The City of London Law Society

4 College Hill
London EC4R 2RB

Tel +44 (0)20 7329 2173
Fax +44 (0)20 7329 2190
DX 98936 – Cheapside 2

mail@citysolicitors.org.uk

www.citysolicitors.org.uk

CLLS Planning & Environmental Law Committee response to Department for Communities and Local Government's Technical consultation on planning

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. This response in respect of the Department's Technical consultation on planning issued 31 July 2014 has been prepared by the Planning & Environmental Law Committee.

Section 1: Neighbourhood planning

Would you like to respond to the consultation on neighbourhood planning?

Yes ☒ No ☐

Time limit for taking decisions on the designation of a neighbourhood area

Question 1.1: Do you agree that regulations should require an application for a neighbourhood area designation to be determined by a prescribed date? We are interested in the views of local planning authorities on the impact this proposal may have on them.

Comments

In principle we agree but we have some reservations about the introduction of a prescribed date in areas of dense urban populations where local planning authorities frequently find themselves faced with overlapping or competing neighbourhood area applications. We think in circumstances where the local planning authority is faced with such circumstances the time limit should be extended automatically to, say, 20 weeks.

Question 1.2: If a prescribed date is supported do you agree that this should apply only where:

- **the boundaries of the neighbourhood area applied for coincide with those of an existing parish or electoral ward; and**
- **there is no existing designation or outstanding application for designation, for all or part of the area for which a new designation is sought?**

Comments

Yes – see our response to Q1.1; we would add a third criterion namely, that during consideration of the relevant application for designation no competing or overlapping application is received.

Question 1.3: If a date is prescribed, do you agree that this should be 10 weeks (70 days) after a valid application is made? If you do not agree, is there an alternative time period that you would propose?

Comments

10 weeks may be a reasonable timeframe in straightforward cases. As indicated above, there should be a longer prescribed date (say, 20 weeks) for instances where there are overlapping/competing applications.

Question 1.4: Do you support our proposal not to change the period of six weeks in which representations can be made on an application for a neighbourhood area to be designated? If you do not, do you think this period should be shorter? What alternative time period would you propose?

Comments

Yes – in our view six weeks is the minimum period needed for consultations.

Further measures

Question 1.5: We are interested in views on whether there are other stages in the neighbourhood planning process where time limits may be beneficial. Where time limits are considered beneficial, we would also welcome views on what might be an appropriate time period for local planning authority decision taking at each stage.

Comments

We would not support deemed designation as suggested in the consultation paper owing to the significant implications of designation for the future of the area.

Pre-submission consultation

Question 1.6: Do you support the removal of the requirement in regulations for a minimum of six weeks consultation and publicity before a neighbourhood plan or Order is submitted to a local planning authority?

Comments

No, given the development plan status of the neighbourhood plan and the requirements of the Strategic Environmental Assessment Directive, it is important that there is consultation at a formative stage of the plan where members of the wider general public have a chance to influence it. It cannot be assumed that the neighbourhood forum or the parish council is representative of the majority of the local population. We think effective pre-application consultation is dependent on the retention of a legal requirement.

Question 1.7: Do you agree that responsibility for publicising a proposed neighbourhood plan or Order, inviting representations and notifying consultation bodies ahead of independent examination should remain with a local planning authority? If you do not agree, what alternative proposals do you suggest, recognising the need to ensure that the process is open, transparent and robust?

Comments

Yes for the reasons indicated in the consultation.

Consulting landowners

Question 1.8: Do you agree that regulations should require those preparing a neighbourhood plan proposal to consult the owners of sites they consider may be affected by the neighbourhood plan as part of the site assessment process? If you do not agree, is there an alternative approach that you would suggest that can achieve our objective?

Comments

We agree with the proposal to require consultation with owners of sites which may be affected by the NP. Paragraph 1.29 refers to "those with an interest in land which may be allocated for development", but we would be concerned if the new consultation requirement was limited to only those with an interest in land.

Although the test formulated in Question 1.8 ("Owners of sites they consider may be affected by the neighbourhood plan") is slightly different, we would be concerned if this was capable of being misunderstood or interpreted as reducing the extent of consultation required with other landowners who may be close to sites allocated in the NP, or with proposals which would be additional to those envisaged in a NP.

Apart from the general requirement of consultation, we accept it would be difficult to define a further set of landowners other than "owners of sites", but it would be helpful of any new regulations for consultation with "owners" could be accompanied with guidance emphasising that this is an additional requirement, and does not reduce the role and weight of consultation responses from other landowners within the NP area or beyond. Even if the pre-application requirement is maintained, we would advocate a formal notification requirement for such affected parties.

Question 1.9: If regulations required those preparing a neighbourhood plan proposal to consult the owners of sites they consider may be affected by the neighbourhood plan as part of the site assessment process, what would be the estimated cost of that requirement to you or your organisation? Are there other material impacts that the requirement might have on you or your organisation? We are also interested in your views on how such consultation could be undertaken and for examples of successful approaches that may have been taken.

Comments

No comments

Introducing an additional basic condition to test the extent of consultation

Question 1.10: Do you agree with the introduction of a new statutory requirement (basic condition) to test the nature and adequacy of the consultation undertaken during the preparation of a neighbourhood plan or Order? If you do not agree, is there an alternative approach that you would suggest that can achieve our objective?

Comments

Following on from our response on Questions 1.6 and 1.8, we agree with the introduction of a new statutory requirement to test the nature and adequacy of consultation.

Strategic Environmental Assessment

Question 1.11: Do you agree that it should be a statutory requirement that either: a statement of reasons, an environmental report, or an explanation of why the plan is not subject to the requirements of the Strategic Environmental Assessment Directive must accompany a neighbourhood plan proposal when it is submitted to a local planning authority?

