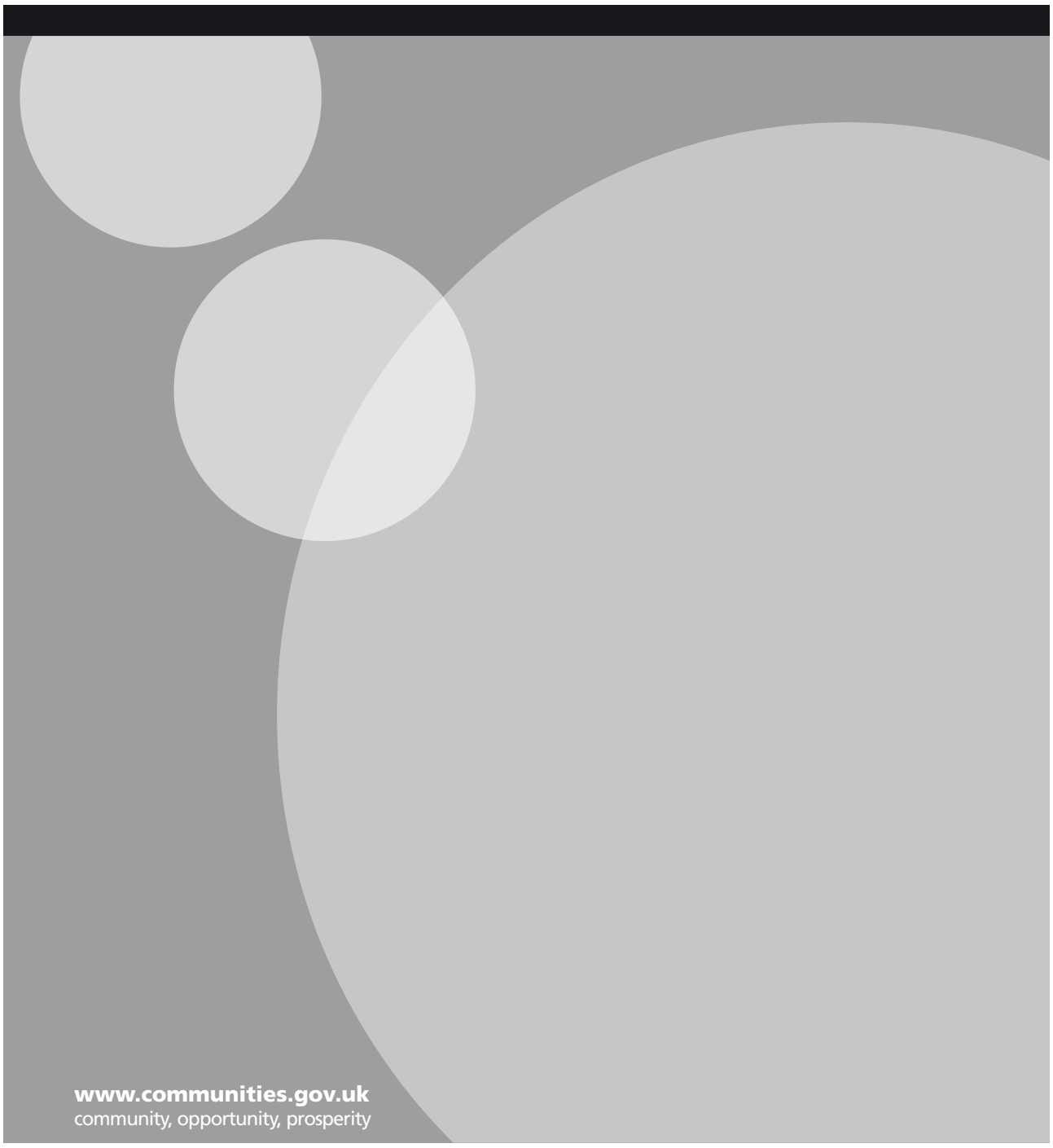
Communities and Local Government

Planning Act 2008: guidance for the examination of applications for development consent for nationally significant infrastructure projects



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Planning Act 2008: guidance for the examination of applications for development consent for nationally significant infrastructure projects

February 2010
Department for Communities and Local Government

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Introduction

1. Section 87 of the Planning Act 2008 ("the 2008 Act" or "the Act") provides that when making any decision about how an application is to be examined, the Examining authority[1] must have regard to any guidance issued by the Secretary of State on how applications for development consent for nationally significant infrastructure projects ("NSIPs") are to be examined.

