The Planning and Infrastructure Bill

Pre-application engagement for Nationally Significant Infrastructure Projects (NSIPs)

In presenting its evidence to the Public Bill Committee, Suffolk County Council (SCC) speaks from its position as a recognised Centre of Excellence for NSIPs and is focusing on the relationship between the NSIP consenting process, statutory consultees, and communities, specifically in relation to Gov NC 44 and 45.

In summary

- Suffolk County Council considers that an effective pre-application process is fundamental for national infrastructure consenting, and indeed all other development consenting processes.

- The proposed replacement of a statutory requirement, by statutory guidance alone, is therefore, neither sufficient nor robust.

- Since 2009 as the number of applicants to the NSIP process has increased, the Council has seen that the average quality of applicants has fallen.

- Schemes of engagement should be agreed on a case-by-case basis at project inception with the Planning Inspectorate.

- Adequacy of Consultation should be tested based on the quality of engagement and outcomes, and not the quantity of engagement.

- Subject to the fitness of the applicant to use the NSIP process, a reciprocal obligation, between the applicant and consultees, to engage effectively and without prejudice, should be established.

- The engagement and consenting process should be designed to safeguard community wellbeing and engender public trust.

- The commencement of the statutory process at s42 currently protects a project from judicial review from that time, until a decision is taken by the SoS. The removal of s42 means that the statutory process begins at the submission of the DCO.

- The Statutory Guidance to consult will not limit the risk of an early application for judicial review on the basis of non-compliance of the

consultation with the Gunning Principles, whereas a statutory notification period, as proposed by SCC, would do so.

- Subject to effective safeguards, and the securing of genuinely effective pre-application engagement, the use of confirmatory Bills, for the most important DCOs, should be considered.

The proposed amendments to the Planning and Infrastructure Bill, Gov NC 44, would remove from the Planning Act 2008, the requirement for consultation and the requirement to have regard for any consultation responses (s49). Proposed Gov NC 45 would retain the need for the project promoter to notify the relevant Local Authority about the existence of the project and to follow the proposed statutory guidance regarding consultation.

The Minister has been clear in the written ministerial statement and elsewhere, that pre-application consultation is extending significantly, and unreasonably, the consenting time for Nationally Significant Infrastructure Projects. Suffolk County Council agrees that the pre-application process has, on average, tended to become longer and lose focus, and be of lower quality than in the past.

However, the proposed deletion of statute on this matter means that the quality and process of engagement and consultation at pre-app, would only be safeguarded by common law principles,[1] (i.e. Gunning) this is a critical concern to the Council.

The proposed Gov NC 45 stipulates that the pre-application process will in future be supported by statutory guidance. The Council considers that statutory guidance alone is not sufficient, because of the importance of the pre-application process to consultees and communities alike, and the critical benefits that effective, and proportionate, pre-application brings to the examination of NSIP proposals.

Therefore, the Council considers, that rather than relying solely on guidance, the NSIP process should be amended, to direct, and specify proportionate pre-application engagement on a case-by-case basis and test the quality of pre-application engagement undertaken by applicants with both consultees and communities, and, test the fitness of applicants to engage in the NSIP process. It should also create reciprocal obligations between the applicant and consultees, both statutory parties and others, regarding their engagement with, and approach to, the pre-application process.

Suffolk County Council has been involved with the delivery of projects under the Planning Act 2008, since 2010, when it became part of the pre-application

[1] https://www.local.gov.uk/sites/default/files/documents/The%20Gunning%20Principles.pdf

engagement for the Ipswich Rail Chord[2]. It therefore recognises, that the pre-application process for NSIP projects has tended to become longer.

The Council considers that effective pre-application discussions between the applicant, statutory consultees, the decision maker and the community, are essential. The Council is of that view, based on its experience, not only as an NSIP consultee, but also as a mineral, waste, and highways, planning authority, that effective and proportionate pre-application discussion with the applicant, and genuine engagement with the local community is essential to delivering effective consenting which has a reasonable degree of community acceptance. For example, the Energy from Waste Plant at Great Blakenham, https://suffolkefw.co.uk/ received only 31 objections, because of the quality of preparation and of community engagement, for that scheme.

Furthermore, the Council considers that, previously, projects consented under the Planning Act 2008, benefited from effective and comparatively rapid pre-application engagement. Suffolk County Council's experience of some projects, for example, East Anglia 1 and East Anglia 3 offshore wind farms, were exemplary in terms of the applicant's engagement with both the other statutory consultees, local authorities and the community.