Comments

Yes

Question 1.12: Aside from the proposals put forward in this consultation document are there alternative or further measures that would improve the understanding of how the Environmental Assessment of Plans and Programmes Regulations 2004 apply to neighbourhood plans? If there are such measures should they be introduced through changes to existing guidance, policy or new legislation?

Comments

We think further guidance would be useful to give a step by step guide for undertaking SEA for neighbourhood plans.

Further measures

Question 1.13: We would like your views on what further steps we and others could take to meet the Government's objective to see more communities taking up their right to produce a neighbourhood plan or neighbourhood development order. We are particularly interested in hearing views on:

- **stages in the process that are considered disproportionate to the purpose, or any unnecessary requirements that could be removed**

- **how the shared insights from early adopters could support and speed up the progress of others**

- **whether communities need to be supported differently**

- **innovative ways in which communities are funding, or could fund, their neighbourhood planning activities.**

Comments

We think the biggest challenge is resource. We would support a Government funded web-based resource or "hub" for neighbourhood forums and parish councils.

Question 1.14: Are there any further comments that you wish to make in response to this section?

Yes ☐ No ☒

Comments

Section 2: Reducing planning regulations to support housing, high streets and growth

Proposal A: Creating New Homes from Light Industrial and Warehouse Buildings

Question 2.1: Do you agree that there should be permitted development rights for (i) light industrial (B1(c)) buildings and (ii) storage and distribution (B8) buildings to change to residential (C3) use?

Comments

The Committee is not commenting on whether there should be permitted development rights for light industrial (B1(c)) buildings to change to residential (C3) use. Whilst we can see the merit in increasing PD rights so as to reduce red tape and speed up and encourage development, the Government should be mindful of the potential impacts of the loss of B1(c) and B8 uses, particularly on employment in the area.

Question 2.2: Should the new permitted development right (i) include a limit on the amount of floor space that can change use to residential (ii) apply in Article 1(5) land i.e. land within a National Park, the Broads, an Area of Outstanding Natural Beauty, an area designated as a conservation area, and land within World Heritage Sites and (iii) should other issues be considered as part of the prior approval, for example the impact of the proposed residential use on neighbouring employment uses?

Comments

The Committee is not commenting on whether there should be a new permitted development right, but if one is introduced, then it should not apply in Article 1(5) land and the impacts of the change on local amenity, employment and infrastructure should be assessed.

Allowing consideration of the impact of the residential use on neighbouring employment uses as part of the prior approval raises difficult issues. The nature of neighbouring employment uses may change from time to time. Careful thought needs to be given as to the scope of any such consideration and whether the Government's intension is in fact that local planning authorities determine in principle whether a permitted development right should apply in a specific location, in light of the mix of uses found there.

Proposal B: Creating New Homes from Sui Generis Uses

Question 2.3: Do you agree that there should be permitted development rights, as proposed, for laundrettes, amusement arcades/centres, casinos and nightclubs to change use to residential (C3) use and to carry out building work directly related to the change of use?

Comments

No comment.

Question 2:4: Should the new permitted development right include (i) a limit on the amount of floor space that can change use to residential and (ii) a prior approval in respect of design and external appearance?

Comments

(i) Before the Committee can answer the question as to whether there should be a limit on the amount of floor space that can change use to residential from the sui generis uses it needs to be able to understand the rationale behind the suggestion of a limit. Is it to ensure that areas are left with an adequate supply of some or all of the sui generis uses (e.g. launderettes)? If so, how would any floor space limit be applied and measured? Would it apply per building, or per "local area", per settlement, or some other factor?

(ii) Yes, but the scope of this approval needs to be set out clearly and limited to prevent it being used as a means of refusing change subjectively.

Proposal C: Office to Residential Permitted Development Rights

Question 2.5: Do you agree that there should be a permitted development right from May 2016 to allow change of use from offices (B1(a)) to residential (C3)?

Comments

Generally we are supportive of the mechanisms which have enabled changes of use from office to residential use between 30 May 2013 and 30 May 2016, subject to the important principle of enabling certain areas to obtain exemptions (as described in paragraph 2.40). We have encountered two areas of commercial uncertainty from clients wishing to take advantage of this temporary permitted development right: firstly, how far must conversion and occupation of units go in order to secure the permitted change; and secondly concerning the risk of Article 4 Direction. This commercial uncertainly can act as a deterrent to taking advantage of the temporary PD rights and reduce the benefit to the housing market which could arise. The proposed extension of the temporary PD rights to 30 May 2019 will help in deferring the first concern, and the proposed prohibition on Article 4 Directions will remove the second source of commercial uncertainty. Both of these proposals are supported.

However, we would ask the Government to consider whether it would be possible to create even more commercial certainty for office conversion schemes where prior approval is given, such as providing that where prior approval is given, it should have at least the standard timescale for implementation of a full planning permission (i.e. 3 years), even if that would extend the life of a particular conversion development beyond May 2019. Otherwise, there would remain the risk of commercial uncertainty from 2017 onwards, once again leaving developers unwilling to take full advantage of the PD rights and reducing the potential benefit to the housing market in those final years of the temporary rights.

We would also appreciate further clarification on the Government's intentions for those areas which were granted exemption up to May 2016. Paragraph 2.42 states that "the exemptions which apply to the current permitted development right will not be extended to apply to the new PD right". What is not clear from that statement is whether the new PD right will also include an opportunity to obtain an exemption in the same manner as the previous scheme (albeit that new requests for exemption would be required). If there will be an exemption process, will it operate in the same manner as under the previous scheme?

Alternatively, if the new scheme will not include an exemption process, what will be the replacement safeguard for nationally significant areas of economic activity, and against substantial adverse economic consequences at the local authority level? Is the intended safeguard to be the Prior Approval process, with the new test of "most strategically important office accommodation" intended to replace the previous area exemption process?