2. This Guidance is to be read alongside the 2008 Act, The Infrastructure Planning (Examinination Procedure) Rules 2010 ("the Procedure Rules") and The Infrastructure Planning (Interested Parties) Regulations 2010.

Purpose

3. The Guidance is provided for the Examining authority, when carrying out their function of examining applications for development consent for NSIPs.

4. It has been made widely available for the benefit of promoters of NSIPs, their legal advisers, other interested parties and the general public. It is a key mechanism for promoting best practice, ensuring consistent application of examination procedures and for promoting fairness, equal treatment and proportionality.

Legal status

5. Section 87 of the 2008 Act provides that it is for the Examining authority to decide how an application for development consent for an NSIP is to be examined. However, in making any decision about how the application is to be examined the Examining authority must have regard to guidance issued by the Secretary of State.

6. The Guidance cannot, however, anticipate every possible scenario or set of circumstances that may arise and as long as Examining authorities have properly understood the Guidance they may depart from it, providing that they have reasonable rationale to do so and are able to demonstrate this. Departure from the Guidance could otherwise give rise to a claim for Judicial Review, and the reasons given could then be a key consideration for the courts when considering the lawfulness and merits of any decision taken.

[1] The Examining Authority will be a Panel or Single Commissioner, appointed by the chair of the IPC to handle an application. Where the Secretary of State has made a direction under section 112 the Examining Authority will be a Panel or Single Commissioner in respect of specified matters or will be the Secretary of State or a person appointed to act of behalf of the Secretary of State.

7. Nothing in this Guidance should be taken as indicating that any requirement of Planning law or any other law may be overridden (including the obligations placed on the authorities under human rights legislation). The Guidance does not in any way replace the statutory provisions of the 2008 Act or add to its scope and only the courts can give an authoritative interpretation of the Act. The Examining authorities and others using the Guidance must take their own professional and legal advice about its implementation.

The examination process

General

8. When the Infrastructure Planning Commission ("the IPC") receives an application for development consent for an NSIP, it must determine whether the application has been made properly in accordance with section 37 of the 2008 Act, and in accordance with the Regulations made by the Secretary of State under Chapter 2 of Part 5 (pre-application procedure) of the Act[2]. This means that the IPC must consider, among other things, whether the applicant has properly carried out a pre-application consultation in accordance with the Regulations.

9. Where the IPC considers that the application is in accordance with the provisions of the Act and that it can accept the application it must notify the applicant of the acceptance by the end of the period of 28 days beginning with the day after the day on which it receives the application.

10. The notification of the acceptance of the application will also remind the applicant of the requirement to notify affected parties of the application and to make copies of the application available. The applicant will have to certify to the IPC that it has complied with these requirements before the IPC could commence with the examination of the application.

The Examining authority

11. The Act establishes two distinct processes for the IPC to examine applications for development consent for NSIPs, reflecting the differences between the projects that are likely to come before the IPC.

The Panel Process

12. Under this process the examination and consideration of an application will be conducted by a group of three or more Commissioners, who will then also determine the application (unless it falls to be determined by the Secretary of State, for example because there is no National Policy Statement in place for that development).

The single Commissioner Process

13. Under this process the examination and consideration of an application is to be delegated to a single Commissioner, but the single Commissioner will not take the decision on the application. Rather, the single Commissioner will

[2] The Infrastructure Planning (Applications: Prescribed Forms and Procedure) Regulations 2009

submit a report with a recommendation to the Council of the IPC, which will take the decision.

14. Giving the IPC the ability to delegate the examination of applications to a single Commissioner, while retaining the decision with a Council of the IPC, will ensure that the IPC can choose a mode of consideration proportionate to the complexity and demands of the case, while ensuring that an appropriate range of specialist expertise is brought to bear on the final decision.

Appointing the Examining authority

15. Section 61 of the Act provides that it is for the chair of the IPC to decide whether an application should be handled by a single Commissioner or a Panel. Before coming to a decision, the chair is required to take into account any guidance issued by the Secretary of State, and to consult the Council of the IPC, the chief executive of the IPC, and any other Commissioners the chair thinks appropriate.