When the national infrastructure planning regime was created, to replace the lengthy and cumbersome public inquiry system, that was a feature of such proposals as Heathrow T5 and Sizewell B, it was not envisaged that there would be a need to deliver a national transformation of the energy transmission and generation system, or embed artificial intelligence infrastructure in the UK, or transform infrastructure or the water supply and processing system, to adapt to and mitigate, the impacts of climate change.

As a result of this change, projects consented under the Planning Act 2008 are now ubiquitous, rather than exceptional. There are many more applicants using the process, and therefore, the quality of applicants is significantly lower, on average, than in the early years of the operation of the 2008 Act, and these applicants are frequently significantly less well-resourced in terms of financing and expertise. The Council's experience is also, that although consultancy support services of all types, have expanded hugely to cope with demand, the quality of those services has, on average, declined.

The Council considers that it is the change in the number of users of the Act and the decline in the average quality of applicants, that together, have tended to increase pre-application times. Therefore, the Council agrees with Minister Pennycook that

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2 https://webarchive.nationalarchives.gov.uk/ukgwa/20151203122844/http://infrastructure.planninginspectorate.gov.uk/projects/eastern/ipswich-rail-chord/?ipcsection=advice&ipcadvice=3426b9f4ad and https://webarchive.nationalarchives.gov.uk/ukgwa/20111014044451/http://infrastructure.independent.gov.uk/projects/eastern/ipswich-rail-chord/documentation/?ipcdocsec=meeting&ipcadvice=9a726a5542

the system is not working as it should, and it is necessary, firstly, to recognise that the use of the Planning Act 2008 has changed, but also to recognise that effective and expeditious pre-application engagement, with statutory consultees and the community is fundamental to a faster and more effective decision making process, and that this needs to be retained in a simplified form.

Suffolk County Council considers there are now two broad classes of nationally significant infrastructure projects, as follows:

Type 1

a) large and complex projects of genuine national significance, that are generally, but not only, identified in strategic documents such as the Centralised Strategic Network Plan or the Strategic Spatial Energy Plan, or water resources management plans and National Highways' or Network Rail's strategic network plans.
b) Proposals for offshore wind farms, interconnectors or multi-purpose interconnectors, that are subject to oversight and licencing by the Crown Estate and Ofgem. Large scale nuclear projects and large onshore windfarms.

Type 2

Other energy generation, transport, and water resource projects, or in future other classes, such as data centres, which meet the thresholds for nationally significant infrastructure projects, but which are likely to be susceptible to the disapplication of development consent (pt1 chpt1 s3 of the Bill) and be consented through other regimes, particularly, the Town and Country planning regime.

Based on these changes to the nature of applications to the process, and to the nature of the applicants, Suffolk County Council sets out its suggested approach to:

- notification
- consultation
- an applicant test of fitness
- a reciprocal obligation between the applicant and consultees
- the adequacy of consultation

The proposed approach to notification

The following approach to notification of statutory consultees as per Schedule 1 of The Infrastructure Planning (Applications: Prescribed Forms and Procedure) Regulations 2009 is suggested. The Council recognises that this would require the modification of Gov NC 45, to expand the scope of notification. However, the Council considers that this would be appropriate, to allow all relevant statutory consultees to be aware of the need for, and therefore plan and resource for, engagement with the applicant and the examination.

Type 1 projects should have an inception meeting with the Planning Inspectorate not less than 24 months prior to the anticipated submission of a development consent order.

Type 2 projects should have an inception meeting with the Planning Inspectorate not less than 12 months prior to the anticipated submission of a development consent order.

Within 14 days of the inception meeting the Planning Inspectorate should publish the minutes of that meeting, a description of the project and a preliminary redline for the project, that has been provided by the applicant. The description of the project must include contact details for the applicant.

All statutory consultees should be notified of the existence of the project, by the applicant within 21 days of the inception meeting, and provided with the preliminary project information as published by the Planning Inspectorate.

Providing basic information in this way will:

a) Allow the Planning Inspectorate and all statutory consultees to be fully sighted on the pipeline of projects and understand how emerging proposals may interact with matters with which they are already dealing.

b) Create, through a standardised process, an accessible public record of emerging proposals.

c) Allow statutory consultees, that is, non-departmental public bodies and local government bodies, that is county, district, and parish councils, as well as mayoral authorities, to plan and resource for their engagement with the examination process.

d) Allow sufficient time so that the relevant bodies and the Secretary of State may consider if a proposal should be consented in an alternative consenting regime, if this has not already taken place.