If the new safeguard is the proposed investigation under prior approval of "*the impact of the significant loss of the most strategically important office accommodation in the local area*", is it intended that this will still permit local authorities to consider protection of strategically important office accommodation within their boundaries on an area-wide basis (which presumably would

need to tie in with their development plan policies and take some time to address), or alternatively will the new test be confined to a building-by-building examination as individual conversion schemes come forward?

We expect that other Consultation responses will emphasise the importance to some local authorities of being able to apply for exemption for certain areas. We also anticipate that consultation responses on behalf of the housebuilder industry will support the removal of exemptions, and support the Government's intention that the ability of the policy to support much needed new housing is not undermined.

Since the prior approval process, by its nature, would seem to apply the assessment of proposed office to residential changes on a building-by-building basis, our concern would be whether it would ever be possible for a local authority to determine that an individual building was the most strategically important office accommodation in the local area.

Question 2.6: Do you have suggestions for the definition of the prior approval required to allow local planning authorities to consider the impact of the significant loss of the most strategically important office accommodation within the local area?

Comments

See above for general comments and queries. The phrasing of this question could be taken to suggest that every "local area" will have a "most strategically important office accommodation", even where this is small in comparison to other settlements or cities. A single numerical floor space threshold applicable across all of England for the measurement of strategic importance would not address the variation in office accommodation across cities, and could be unrealistically high or low. An alternative approach might be to assess the floorspace of the individual office to be converted against the total office floorspace in the relevant "local area", and set the threshold as a ratio of individual building against total floorspace. There may be concern, however, that any such quantitative tests will facilitate the loss of smaller offices which play an important part in the overall employment needs of an area.

Proposal D: Extensions to Dwellings

Question 2.7: Do you agree that the permitted development rights allowing larger extensions for dwelling houses should be made permanent?

Comments

No comment.

Proposal E: Increasing Flexibilities for High Street Uses

Question 2.8: Do you agree that the shops (A1) use class should be broadened to incorporate the majority of uses currently within the financial and professional services (A2) use class?

Comments

Yes. The impacts of these types of use are often broadly similar and broadening the use class would provide welcome certainty and flexibility to businesses and landlords.

Question 2.9: Do you agree that a planning application should be required for any change of use to a betting shop or a pay day loan shop?

Comments

Yes. The change is likely to have an impact on local amenity which should be assessed appropriately.

Question 2.10: Do you have suggestions for the definition of pay day loan shops, or on the type of activities undertaken, that the regulations should capture?

Comments

An establishment at which the customer can borrow a relatively small amount of money on a short-term basis and at a high rate of interest, on the agreement that it will be repaid when the borrower receives their next wage/salary payment.

Proposal F: Supporting a Broader Range of Uses on the High Street

Question 2.11: Do you agree that there should be permitted development rights for (i) A1 and A2 premises and (ii) laundrettes, amusement arcades/ centres, casinos and nightclubs to change use to restaurants and cafés (A3)?

Comments

The Committee is not commenting on whether there should be a new permitted development right, but if one is introduced, we query why only those "immediately adjacent to the property" should be permitted to make representations in respect of the impact of the proposed change on local amenity. The potential impacts from the factors listed ("noise, odours [and] traffic") can affect other neighbours and users of the high street, not just those immediately adjacent.

Proposal G: Supporting the Diversification of Leisure Uses on the High Street

Question 2.12: Do you agree that there should be permitted development rights for A1 and A2 uses, laundrettes, amusement arcades/centres and nightclubs to change use to assembly and leisure (D2)?

Comments

No comment.

Proposal H: Expanded Facilities for Existing Retailers

Question 2.13: Do you agree that there should be a permitted development right for an ancillary building within the curtilage of an existing shop?

Comments

Yes, subject to sensible size restrictions and design approval. We recognise the Government's intention to support retailers.

Question 2.14: Do you agree that there should be a permitted development right to extend loading bays for existing shops?

Comments

Yes, as above, the Government needs to be sensible about enabling retailers to improve their businesses. Any impacts on noise and congestion should be assessed as part of the prior approval process.

Question 2.15: Do you agree that the permitted development right allowing shops to build internal mezzanine floors should be increased from 200 square metres?

Comments

There are a wide variety of views in the industry as to whether a mezzanine limit is required - some investors and developers regard a mezzanine limit as an essential safeguard, and others would prefer to see no limit at all. The Committee offers no view as to whether the current threshold should be raised, and where any new threshold should be drawn. We are aware of views which would favour retaining current limits, favour greater limits, and indeed, there will be points of view which would call into question the need for any threshold at all. We also query the effectiveness of the current restrictions in any event.

Question 2.16: Do you agree that parking policy should be strengthened to tackle on-street parking problems by restricting powers to set maximum parking standards?

Comments

We generally agree with the philosophy of restricting maximum parking standards.

Proposal I: Permitted Development Right for the Film and Television Industries

Question 2.17: Do you agree that there should be a new permitted development right for commercial film and television production?

Comments

This is a growing industry and so the Committee is in general agreement that it should be encouraged. However, the legislation would need to be precise to ensure that only technical production and (not filming etc) is permitted.

Proposal J: Solar PV Panels for Commercial Properties

Question 2.18: Do you agree that there should be a permitted development right for the installation of solar PV up to 1MW on the roof of non-domestic buildings?

Comments

We agree with the principle of an increased level of permitted development right for Solar PV on the roof of non-domestic buildings. We would appreciate further explanation of the rationale for the proposed limit of 1MW, and given the proposed twenty-fold increase from the current limit of 50kV, we wonder why there needs to be any limitation.

Proposal K: Extensions to Business Premises

Question 2.19: Do you agree that the permitted development rights allowing larger extensions for shops, financial and professional services, offices, industrial and warehouse buildings should be made permanent?