16. The Secretary of State considers that the major or complex applications which raise many issues and attract widespread public interest in the outcome should be dealt with differently from less complex applications proposing developments which may only have limited impacts or only impact upon immediate neighbours.

17. In deciding whether an application should be handled by a single Commissioner or a Panel, the chair of the IPC is to have regard to:

A. The complexity of the case

18. The complexity and the number of issues raised by individual applications will vary greatly depending on the nature and location of the proposed infrastructure development. An initial assessment of the application documents, including the consultation report[3], will make the chair of the IPC aware of the complexity of the case and the number of issues it raises which require examination and resolution. In particular, the application documents will indicate to the chair whether the proposal:

- raises novel issues for development
- raises complex legal or technical considerations
- proposes associated development which would require consideration of policy contained in more than a single National Policy Statement or
- involves analysis of policy issues because, for example, there is no National Policy Statement in effect which relates to the proposed development

19. The chair of the IPC will consider whether the complexity of the case, or issues raised by the application, require a range of expertise to be available

[3] Consultation report received by the IPC in accordance with Section 37(3)(c) of the 2008 Act. The consultation report sets out how the applicant has consulted, and taken account of the views of the local community and other interested parties.

within the Examining authority, or whether they can be dealt with by a single Commissioner, perhaps with the assistance of an assessor . The chair will also consider whether the application may be dealt with expediently if the Examining authority could delegate the holding of hearings to more than one Commissioner so that, for example, specific issues could be probed at concurrent hearings.

B. Level of public interest in the outcome

20. Anyone is entitled to support or object to any application for development consent. Individuals may have social, political, environmental or purely personal concerns about a particular development proposal. Each application for an NSIP is likely to be unique, and the level of public interest generated will vary greatly depending on the size, scale, location and nature of the proposed development.

21. The initial assessment of the application documents, including the consultation report, will provide the chair of the IPC with an indication of the level of public interest in the proposed development, and the likely level of public participation in the examination of the application. Where the application documents indicate significant public interest in the outcome – and likely significant participation in the examination process – the chair should consider whether the examination of the application would benefit from more than one Commissioner examining the application.

22. In particular, the IPC should consider the likelihood of the examination requiring hearings so that interested parties can make oral representations about the application to the Examining authority, and whether the application may be dealt with more efficiently if there were concurrent hearings.

C. Aviation and nuclear power projects

23. In all cases, the choice of whether the application is to be examined by a single Commissioner or a Panel of Commissioners rests with the chair of the IPC. However, the Secretary of State expects that where the application to the IPC relates to an aviation or a nuclear power project, the level of public interest and the complexity of the issues raised will almost certainly dictate that the application should be examined by a Panel. The main matter for resolution by the chair is therefore likely to be determining the appropriate size and composition of the Panel.

D. Expectation set out in the impact assessment

24. As set out in the Impact Assessment that accompanies the Infrastructure Planning (Fees) Regulations 2010 and the Procedure Rules, it is expected that around two thirds of applications will be handled by a Panel of 3 Commissioners. The chair of the IPC will appoint a single Commissioner to examine an application for smaller and less complex projects, which it is expected will generally be highways or standalone electricity line schemes.

The largest and most complex cases will usually be handled by a Panel of 5 Commissioners.

25. It should be noted that where the chair has appointed a single Commissioner to examine an application, the chair will be able to transfer the application to a Panel at any time if the chair considers, after consulting with the Council of the IPC, the Chief Executive of the IPC, and any other Commissioners the chair thinks appropriate, that the application is more complex than the chair's assessment indicated and that it requires a wider range of expertise.

Who can take part in examining the application

26. Section 102 of the 2008 Act, and The Infrastructure Planning (Interested Parties) Regulations 2010, define the key bodies and individuals who have important roles in the examination of applications.

Interested parties

27. The statutory definition of an "interested party" is a very significant one, because interested parties are given important entitlements before, during and after the examination process. These include the right to be invited to a preliminary meeting; the right to require, and be heard at, an open-floor hearing; the right to be heard at an issue-specific hearing, if one is held; the right to be notified of when the Examining authority has completed its examination; and the right to be notified of the decision.