The proposed approach to consultation

On the basis that effective pre-application is essential and should be retained, and the examination and decision-making process should not be overburdened with

matters that could, and should, have been resolved prior to submission of the DCO. The Council recognises that Gov NC 45 seeks to make provision for Statutory Guidance, however it is suggested that a more robust approach would be, in addition, to formalise pre-application at the point of inception, therefore, the Council suggests:

1) In all cases the approach to pre-app engagement should be agreed on a bespoke basis, between the Planning Inspectorate and the applicant.

2) In doing so the Planning Inspectorate must consider the nature, location and type of project, and critically, any consultation or engagement that has taken place prior to inception.

3) If no consultation or engagement has taken place prior to inception, the following minimum standards are suggested:

a) Type 2 projects should have at least one period of public consultation lasting a minimum of 8 weeks during the 12 months following the inception meeting.

   Type 2 projects should publish, following their consultation, and at least 12 weeks prior to DCO submission, their revised and updated project proposals, to ensure the public, and statutory consultees, understand the progress of the project design prior to submission, and can begin to draft their responses to a future DCO consultation. This is not a consultation.

b) Type 1 projects should have at least two rounds of consultation in the 24 months prior to the submission of the DCO, each of 8 weeks in duration. The second consultation may include a Preliminary Environmental Information Report, either at the discretion of the applicant, or if this has been requested by the Planning Inspectorate.

c) Both type1 and type 2 projects should set out their outline approach and timetable for engagement with statutory consultees. Therefore, it will be for the applicant to ensure that a draft proposal for engagement has been agreed with the relevant parties prior to the inception meeting.

d) The planning inspectorate may, at its discretion, instruct the applicant to engage with other parties who are not statutory consultees, but may be relevant to the location and specifics of the proposed development.

The Council understands this approach would mean that the statutory process of the Planning Act 2008 (and the operation of s118) would commence at the point of inception, one or two years prior to DCO submission, and in most cases, prior to any consultation or engagement by the applicant. Rather than at the point of submission of the DCO, which would be the effect of Gov NC 44.

A proposed test of applicant fitness at inception

Given that the number of applicants using the Planning Act 2008 has increased significantly and therefore, on average, the quality of those applicants has fallen, the Council considers that it would be reasonable for any applicant to undergo a test of financial fitness at the point of the inception.

Effective and rapid pre-application engagement to minimise areas of dispute at examination and the number of unresolved issues at the decision stage, requires the applicant to have sufficient resources, in addition to the Planning Inspectorate fee; to pay any pre-application fees of statutory consultees, and to reimburse local authorities, that is, County Councils, District Councils, Unitary Authorities and Mayoral Authorities, for the costs incurred by them in dealing with the application, between inception, or earlier, and publication of the decision by the Secretary of State.

Local Authorities, in their role as a statutory consultee, will only recover their costs, in relation to their own staff and resources, and any expenditure on additional consultancy that they may require to deal effectively with relevant matters.

To establish that the applicant has made adequate financial provision for this, the Planning Inspectorate will seek confirmation from the relevant parties to ensure they are content. Therefore, it will be for the applicant, in discussion with the statutory consultees and Local Authorities, to ensure that agreement, regarding fees and costs, has been reached prior to the inception meeting.

A reciprocal obligation between the applicant and consultees for pre-app engagement

The Council considers that statutory consultees and local authorities, parish and town councils, and any other bodies that may choose to engage with the applicant, should during pre-application, be obliged to engage without prejudice to any in principle or other objections that they may have to the scheme, and always seek to minimise the areas of disagreement. This provision should not apply to individuals.

Likewise, the applicant will have an obligation to engage effectively with statutory consultees and local authorities, and parish and town councils and other bodies that may choose to engage with the applicant. The applicant should always seek to minimise any areas of disagreement.

The Council considers that town and parish councils, non-government organisations and other bodies who are engaging with the applicant, should be similarly bound by this mutual obligation, however as they are not undertaking either their statutory duty, or receiving a fee or reimbursement of costs for their participation, they should only be required to use their reasonable endeavours to minimise the areas of disagreement.

Whereas, statutory consultees and Local Authorities, *when the provision of fees and costs has been agreed with the applicant*, must always seek to eliminate areas of technical disagreement prior to examination and subsequently. In the absence of agreement of fees and costs the obligation will fall away, and in any case the applicant would not pass the test of fitness at inception.

Based on this mutual obligation, it is not acceptable for either party to seek to defer areas of disagreement on any technical matter to the examination period, that could reasonably have been resolved earlier.