Comments

No comment.

Proposal L: Permitted Development Rights for Waste Management Facilities

Question 2.20: Do you agree that there should be a new permitted development right for waste management facilities to replace buildings, equipment and machinery?

Comments

No comment.

Proposal M: Equipment Housings for Sewerage Undertakings

Question 2.21: Do you agree that permitted development rights for sewerage undertakers should be extended to include equipment housings?

Comments

If this change is implemented, we would suggest that there are limitations on size and design.

Other Comments

Question 2.22: Do you have any other comments or suggestions for extending permitted development rights?

Comments

There is considerable concern that extending permitted development rights will result in a material loss of development control. A balance needs to be carefully struck between freedom for the occupier of the land and appropriate development controls for the benefit of the community as a whole. A precautionary approach should be adopted with a proper analysis being made of the individual and cumulative effects of each set of reforms before initiating any extension to permitted development rights in addition to those the subject of this consultation.

Question 2.23: Do you have any evidence regarding the costs or benefits of the proposed changes or new permitted development rights, including any evidence regarding the impact of the proposal on the number of new betting shops and pay day loan shops, and the costs and benefits, in particular new openings in premises that were formerly A2, A3, A4 or A5?

Comments

No.

Question 2.24: Do you agree:

(i) that where prior approval for permitted development has been given, but not yet implemented, it should not be removed by subsequent Article 4 direction; and

(ii) should the compensation regulations also cover the permitted development rights set out in the consultation?

Comments

(i) For the reason outlined above in response to question 5, we generally support the proposed restriction on use of Article 4 Directions. (ii) No comment.

Section 3: Improving the use of planning conditions

Question 3.1: Do you have any general comments on our intention to introduce a deemed discharge for planning conditions?

Comments

We agree that a deemed discharge for planning conditions is a sensible idea.

At present, there can be considerable delay in obtaining approval of pre-commencement conditions, which in turn causes delay to development taking place. In view of the costs caused by that delay, developers sometimes take a commercial decision to commence development in breach of the conditions, hoping that the applications are subsequently approved and it is not expedient for authorities to pursue enforcement. This can raise legal issues on transactions in terms of the continuing risk of enforcement.

Accordingly, a clear procedure whereby authorities have reasonable time to deal with the applications before deemed discharge applies is sensible.

There is a risk, however, that some authorities will routinely refuse applications which come close to the deadline without determination, to prevent deemed discharge applying. Careful thought is required to avoid that unwelcome situation.

Question 3.2: Do you agree with our proposal to exclude some types of conditions from the deemed discharge (e.g. conditions in areas of high flood risk)?

Where we exclude a type of condition should we apply the exemption to all the conditions in the planning permission requiring discharge or only those relating to the reason for the exemption (e.g. those relating to flooding)?

Are there other types of conditions that you think should also be excluded?

Comments

We agree that conditions requiring approval of reserved matters should not be subject to deemed discharge.

To the extent that conditions relate to matters arising out of an EIA or a flood risk assessment, again, we can see reason for their exclusion.

Automatically excluding all consents which are subject to EIA or in areas of high flood risk will significantly reduce the application and therefore usefulness of the proposed provisions. It would be preferable to exclude only the conditions that relate to the reason for exemption. We are concerned, however, that there is scope for over-complicating the provisions and introducing ambiguity.

Question 3.3: Do you agree with our proposal that a deemed discharge should be an applicant option activated by the serving of a notice, rather than applying automatically? If not, why?

Comments

Many applicants will be attracted to the idea of the provisions applying automatically. However, as noted above, we do have concerns about the implications.

Accordingly, we agree that the applicant should have the right to trigger the deemed discharge provision by service of notice. However, providing authorities with limited further time to determine the application could also result in a refusal.

The provisions must therefore retain sufficient flexibility so that, at any time, the applicant and authority can agree an appropriate extension of time (to avoid a refusal) or the applicant can serve extend time further unilaterally by additional notices.

Question 3.4: **Do you agree with our proposed timings for when a deemed discharge would be available to an applicant? If not, why? What alternative timing would you suggest?**

Comments

We are not opposed to an initial period of 6 weeks subject to our comments in paragraph 3.3.

The applicant's right of appeal should be retained on any refusal irrespective of whether the deemed discharge provisions have been triggered.

Question 3.5: We propose that (unless the type of condition is excluded) deemed discharge would be available for conditions in full or outline (not reserved matters) planning permissions under S.70, 73, and 73A of the Town and Country Planning Act 1990 (as amended).

Do you think that deemed discharge should be available for other types of consents such as advertisement consent or planning permission granted by a local development order?

Comments

We consider that any conditions imposed on reserved matters approvals could be subject to the same deemed discharge procedure.

Question 3.6: Do you agree that the time limit for the fee refund should be shortened from twelve weeks to eight weeks? If not, why?

Comments

It would be sensible for the fee refund provisions to tie in with the deemed discharge provisions.

Question 3.7: Are there any instances where you consider that a return of the fee after eight weeks would not be appropriate? Why?

Comments

No comment.

Question 3.8: Do you agree that there should be a requirement for local planning authorities to share draft conditions with applicants for major developments before they can make a decision on the application?

Comments

In our experience, for major development, conditions are routinely shared with applicants and this should be encouraged as much as possible. This benefits both local planning authorities and applicants.

In the circumstances, we do not consider that a statutory requirement is necessary and any change should be by way of guidance.

Question 3.9: Do you agree that this requirement should be limited to major applications?

Comments

Please see above.

Question 3.10: When do you consider it to be an appropriate time to share draft conditions:

- **10 days before a planning permission is granted?**
- **5 days before a planning permission is granted? or**
- **another time?, please detail**

Comments

It is important to bear in mind that there are a number of possible scenarios. Where applications are reported to Committee and members are making a decision on the basis of a list of conditions attached to the report, the conditions should be shared before the report is finalised. Where applications are dealt with under delegated powers, the officer should share conditions before issuing the decision.