28. Under the definition in section 102, interested parties comprise the following persons and bodies:

- the applicant
- statutory parties as prescribed in The Infrastructure Planning (Interested Parties) Regulations 2010[4]
- relevant local authorities
- the Greater London Authority where the land is in Greater London; and
- persons who have made "relevant representations" about the application to the IPC (see below).

29. Where an interested party wishes to take part in an oral hearing, they may appoint a representative, including a legal representative, to speak on their behalf at the hearing.

Relevant representations

30. A "relevant representation" is defined in section 102(4). Treating any person who has made a relevant representation as an interested party for the purposes of the examination will ensure that people other than applicants, statutory parties, and relevant local authorities, who have an interest in the application, can register their interest and assert their right to make representations about it to the Examining authority.

[4] Once established, the Marine Management Organisation will be added to the list of statutory parties in section 102(1)(b) of the 2008 Act.

31. A representation will only be "relevant" if it is in accordance with regulation 4 of the Infrastructure Planning (Interested Parties) Regulations 2010, and is received by the IPC by the deadline specified in the notice given by the applicant that the application has been accepted by the IPC. A representation is not relevant to the extent (but only to the extent) that it contains material about compensation for compulsory acquisition of land or an interest in or right over land; material about the merits of policy set out in a national policy statement; or material that is vexatious or frivolous.

32. A relevant representation should contain an outline of the principal submissions which a person intends to make in respect of the application (see regulation 4 of the Infrastructure Planning (Interested Parties) Regulations 2010). To be accepted as a "relevant representation", this outline does not need to set out the full detail of the arguments which the person intends to make during the examination of the application. However, it should contain sufficient information to enable the Examining authority to understand which aspects of the application the person supports or objects to, and the reasons why.

33. These outlines of principal submissions have two functions. First, they provide advance warning of arguments which the various participants are proposing to deploy at the examination. It should be possible to identify from these outlines of principal submissions the issues that are likely to feature most prominently during the examination process. Secondly, the outlines of principal submissions provide the information that the Examining authority requires to structure and programme the examination. In the light of what is said in them the Examining authority may wish to invite participants who appear to hold the same or similar views to consider collaborating to present a single case at any hearing. The outline of principal submissions will also help the Examining authority to see whether there are any relevant issues which are at risk of not being properly covered, and to consider how to remedy any deficiencies, for example by inviting persons who have expert knowledge of the matter concerned to take part in the examination.

34. Where a person has not submitted a relevant representation within the specified period and decides to participate at a later stage, the Examining authority may consider whether to exercise its discretion to allow the person to participate in the examination of the application.

Vexatious and frivolous representations

35. It is for the Examining authority to determine whether any representation by an interested party is frivolous or vexatious. The authority might conclude, for example, that the points raised in a representation were so trivial in the context of the application that they were not worthy of serious consideration, and should therefore be rejected. This is, however, not a step to be taken lightly. A person who is aggrieved by a rejection of their representations on these grounds may challenge the Examining authority's decision by way of a claim for judicial review.

36. In certain cases it may be difficult to determine whether a request is frivolous or vexatious. The Secretary of State recommends that in borderline cases, the benefit of the doubt should be given to the party making the representation. Any subsequent examination of the representation, at a hearing for example, would then provide an opportunity for the person or body making the representation to amplify and clarify it. If it then emerged that the representation did not merit any further serious consideration, the Examining authority could decide to give it little weight. In such circumstances, the Examining authority should limit any further time that may have been allocated for the consideration of that representation, and ensure that any further oral representations made by the person address other matters or provide additional information.

Affected persons

37. "Affected persons" are the bodies or individuals known to the applicant, after making diligent inquiry, as having an interest in the land to which a compulsory acquisition request relates (sections 59 and 92 of the 2008 Act refer). Such persons are specified as "statutory parties" in regulation 3 of the Infrastructure Planning (Interested Parties) Regulations 2010, which means in turn that they fall within the definition of an "interested party".

38. It should be noted that the applicant is under a duty, under section 59 of the Act, to notify the Examining authority of the names, and such other details as may be prescribed, of each affected person in relation to his application.

