the current proposal would exclude such a development by setting the threshold at 40,000 seats.

2.2.5 A 40,000m2 warehouse and distribution park is not an especially large development of its kind, yet a 100 hectare leisure, or tourism facility or a 40,000m2 conference and exhibition centre would be. Depending on location and purpose developments above and below these thresholds could be of national significance.

Area based and floorspace thresholds

2.2.6 It seems odd to have an area-based threshold for the leisure, tourism and recreation category but a floorspace-related threshold for most other categories.

2.2.7 If thresholds are to be applied, there would seem benefit in having both floorspace and area based thresholds capable of applying on alternative bases.

Mixed use threshold

2.2.8 We have a concern about the level of the threshold related to the final category (mixed use). We question whether it is logical for, say, a mix of offices and manufacturing uses to be required to meet a threshold which is 2½ times higher than that for those uses separately.

2.2.9 The mixed use category is for developments including one or more other prescribed uses. Yet the floorspace threshold is, at 100,000m2, more than two and a half times the scale of any other category. This seems illogical. A 79,000m2 development comprising for example 39500m2 of offices and R and D and 39500m2 of conference centre would not qualify but a 40,000m2 office development would.

2.2.10 A mixed use proposal of 40,000 square metres (or less) may be just as likely to be of national significance as a single use office or a manufacturing project of the same size.

Consistency with matters proposed to be taken into account

2.2.11 The consultation paper suggests that the range of matters proposed to be taken into account when considering a relevant request include "the rarity and importance" of a proposed mineral and "whether issues of national security or which involve foreign governments are involved" as well as whether or not "the location of the proposed project" would give rise to "substantial cross boundary or national controversy".

2.2.12 It seems to us that if any of the above criteria are met, the thresholds proposed are either unnecessary or set too high. These are plainly criteria going directly to national interest and significance. It would be unfortunate if thresholds set for administrative convenience were to act to disqualify developments of genuinely national significance from the new procedure.

3 Q3 DO YOU AGREE WITH OUR PROPOSED ASSESSMENT OF THE FACTORS THAT THE SECRETARY OF STATE WOULD NEED TO TAKE INTO

ACCOUNT WHEN CONSIDERING WHETHER A PROJECT IS NATIONALLY SIGNIFICANT?

3.1 **Yes/No**

Yes but the list should not be exhaustive.

3.2 **Comments**

3.2.1 The list of factors to be taken into account is helpful and a useful checklist.

3.2.2 Nevertheless, we suggest that guidance should be provided to make clear that the factors to be taken into account should expressly include "other factors going to the significance of the project at a national level"

4 **Q4 DO YOU AGREE THAT RETAIL PROJECTS SHOULD NOT BE A PRESCRIBED BUSINESS OR COMMERCIAL PROJECT?**

4.1 **Yes/No**

No

4.2 **Comments**

4.2.1 Please see generally our comments in relation to Question 1.

4.2.2 Retail uses often underpin town centre regeneration projects and can provide an essential element within mixed use development projects.

4.2.3 It is notable that if one considers the uses prescribed and those excluded from the prescribed list, development to replace that destroyed by the Bishopsgate Bomb may have been capable of falling within the newly proposed DCO category but development to replace that destroyed by the Manchester Bomb would not. This is, at best, anachronistic.

5 **Q5 DO YOU AGREE THAT GOVERNMENT SHOULD NOT PREPARE A NATIONAL POLICY STATEMENT (OR STATEMENTS) FOR THE NEW CATEGORY OF BUSINESS AND COMMERCIAL DEVELOPMENT?**

5.1 **Yes/No**

No

5.2 **Comments**

5.2.1 We agree that one or more national policy statement(s) for the new category of business and commercial development, should not be a pre-requisite to the new process applying. Nevertheless, we do not consider that national policy statements should be ruled out. On the contrary, they may for some forms of development be very helpful in achieving the purpose (certainty and expedited delivery) of the DCO process.

5.2.2 An underlying objective of National Policy Statements for the purpose of DCO processes under the Planning Act 2008 was, by giving national policy support to particular developments or categories of development, substantially to remove the question of need for particular facilities from debate post application. This, in turn, was designed to expedite procedures and to reduce scope for legal challenge.

5.2.3 We recognise that there are procedural complexities associated with national policy statements, including need for sustainability appraisal and/or SEA. We recognise also that these may give rise to delay. Nevertheless, absence of national policy statements, even if non-site-specific, and reliance on general, generic policies within the NPPF creates scope for policy debate. Debate of this kind has in the past served to delay rather than expedite post application consenting processes for developments. Absence of specific national policy endorsement may also suggest absence of true government support for the proposals concerned and undermine the robustness of the Secretary of State's decision on national significance in any given case.