We do not offer a firm view on how long is appropriate.

Question 3.11: We have identified two possible options for dealing with late changes or additions to conditions – Option A or Option B. Which option do you prefer?

If neither, can you suggest another way of addressing this issue and if so please explain your alternative approach?

Comments

As noted above, we do not consider that there is a need for a statutory requirement to consult on draft conditions or on proposed changes to draft conditions. This can be addressed in guidance.

Question 3.12: Do you agree there should be an additional requirement for local planning authorities to justify the use of pre-commencement conditions?

Comments

No firm view. However, we consider it unlikely that a statutory requirement to provide a written justification will result in a difference practice being adopted by authorities.

Question 3.13: Do you think that the proposed requirement for local planning authorities to justify the use of pre-commencement conditions should be expanded to apply to conditions that require further action to be undertaken by an applicant before an aspect of the development can go ahead?

Comments

Please see above.

Question 3.14: What more could be done to ensure that conditions that require further action to be undertaken by an applicant before an aspect of the development can go ahead are appropriate and that the timing is suitable and properly justified?

Comments

Section 4: Planning application process improvements

Would you like to respond to the consultation on planning application process improvements?

Yes ☒ No ☐

Review of requirements for consultation with Natural England and the Highways Agency

Question 4.1: Do you agree with the proposed change to the requirements for consulting Natural England set out in Table 1? If not, please specify why.

Yes ☒ No ☐

Comments

Yes – for the reasons indicated in the consultation paper the 2km radius is arbitrary and adds little to the consultation requirement.

Question 4.2: Do you agree with the proposed changes to the requirements for consulting the Highways Agency set out in Table 2? If not, please specify what change is of concern and why?

Yes ☒ No ☐

Comments

Yes – for the reasons set out in the consultation paper.

Review of requirements for consulting with English Heritage

Question 4.3: Do you agree with the proposed changes to the requirements for consulting and notifying English Heritage set out in Table 3? If not, please specify what change is of concern and why?

Yes ☒ No ☐

Do you agree with the proposed change to remove English Heritage's powers of Direction and authorisation in Greater London? If not, please explain why?

Yes ☒ No ☐

Comments

We endorse the need for consistency between London and the rest of the country. In relation to notification for planning applications for development affecting a conservation area we question whether area of land should be the only criterion and not e.g. height of buildings.

Question 4.4: Do you agree with the proposed changes to the requirements for referring applications to the Secretary of State set out in Table 4? If not, please specify what change is of concern and why.

Yes ☒ No ☐

Comments

We agree that the proposed reduced requirements for notification to the Secretary of State are appropriate.

Question 4.5: Do you agree with the proposed minor changes to current arrangements for consultation/notification of other heritage bodies? If not, please specify what change is of concern and why.

Yes ☒ No ☐

Comments

For the reasons in the consultation.

Further measure to streamline statutory consultation arrangements

Question 4.6: Do you agree with the principle of statutory consultees making more frequent use of the existing flexibility not to be consulted at the application stage, in cases where technical issues were resolved at the pre-application stage?

Yes ☒ No ☐

Do you have any comments on what specific measures would be necessary to facilitate more regular use of this flexibility?

Yes ☒ No ☐

Comments

Each statutory consultee should be required to publish a position statement on pre-application consultation and what it requires to reach agreement on technical issues at the pre-application stage including timing and information.

Impacts and benefits of the proposals

Question 4.7: How significant do you think the reduction in applications which statutory consultees are unnecessarily consulted on will be? Please provide evidence to support your answer.

Comments

Take up depends on the consultees signaling their willingness to forego planning application consultation by pre-application agreement on technical issues.

Notifying railway infrastructure managers of planning applications for development near railways

Question 4.8: In the interest of public safety, do you agree with the proposal requiring local planning authorities to notify railway infrastructure managers of planning applications within the vicinity of their railway, rather than making them formal statutory consultees with a duty to respond?

Yes ☒ No ☐

Comments

We think the final language for triggering consultation need to be more precise than "in the vicinity". We would support a specific measurement as set out below.

Question 4.9: Do you agree with notification being required when any part of a proposed development is within 10 metres of a railway?

Yes ☒ No ☐

Do you agree that 10 metres is a suitable distance?

Yes ☒ No ☐

Do you have a suggestion about a methodology for measuring the distance from a railway (such as whether to measure from the edge of the railway track or the boundary of railway land, and how this would include underground railway tunnels)?

Yes ☐ No ☒

Comments

We support a specific distance from the railway as a trigger for consultation.

Consolidation of the Town and Country Planning (Development Management Procedure) Order 2010

Question 4.10: Do you have any comments on the proposal to consolidate the Town and Country Planning (Development Management Procedure) Order 2010?

Yes ☒ No ☐

Comments

We agree with the proposal to consolidate the DMPO

Measurement of the end-to-end planning process

Question 4.11: Do you have any suggestions on how each stage of the planning application process should be measured? What is your idea? What stage of the process does it relate to? Why should this stage be measured and what are the benefits of such information?

Yes ☒ No ☐

Comments

We question whether attempting to measure the pre-application process (with various possible stages at which it could be said to "start") or the post-permission stages will produce any meaningful data. We would not be supportive of measurement of such stages of the planning process if it leads to further regulation.

Question 4.12: Are there any further comments that you wish to make in response to this section?

Yes ☐ No ☒

Comments

Section 5: Environmental Impact Assessment Thresholds

Would you like to respond to the consultation on Environmental Impact Assessment Thresholds?

Yes ☒ No ☐

Question 5.1: Do you agree that the existing thresholds for urban development and industrial estate development which are outside of sensitive areas are unnecessarily low?