39. The Government is firmly committed to ensuring that the rights of those whose land is being compulsorily acquired are properly protected under the new development consent regime. That is why the Act provides that before an application involving the authorisation of the compulsory acquisition of land can be approved, the decision-maker must be satisfied that such purchase is required for the development, to facilitate or is incidental to it or as "replacement land" and there is a compelling case in the public interest for it. The Secretary of State has issued guidance on the authorisation of compulsory acquisition[5].

40. Because all "affected persons" are 'interested parties', they have all the entitlements that interested parties have. However, in addition, affected persons are also able to request that a compulsory acquisition hearing be held to consider the issues arising in connection with the authorisation of the compulsory acquisition of land, such as whether there is a compelling case for the compulsory acquisition of the land, and to make oral representations at that hearing. This ensures that those persons whose land is being compulsory purchased are properly protected under the new consent regime. They will also continue to have clear rights to compensation and to legal challenge.

[5] http://www.communities.gov.uk/planningandbuilding/planning/planningpolicyimplementation/reformplanningsystem/planningbill/

Other persons

41. Although the legislation provides that only interested parties (or their appointed representative) have an automatic right to participate in the examination of an application for development consent for an NSIP, the Examining authority is able to permit any other person to submit written representations about the application, or make oral representations about the application at any hearing held for the purpose of examining the application. This is provided for in the Procedure Rules.

42. In particular, the Rules allow the Examining authority to call expert witnesses to give evidence on specific points at hearings and to consider requests from the applicant and other interested parties to call expert witnesses in support of representations they make about the application.

43. It is for the Examining authority to decide whether to allow persons other than those categorised as interested parties to participate in the examination of the application, including expert witnesses. But where a request is received from an interested party to allow an expert witness to take part in the examination of an application, the Secretary of State considers that this should be given serious consideration, in the interests of informed decision making.

How the application is examined

44. It is for the Examining authority to determine how the application is to be examined. However, the Examining authority in making the decision on how the application is to be examined must comply with the Procedure Rules made by the Lord Chancellor, have regard to this Guidance, and any guidance issued by the IPC.

45. The examination of applications is to be carried out in public except in the rare case where the Secretary of State intervenes in an application in the interest of defence or national security[6] and directs that representations on matters relating to defence or national security are to be made to a person of a specified description instead of being made in public[7].

46. "Carried out in public" means that all meetings and hearings presided over by the Examining authority (as opposed to a person prescribed by the Secretary of State) are to be held in public, and the Examining authority may only take into account any representation or evidence or any other information received from any person before the examination opens or during the examination provided that it is made available for public inspection in accordance with rule 21 of the Procedure Rules.

Initial assessment of the application

47. The Examining authority is required to make an initial assessment of the issues arising from the application through its preliminary examination of the application documents and relevant representations received from interested parties as part of the information contained in their registration forms. This initial assessment will guide the Examining authority to form a provisional view as to how the application is to be examined.

48. The Examining authority will normally complete its initial assessment of the application within a period of 21 days that begins with the day after the deadline for receipt of relevant representations set out in the applicant's notification to interested parties that its application has been accepted by the IPC.

Preliminary meeting

49. The Examining authority is required to hold a preliminary meeting after it has made an initial assessment of the application, and it will invite the applicant, each interested party and any other person it chooses to invite, giving them at least 21 days' notice. The Secretary of State considers that in most cases a

[6] Section 112 of the 2008 Act
[7] Paragraph 2(6) of Schedule 3 to the 2008 Act

preliminary meeting should be held within a period of six weeks that begins with the day after the deadline for receipt of relevant representations set out in the applicant's notification to interested parties that its application has been accepted by the IPC.

50. The purpose of the preliminary meeting is to enable those present to make representations as to how the application should be examined and to discuss any other matter the Examining authority wishes. Investing time up front, ahead of the examination itself, to identify issues and work out how best to consider them is vital to ensuring an effective and efficient examination of issues. This will ensure that the Examining authority makes a proper assessment of the issues and meets the interested parties to discuss how the application should be handled.

51. It is also important that the pre-examination phase, and the period leading up to a hearing, is used to reach as much consensus between participants as possible, to make the most effective use of time.