5.2.4 If it is not considered practical to prepare another NPS at the outset then in the absence of NPS it will be essential that the Secretary of State firmly establishes or endorses the national significance and need for each scheme which is the subject of a Direction under the new procedure in his Direction letter. This would at least go some way towards enabling the DCO Examination process to operate as efficiently for business/commercial schemes as it currently does for NSIPs which have the benefit of a National Policy Statement.

6 Q6 DO YOU HAVE ANY OTHER COMMENTS ON THE PROPOSALS THAT YOU WOULD LIKE TO MAKE?

6.1 **Yes/No**

Yes

6.2 **Comments**

Importance of the process being subject (as proposed) to promoter opt in

6.2.1 We note that the new process is to be subject to and initiated by the project promoter requesting that it apply. We consider this to be of fundamental importance.

6.2.2 DCO processes can be cumbersome, expensive, bureaucratic and time consuming. They are also in their infancy with very few orders yet made and even fewer implemented. The degree to which DCO procedures are vulnerable to challenge in the Courts has also yet to be fully ascertained.

6.2.3 From a promoter's perspective, DCO processes are justifiable (for example) to overcome local authority indecision, to secure powers of compulsory purchase and to wrap up all relevant consents in one procedure. They are neither suitable nor necessary for all developments falling within the types described, particularly where the local planning authority is supportive, few consent or order procedures are required and the promoter owns all requisite land.

6.2.4 The right of promoters of development to decide whether to use existing non-DCO processes must therefore be preserved and it is essential that the new procedure applies only on Promoter request.

Importance of approach to full range of development consent order elements being spelled out

6.2.5 The development consent order process under the Planning Act 2008 allows for compulsory purchase of third party land. Normally, in relation to mainstream

development, compulsory purchase powers are available only to utility undertakers and public authorities.

6.2.6 Many promoters of the types of development proposed to be prescribed are likely to be private sector organisations. Clearly, the appropriateness of granting to an individual organisation powers of compulsory purchase can be taken into account by the Secretary of State in deciding whether or not to grant a DCO. In practice, the robustness of a promoter's financial statement will also be a consideration on the part of PINS when deciding whether or not to accept an application.

6.2.7 Nevertheless, by the stage of either of the above decisions, significant blight may, in practice, have arisen. Promoter robustness does not seem to be one of the matters to be taken into account when considering whether a development qualifies for the new procedures.

6.2.8 We would therefore suggest the regulations include powers for the Secretary of State to consider the legal and financial soundness of the proposed promoter of the proposed DCO before his decision on whether to allow the DCO procedure to apply.

Importance of not excluding housing from the types of project to which the new procedure is capable of applying

6.2.9 Sustainable forms of housing development, particularly of large scale, are central to delivery of national economic, growth and sustainable development policies.

6.2.10 The most sustainable developments include housing, employment, energy generation and community uses co-located close to public transport hubs. By so doing, sustainable, ecologically friendly communities are created. The New Towns and Garden Cities created in the 20th Century are excellent examples of such developments.

6.2.11 Such developments traditionally require critical mass in order to succeed and often straddle local authority boundaries. They tend to give rise to substantial cross-boundary or national controversy; to be of a scale running to hundreds of hectares; and potentially give rise to widespread environmental effects.

6.2.12 In the East of England Region, one of the reasons for a shortfall in housing delivery is historic squabbling between unitary authorities, who wanted developments to proceed, and county authorities who vehemently opposed them. Delivery of new settlements sufficient to house tens of thousands of people have been delayed. This has undoubtedly had implications for growth.

6.2.13 We suggest that it is both illogical and counterproductive for major housing developments, particularly of mixed use, sustainable community scale and nature, to remain outwith the scope of the types of development to which the Bill proposes the new procedures will apply.

List of types of development to which the new procedure applies not to be exhaustive

6.2.14 Our comments in response to Question 1 refer.

Thresholds to be adjusted or disapplied so as to remove anomalies and not to exclude developments of genuine national significance

6.2.15 Our comments in response to Question 2 refer.

Factors suggested to be taken into account when determining whether the new procedure applies not to be exhaustive

6.2.16 Our comments in response to Question 3 refer.

Retail and predominantly retail developments not to be excluded from the new procedures

6.2.17 Our comments in response to Question 4 refer.

Additional National Policy Statements not to be ruled out

6.2.18 Our comments in response to Question 5 refer.