Yes ☒ No ☐

Comments

On the basis of the average housing density stated in paragraph 5.26 (30 dwellings per hectare), we agree that the threshold of 0.5Ha for housing (i.e. 15 dwellings) could be considered low.

Question 5.2: Do you have any comments on where we propose to set the new thresholds?

Yes ☐ No ☐

Comments

We would support a new threshold of 5Ha for housing. We suggest that a period of time be allowed to see how this threshold operates in practice before it is raised further.

Question 5.3: If you consider there is scope to raise the screening threshold for residential dwellings above our current proposal, or to raise thresholds for other Schedule 2 categories, what would you suggest and why?

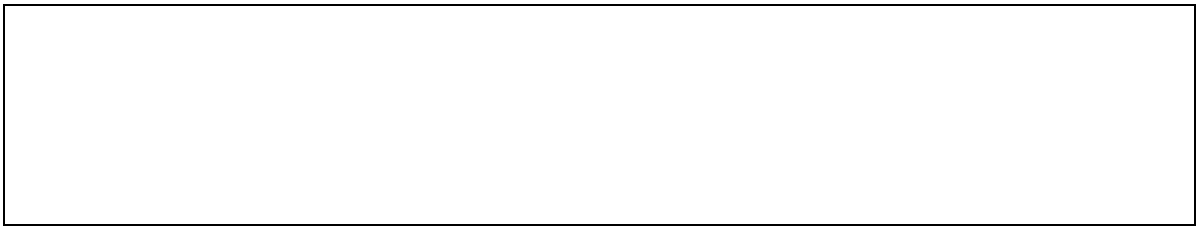
Comments

We cannot offer additional comments on where (between notional scale of 150-1,000 units) residential development might pass over a threshold where EIA should be considered necessary. We have no comment on alternative thresholds for other Schedule 2 developments other than to suggest increases to the threshold should be gradual and tested in practice before being raised further.

Question 5.4: Are there any further comments that you wish to make in response to this section?

Yes ☐ No ☒

Comments



Section 6: Improving the nationally significant infrastructure planning regime

Non-material and material changes to Development Consent Orders

Question 6.1: **Do you agree that the three characteristics set out in paragraph 6.10 are suitable for assessing whether a change to a Development Consent Order is more likely to be non-material? Are there any others that should be considered?**

Comments

Paragraph 6.10 proposes the absence of need for the following as characteristics of non-material change:

- update to the Environmental Statement (from that at the time the original Development Consent order was made) to take account of likely significant effects on the environment;
- need for a Habitats Regulations Assessment, or the need for a new or additional licence in respect of European Protected Species;
- compulsory acquisition of any land that was not authorised through the existing Development Consent Order.

We would regard these criteria as a good starting point.

Other characteristics might include:

- (where alteration of the development description in the order is required) absence of need for alterations to plans or sections;
- (where alteration to plans or sections is required) absence of need for alteration of the development description in the order;
- shifting descriptions of works authorised from one part of the order to another but without overall change;
- typographical corrections;
- modifications to order wording without affecting the physical scope or content of works; and
- modifications to respond to legislative changes occurring between the date that the order is applied for and the date that it is made.

At a practical level it is important that guidance recognises that materiality is a question of degree and ad hoc judgement. The guidance should therefore also recognise that (a) the characteristics identified are not exhaustive; and (b) presence or absence of one or more of the characteristics identified need not therefore be definitive of what is or is not material.

Making a non-material change

Question 6.2: Do you agree with:

(i) making publicising and consulting on a non-material change the responsibility of the applicant, rather than the Secretary of State?

Comments

This proposal has merit in removing a tier of bureaucracy from what should be a relatively simple, streamlined process. It would be of concern, however, if it were to be used as a reason for reducing staffing levels within teams who would otherwise deal with such operations such as to impact on service levels in processing other aspects of non-material changes.

(ii) **the additional amendments (see above) to regulations proposed for handling non-material changes?**

Comments

We set out our comments on the individual proposals for additional amendments in tabular form adjacent to the amendments identified.

Proposed amendment	**Comment**
The Consultation Paper indicates at paragraph 6.16 that additional amendments include:	
• an amendment to the regulations on publicising the application to make clear that, in addition to publicising the notice for at least two successive weeks in one or more local newspapers, the applicant will also need to publish the notice of the application in other publications to ensure that notice of the application is given in the vicinity of the local area;	This is acceptable in principle, but in the case of long distance linear projects (such as long distance power lines) consideration should be given to limiting publicity requirements for non-material amendments to areas within a specified distance of the location in which the amendment is to apply.
• an amendment to the regulation covering the duty to consult so that the applicant will have to consult other persons or bodies who could be directly affected by the proposed change, in addition to those currently specified in the regulations;	This is acceptable in principle, but in the case of long distance linear projects (such as long distance power lines) consideration should be given to limiting publicity requirements for non-material amendments to areas within a specified distance of the location in which the amendment is to apply. For the sake of robustness, notice requirements should also embrace those who might be materially but indirectly affected by the proposed change.
• new requirements on the applicant to supply a copy of the notice used in respect of publicity and consultation requirements to the Secretary of State and to send a statement to the Secretary of State setting out details of how they have met the necessary requirements in the regulations on publicity and consultation.	This seems reasonable. Template guidance should be given as to the form and content of the statement. Alternatively, a simple form might be provided for applicants to complete.
The Consultation Paper indicates at paragraph 6.20 that the Government is also proposing to make some other minor changes to the 2011 Regulations covering non-material changes to	

Development Consent Orders. These are:	
• an amendment to the regulation that specifies the scale of maps to be provided by the applicant with their application. The Government has indicated that it will amend the requirements for maps for applications for Development Consent Orders for offshore projects. This amendment would ensure that applications for change are treated in the same way.	This seems reasonable, and can make interpretation by members of the public much easier, especially in the case of long-distance linear projects where there is little to be gained by providing large scale drawings showing little more than a line and its limits of deviation.
• an amendment to the regulation on fees to remove the requirement for an applicant to pay the Secretary of State's costs for publicising the application (the applicant would be responsible for publicity under the Government's new proposals).	In addition to removing the duty to pay the Secretary of State for the cost of a disbursement he will not incur, although the sum may not be large, it would be reasonable to reduce the overall fee payable commensurately with time in preparing and placing notices which his staff will not spend.