Procedure for preliminary and other meetings

52. The Examining authority will notify all invitees of the matters it wishes to discuss at the preliminary meeting. When giving notice of the meeting, it will also provide a clear statement of what, on the information before it, the Examining authority considers to be the key issues. This is intended to assist the Examining authority and parties in preparing for the examination of the application. It is not intended, though, to be a definitive statement of the issues to be considered since the Examining authority must be free to hear all evidence that it believes is relevant to its consideration of the case. The Examining authority may also give an indication of those matters which it considers do not need to be considered or which need not be considered in great detail during the examination process.

53. The Examining authority will make the application and relevant representations available to all participants in accordance with rule 21 of the Procedure Rules. In any event, arrangements will be made for copies of all representations to be available for public inspection.

54. Experience of planning and other inquiries has shown that pre-inquiry meetings and other meetings can be a very effective means of agreeing facts, and narrowing the extent of disagreements, both before and during the inquiry. Various models have been adopted by examining authorities, but they have in common a format that is non-adversarial and in which a discussion of a specific issue is led by the examining authority or by a chairperson nominated from within the group. The results of these sessions may be written up as examination documents and form part of the material which informs the Examining authority's report.

Procedural decision

55. The Examining authority will decide how the application is to be examined in light of the discussions held at the preliminary meeting. It will notify all

participants of this procedural decision at the preliminary meeting, or as soon as practicable afterwards.

Timetable

56. The Examining authority is required to comply with the statutory timetable for completing the examination of the application, as set out in section 98 of the Act. It should also set out a timetable for when each stage of the examination will be completed as this would provide greater certainty to all participants and interested parties about how the examination will proceed.

57. The Examining authority should propose the timetable for the examination of the application at the preliminary meeting. The timetable can then be agreed or amended in light of the representations received about it from interested parties and other attendees.

58. The timetable must specify the date by which any further written representations required by rule 10 of the Procedure Rules are to be received. It should also timetable any hearings to be arranged to allow parties to make oral representations about the application. The 2008 Act enables hearings to examine specific issues to be held in concurrent sessions (where the application is examined by a Panel) by a number of Commissioners. The use of concurrent sessions, where appropriate, should help to achieve overall savings in the length of the examination process. However, when considering the timetabling of concurrent sessions, the Examining authority should have due regard to enabling any interested party who may wish to participate in concurrent sessions to be able to do so.

59. Since the full extent of the issues to be investigated will not always be clear at the outset of the examination of an application, which will make providing exact timings difficult, the Examining authority should keep the timetable under review at all times. If, at any point during the examination, the Examining authority believes that the timetable will not be met for any reason, including any unforeseen circumstance, any difficulty concerning any stage of it, or any change to the statutory timetable, then it must prepare a revised timetable and notify all interested parties, and any other persons it invited to the preliminary meeting, of the changes to the timetable.

60. The timetable must also specify the date by which the Examining authority is to receive the local impact report from the relevant local authority, or relevant local authorities as the case may be, and the date by which the Examining authority is to receive comments on the contents of the local impact report from the interested parties.

61. The Secretary of State considers that normally the local impact report should be received by the Examining authority within a six week period starting from the day following the end of the preliminary meeting, unless it considers that the relevant local authority, or local authorities, require a longer period to prepare the reports because of the number of issues raised by the application. Interested parties are to be given not less than 21 days to submit their comments on the local impact report to the Examining authority,

starting from the day after the local impact report was made available to them by the Examining authority.

62. The timetable is also to specify the date by which the Examining authority is to receive any statement of common ground from the applicant and any interested parties.

Statement of common ground

63. The statement of common ground is a written statement prepared jointly by the applicant and the main objectors, setting out the agreed factual information about the application. A statement of common ground is useful to ensure that the evidence at the examination focuses on the material differences between the main parties. Effective use of such statements is expected to lead to a more efficient examination process.

64. The statement should contain basic information on which the parties have agreed, such as the precise nature of the proposed infrastructure, a description of the site and its planning history. In addition to basic information about the application, agreement can often be reached on technical matters and topics that rely on basic statistical data. For example, traffic evidence can be simplified and the issues refined by agreeing matters such as traffic flows, design standards, and the basis for forecasting the level of traffic the application would generate. The topics on which agreement might be reached in any particular instance will depend on the matters at issue and the circumstances of the case.

65. As well as identifying matters which are not in real dispute, it may also be useful for the statement to identify areas where agreement is not possible. The statement should include references to show where those matters are dealt with in the written representations or other documentary evidence. Agreement should also be sought before the examination commences about the requirements that any order granted should contain.