The adequacy of consultation

The Council considers that the adequacy of consultation test should consider the quality and type of engagement that is proposed and implemented by the applicant, specifically considering the engagement proposals against the International Association for Public Participation (IAP2)'s spectrum of public participation. The expectation is that communities in particular, and non-professional interested parties in general, should have reasonable and effective opportunities to genuinely participate and engage in the development and co-design of the project.

https://iap2canada.ca/Resources/Documents/0702-Foundations-Spectrum-MW-rev2%20(1).pdf

Likewise, statutory consultees should be satisfied that they will have adequate opportunity to engage with the project promoter on the required range of technical matters during the pre-application period.

Therefore, a mechanism is needed to verify and score the *adequacy of the quality of consultation* in terms of the following two areas:

1) The degree to which the applicant has informed and consulted.
2) The degree to which the consultation has enabled involvement and collaboration between the parties.

Separate scores should be given for each of these aspects of the applicant's engagement with statutory consultees, and communities, respectively.

Scoring could produce the following potential results; outstanding, good, adequate, requires improvement (inadequate).

This would incentivise good behaviour among project promoters, by both removing the pass and fail, introducing a qualitative element to assessing the adequacy of consultation, and highlighting any inconsistencies in the approach between the applicant's engagement with statutory consultees and communities.

The Council considers, based on its significant experience with NSIPs, that such an approach would make the pre-application stage more effective and proportionate with a clear focus on the quality of, rather than the quantity of, the applicant's engagement with communities and statutory consultees.

Effective dialogue with statutory consultees which moves issues forward, and makes decisions, and is not, a series of performative meetings and presentations, in which no substantive progress is made, is required. The latter has become a feature of some applicant's engagement with statutory consultees in recent years.

Less protracted, more effective, and genuine, engagement with communities would also have significant benefits for community wellbeing, by reducing the community's experience of powerlessness, and the adverse impacts of a protracted process.

Suffolk County Council has set out its case for better quality engagement, and the benefits this has for communities, in its Community Engagement and Wellbeing supplementary guidance document. https://www.suffolk.gov.uk/asset-library/community-engagement-and-wellbeing-policy.pdf

Safeguarding community wellbeing

The Council consider that it is essential that the NSIP consenting process must safeguard community wellbeing and so foster, and retain, a greater degree of confidence and public trust, if it is to deliver the transformational change to the UK economy that is the government's objective.

Clarity of process, transparency, and effective communication between the parties is essential at all stages of the process, to identify, minimise and, if possible, resolve, the areas of disagreement. A faster process, therefore, must be based on a high quality of communication and engagement between the parties if it is to succeed. A protracted process characterised by uncertainty and poor communication, and low levels of trust between the parties, is very bad for both individual and community wellbeing. The Council notes the discussion during the morning of oral evidence taken by the committee on the 24 April, including contributions from Robbie Owen and Sir John Armitt in relation to Judicial Review. The Council considers that Judicial Review may extend the duration of uncertainty for affected communities, this may be harmful to community wellbeing generally, and especially to the wellbeing of interested parties with land, businesses or property, directly or indirectly impacted by the scheme.

Furthermore, in the event of a successful judicial review, given that it is a review of the process of decision making, and not of the decision, the decision will, in most instances, be remade, to comply with the findings of the Court. Therefore, with the provision of effective engagement, process, and safeguards, for parties directly impacted by the scheme, it would not be unreasonable to consider Mr Owen's suggestion for the use of confirmatory Bills, for type 1 projects, given their demonstrable national significance, and the harm to communities and individuals caused by a prolonged, and generally fruitless, process of judicial review.

In conclusion:

Suffolk County Council considers that, based on its experience of the Planning Act 2008, from 2010 onwards, the principles of the Act that there is a need for effective pre-application consultation and engagement, and that the objective of this should be to resolve most or all matters, prior to examination, are fundamentally sound.

However, Suffolk County Council considers that the current *implementation* of those principles and requirements of the Act is, as Minister Pennycook has suggested in the written ministerial statement, and elsewhere, unacceptable.

As the number of applicants using the process has increased, the average quality of applicants has deteriorated, particularly in relation to project management and leadership, as well as their understanding of the process. This has led to an over reliance on third party advisors, who have a pecuniary interest in the process, rather than in expediting the outcome, and they are, in the experience of the Council, increasingly leading the pre-application discussion on behalf of the applicant, rather than appropriately facilitating the applicant's leadership of the dialogue and engagement with statutory consultees and the community.

The Council has set out in its representations what it considers to be a reasonable and proportionate approach to achieving effective pre-application engagement.; by getting back to the basics, that characterised the successful operation of the Planning Act 2008 in earlier years, whilst making adaptations to meet the new demands now placed on the infrastructure consenting process.

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