Making a material change

Question 6.3: Do you agree with the proposals:

(i) to change the consultation requirements for a proposed application for a material change to a Development Consent Order?

Comments

Paragraphs 6.26 and 6.27 of the Consultation Paper propose that:

- Instead of the current requirement to consult each person consulted about the original application for a Development Consent Order for which a change is being sought, the applicant would be required to consult those persons who could be directly affected by the change proposed if consent for the change was given.

- Other consultation requirements, for example the need to consult local authorities and the bodies listed in Schedule 1 of the 2011 Regulations would remain unchanged.

Whilst we support the generality of these proposals:

- clear guidance as to what is required in terms of consultation will be valuable;

- the requirement to consult persons who would be directly affected ought also to extend to those who would be indirectly affected to a material degree;

- the requirement to consult all bodies listed in Schedule 1 of the 2011 Regulations should be modified to extend only to those bodies for whom the nature and extent of amendment is material. This is particularly pertinent in the case of long distance linear projects. Guidance could readily give examples of those for whom amendments might be material in particular circumstances.

- there should be clear guidance as to the expectation that the nature and extent of consultation should be proportionate to the nature and extent of the change proposed.

(ii) **to remove the requirement on an applicant to prepare a statement of community consultation for an application for a material change?**

Comments

Whilst on its face, this proposal would remove a burdensome element of pre-application procedure, we wonder whether in the context of post order modifications it might be counter-productive? Presence or absence of consultation can be an emotive subject capable of engaging or alienating communities and other bodies. Outlining the scale and nature of a proposed consultation in a SoCC (albeit suitably scaled down by comparison with the pre-application SoCC) may be effective in offsetting concerns as to nature and scope of consultation and risk of challenge for want of sufficient consultation. If a SoCC were to be retained in advance of post-order consultations, publicity requirements (both as to scope and duration) should be reduced proportionately.

(iii) **to remove the current requirement to publish a notice publicising a proposed application where an application for a material change is to be made?**

Comments

If there is effective pre-application consultation, in practice this would involve notification of those most likely to be affected of the likelihood of an application. On this basis, notification of the application itself, once made, ought to be sufficient.

Submission of application and representations

Question 6.4: Do you agree with the proposal that there should be a new regulation allowing the Secretary of State to dispense with the need to hold an examination into an application for a material change?

Comments

The proposals as outlined in the Consultation Paper, and the circumstances in which an examination might be dispensed with seem reasonable and consistent with procedures applying to other statutory processes such those concerning closure and diversions of public rights of way. Should the proposals be adopted, it is important that guidance sets out clearly the policy to be applied to decisions over whether or not examination will be dispensed with in any given case.

Statutory Timetable

Question 6.5: Do you agree with the proposal to reduce the statutory time periods set out in the 2011 Regulations to four months for the examination of an application for a material change, two months for the examining authority to produce a report and their recommendation and two months for the Secretary of State to reach a decision?

Comments

In principle, and from an applicant's perspective, this proposal is to be supported. Nevertheless, it is implicit from earlier comments in the Consultation Paper that a material change may necessitate supplemental Environmental Assessment and/or Habitats Directive Assessment and/or additional compulsory acquisition of land. Should this be the case, then the material in support of the application may prove bulky. In any event, complex issues may arise and the volume of representations, particularly for a complex or long distance linear project, may be substantial. It is important that statutory timescales allow sufficient time for proper consideration of representations and for reporting after the examination has taken place. Questions of proportionality will arise and what is needed will vary from case to case.

Experience of application processes themselves suggests that for single-site straightforward DCOs even current post application timescales are generous but are arbitrarily applied. Conversely, for complex linear projects, current post application target timescales are equally arbitrarily applied and can place both applicants and objectors under extreme pressure.

It is therefore important that (a) target timescales are applied flexibly and proportionately and (b) guidance is issued illustrating how such flexibility and proportionality is likely to be applied. These comments apply as much to the processes for original order applications as to the proposals for material amendments.

Safeguards

Question 6.6: Are there any other issues that should be covered if guidance is produced on the procedures for making non-material and material changes to Development Consent Orders?

Comments

Paragraph 6.44 of the Consultation Paper indicates that the proposed guidance will mainly be aimed at applicants for change and is likely to cover:

- the assessment of whether changes are material or not;
- practical details on submitting applications for non-material and material changes;
- the pre-application stage for material changes and consultation requirements, including the role of statutory consultees;
- examples of the circumstances when the Secretary of State may decide not to hold an examination into a material change;
- the circumstances where the Secretary of State may decide to use the power to decline to determine an application for a material change.

These are helpful minimum indications as to the scope of guidance and accord with numerous of our comments above.

The head "practical details on submitting applications" could helpfully be expanded. By way of example, reference to the scope, nature and form of presentation of application documents would be helpful. Similarly need for, scope of and mode of presentation of any supplemental environmental assessment will assist applicants significantly.

Additional areas for guidance might include:

- the importance of representations on applications for amendments to relate to the amendments and their implications in the context of the Project as amended, rather than

to the principle (or unamended aspects) of the Project;

- practical arrangements for and scope of examination, especially where modifications are limited to particular localities; and
- how discretion as to timescales for post-application examination, reporting and decision-making is likely to be exercised.