66. How such agreement is reached will vary depending on the nature and complexity of the application and the matters at issue. Where there are only two or three major parties involved and the issues are fairly straightforward, the Examining authority might simply encourage the parties at the preliminary meeting to get together with a view to producing a statement of common ground containing agreed facts. For major applications a more formal arrangement may be necessary, particularly where several parties are expected to bring evidence of a technical nature to the examination.

67. However, the duty of Examining authority is not simply to accept the statement of common ground or to react to the evidence presented. The role of the Examining authority is to ensure that all aspects of any given matter are explored thoroughly, especially with regard to the matters fundamental to the decision, rather than seemingly accepting the statement of common ground without question.

68. Consequently, the Examining authority should probe the evidence thoroughly if their judgment or professional expertise indicates that either.

- all of the evidence necessary for a soundly reasoned decision has not been put before them or,
- that a material part of the evidence they do have has not been adequately tested

Appointment of assessor

69. When it seems likely that evidence to be given about an application will be of a specialist nature, or of a level of complexity outside the normal experience of the Commissioners appointed to examine an application, the chair of the IPC, at the Examining authority's request, can appoint one or more assessors to advise and assist them.

70. Although the IPC will be able to draw on a wide range of skills and expertise, the use of an assessor could be important in assisting the progress of the examination towards a quicker understanding of the more technical and specialised issues.

71. Where an assessor has been appointed to assist the Examining authority by the chair of the IPC, the Examining authority must notify persons entitled to participate in the examination of the assessor's name and the matters on which the assessor is to assist the Examining authority.

72. Although an assessor may be appointed at any time during the examination of the application, in most cases the appointment is likely to be made at the pre-examination stage. This is because the initial assessment of the application would have identified to the Examining authority the issues that require further examination, and helped it assess whether these could be examined more efficiently and expediently with the assistance of an assessor.

73. Therefore, in most cases, before the examination of the application begins, the Examining authority should consult the assessor and define the latter's role and contributions to the running of the examination, and to the Examining authority's report. The assessor should be introduced at the preliminary meeting and any subsequent hearing, and his or her role explained. Where the assessor is appointed at some stage after the examination of the application has begun, the assessor should be introduced, and his or her role explained, as soon as is practicable.

74. The Examining authority is in charge of the hearing and should retain control of it at all times. The Examining authority should seek to set and maintain an investigatory approach at the inquiry which while seeking the truth does not become aggressively adversarial. Even when specialist issues are being argued the various parties should address the Examining authority. When an assessor wishes to ask a question the Examining authority can often ask it on the assessor's behalf, but when the subject matter is highly specialised

or complicated the assessor may, with the Examining authority's agreement, do any necessary questioning. The Examining authority should always retain control of proceedings while the assessor is putting questions, be ready to step in and curtail unnecessary questioning, and should be clearly present throughout.

75. It is the responsibility of each assessor to ensure that all the relevant facts required for a complete understanding of the issues involving the assessor's specialism emerge at the hearing, and that the Examining authority is provided with whatever explanation is required to enable the Examining authority properly and fully to understand the subject matter.

76. Whilst the assessor is assisting the Examining authority in preparing for, holding and reporting on the examination, the assessor is also expected to abide by the principles of impartiality, fairness and openness and should avoid informal contact with any of the participants, either at the hearing venue or elsewhere.

Appointment of barrister, solicitor or advocate

77. As already mentioned, the Act proposes an inquisitorial approach to the examination of applications, and this includes examination at hearings. It is envisaged that in most cases it will be the Examining authority that will ask questions of persons making oral representations at hearings.

78. However, the Act recognises that the Examining authority might sometimes need the support of a professional advocate to ensure that the evidence is tested in the most effective and revealing way. It therefore provides that the chair to the IPC may appoint a barrister, solicitor or advocate to give legal advice and assistance to the Examining authority, where the Examining authority requests it. The advice and assistance which may be provided includes the ability to conduct oral questioning at a hearing.

Written representations

Procedure for written representations

79. Written representations are one of the main types of evidence which the Examining authority will take into account when taking its decision, or as the case may be, considering its recommendation. It is envisaged that in most cases there will be at least two rounds of written representations. This will include the relevant representations made by the interested parties in accordance with rule 3 of the Procedure Rules, and any detailed written representations requested by the Examining authority at or subsequent to the preliminary meeting.