Streamlining the consenting process

Question 6.7: Do you agree with the proposal that applicants should be able to include the ten consents (listed below) within a Development Consent Order without the prior approval of the relevant consenting body?

Annex A

1. *European Protected Species: Licence under regulation 53 of the Conservation of Habitats and Species Regulations 2010 - issued to allow for necessary movement or disturbance of a protected species*.*

2 *Flood Defence: Consent under section 109 of the Water Resources Act 1991 – for works that affect flood risk of main rivers.*

3. *Flood Defence: Consent under section 23 of the Land Drainage Act 1991 (prohibitions of obstructions in watercourses) - consent for works that affect the flow of ordinary watercourses.*

4. *Flood Defence: Consent under byelaws (paragraphs 5, 6 or 6A of Schedule 25 of the Water Resources Act 1991) - for works affecting sea defences/land drainage on main rivers, washlands and floodplains.*

5. *Discharge for works purposes: Consent under section 164 of the Water Resources Act 1991 – an operational consent required only in some cases.*

6. *Discharge for works purposes: Consent under section 166 of the Water Industry Act 1991 – concerns discharge from water company works and assets.*

7. *Trade effluent consents: Notice of determination of a reference by a sewerage undertaker (water company) under Chapter 3, Part 4 of Water Industry Act 1991 – concerns effluent discharge.*

8. *Water Abstraction: Licence under section 24 of the Water Resources Act 1991 (restrictions on abstraction) - issued to ensure maintenance and preservation of water resources**.*

9. *Water Impoundment: Licence under section 25 of the Water Resources Act 1991 (restrictions on impounding) - to allow the construction of dams, weirs and engineering works during construction of a project**.*

10. *Water Abstraction: Consent under section 32 of the Water Resources Act 1991 - to allow testing for the presence and quality of ground water before applying for a water abstraction licence**.*

** In the case of European Protected Species, at the point of the Development Consent Order application, the requirement to obtain a licence would apply (if at all) to the construction phase.*

*** Proposal is for these three licences to be included within the Development Consent Order for construction phase of project only unless the Environment Agency agree to a request for it to also cover the operational stage.*

Comments

On the basis that the Secretary of State is the body who grants a DCO on behalf of the Government, and other consents are granted under statute, we see few reasons (so long as issues of national security and over-riding confidentiality can be managed) why the DCO should not be a complete "one-stop shop" for all pre-commencement consents required for project delivery. It is accepted that this may mean a higher information requirement at application stage. Nevertheless, if the objectives of the DCO process are truly to remove layers of bureaucracy, to streamline application processes and to expedite delivery, we see no reason why the default position should not be the right to include all necessary consents within a DCO.

Question 6.8: Do you agree with the ways in which we propose to approach these reforms?

Comments

Paragraphs 6.57 and 6.58 of the Consultation Paper indicate that:

- there would be no compulsion for developers who need these consents to include them within their Development Consent Order. It would be a choice, with applicants able to seek advice from the Planning Inspectorate and relevant consenting bodies on what approach may work best for their project.

- as far as is practicable, the Secretary of State would wish to replicate features of the current consenting regime (for the ten consents) within the Development Consent Order process, so as to minimise any confusion that might arise from there being two systems applicable to the same consents. The process would be as stringent, whichever route is chosen.

These principles seem satisfactory. Nevertheless, it is very important that the requirements for inclusion of sufficient information within application packages for DCOs to enable consenting requirements of other procedures to be met is not allowed to become a brake on DCO processes. If necessary information requirements and procedures for other consenting processes will need to be revisited to make them consistent with the expedited delivery philosophy applicable to DCOs. We recognise that in some instances requirements of EU legislation will come into play. Nevertheless, we have little doubt that with imagination, alignment of procedures as well as expedition can be achieved.

Question 6.9: Are there any other ideas that we should consider in enacting the proposed changes?

Comments

For the DCO to include a range of other consents will necessitate additional and/or deeper pre-application consultation. It will be important for there to be a duty on Natural England and the Environment Agency fully to cooperate and engage in that process. The suggestion of a Natural England "assessment of preparedness" is interesting. It will be important for encouragement to be

given to Natural England to move away from its approach of "technical objection" on Habitats Directive matters. This is sometimes used either as a basis for negotiation or as a means of avoiding reaching a difficult decision. In either case, it can trigger a need for appropriate assessment or worse a need to demonstrate absence of alternatives as a condition of proceeding. Change of culture in dealing with development projects should be encouraged as well as accelerating the processes for consenting them.

Similarly, it is common practice for the Environment Agency and Natural England to seek full blown collateral contractual commitments in relation to acts of parliament which on their face displace their consenting powers. If indirect delays to application processes are to be avoided It will be vitally important for standard protective provisions and information requirements to be published as part of or to accompany the legislative package.

Question 6.10: Do you have any views on the proposal for some of the consents to deal only with the construction stage of projects, and for some to also cover the operational stage of projects?

Comments

Since there is intended to be an election as to whether or not to include the ten consents within a DCO application, we can see no reason in principle why the applicant should not apply for any applications to extend to the operational as well as construction phase if so desired. There may be additional information requirements but this would be a burden for the applicant to shoulder and hence the choice should lie with the applicant. Otherwise, the "one-stop shop" principle would be undermined.

Question 6.11: Are there any other comments you wish to make in response to this section of the consultation?

Comments

We note that the Consultation Paper proposes that it is an option for the applicant whether or not to include additional consents within the DCO. In our view, it would be helpful to promoters of projects, if the entire DCO process (as distinct from pursuing more conventional processes) were subject to opt in by the applicant. This already applies to nationally significant business and commercial projects; why not more generally? For some projects, the DCO process is much more expensive and burdensome than the traditional procedures it has replaced.

Date 26 September 2014

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