80. The Secretary of State considers that where either no relevant representations are received about the application within the period specified, or the representations received do not object to the proposal contained in the application, the Examining authority should not need to seek further detailed written representations about the application.

81. The fact that no relevant representations have been received to an application by the Examining authority should not be taken to mean that the Examining authority should automatically grant consent to the applicant. Instead, the Examining authority is to proceed with examining the application against the criteria set out in the National Policy Statement, whilst having regard to any local impact report submitted by the relevant local authority or relevant local authorities, and any matters prescribed by the Secretary of State in relation to the development of the description proposed.

82. In the majority of cases however, it is likely that the Examining authority will require further written representations to obtain greater details of interested parties' cases. The Examining authority will normally request written representations at the preliminary meeting, or as soon after as is practicable, giving at least 21 days' notice.

83. The written representations should include each party's detailed case (that is, why they support or oppose the application), and identify those parts of the application proposals or specified matters with which they agree and each part with which they do not agree, stating reasons for any disagreement.

84. Participants should normally also provide with their written statements, the data, methodology and assumptions used to support their submissions. If this is not done it could cause delays in the examination of an application. For example, if extensive tables, graphs, diagrams, maps etc. are not produced until after an issue-specific hearing has opened, this can cause unnecessary delay, and the other interested parties might well need extra time to study these. If new material is raised at a very late stage which another interested party has not had adequate time to consider, delays in the examination

of the application may result and, unless there is good reason for the late submission, an award of costs could arise[8].

85. The Examining authority can also ask written questions and require additional information from any interested parties at any stage of the examination process, and require that a response is to be made in writing within a period it specifies. It may disregard any written representations and responses to its questions if these are received after the specified date.

[8] Section 95(4) of the 2008 Act applies the costs regime set out in section 250(5) of the Local Government Act 1972 to examinations under the 2008 Act. This provision allows the Examining authority to make orders relating to the costs of the parties participating in the examination, and the parties by whom those costs are to be paid. The Government expects the IPC to develop its own policy in relation to when costs are to be awarded, taking into account Circular 03/09: Costs Awards in Appeals and Other Planning Proceedings.

Hearings

Notification of hearings

86. The Government's aim, in cases where hearings are required, is for the Examining authority to fix as early a hearing date as possible. Once a date has been fixed, it should be changed only for exceptional reasons. The venue for the hearings should afford adequate facilities for those with special needs.

87. The Examining authority is to notify all those entitled to appear at compulsory acquisition and open-floor hearings (that is, affected persons and interested parties respectively) of the date by which they must notify the IPC of their wish to be heard at such hearings. The notification should be in writing and made as soon as is practicable after the date specified for the receipt of relevant representations.

88. The notification must give those entitled to appear at the hearings at least 21 days' written notice of the date, time and place fixed for the holding of the hearing. In practice, it may normally be possible to give much more notice.

89. In addition, the Procedure Rules impose an obligation on the applicant regarding publicity for the hearing(s). Firstly, the applicant is required to publish a notice of the hearing in two successive weeks in one or more local newspapers circulating in the locality in which the land in question is situated. Secondly, the applicant is required to post a notice of the hearing in places near to the location of the proposed development, and post a notice of the hearing on the land itself where it is in the control of the applicant, so as to be visible and legible to members of the public.

90. The published or posted notices must state the place, date and time of the hearing; the relevant section of the 2008 Act under which the application has been made; sufficient description of the proposals in the application to identify their location with or without reference to a specified map; and details of a place where a copy of the application and relevant documents can be inspected.

Specific issue hearings

91. If the Examining authority decides that consideration of oral representations about a particular issue is necessary to ensure adequate examination of the issue or that an interested party has a fair chance to put forward its case, it must hold an issue-specific hearing to receive oral representations about the issue.

92. All interested parties are to be invited to participate in the issue-specific hearing and are to be able, subject to the Examining authority's powers of control over the conduct of the hearing, to make oral representations on the specific issue or issues being examined at the hearing.

93. Where the application is examined by a Panel, hearings to examine specific issues can be held in concurrent sessions by a number of Commissioners. The use of concurrent sessions should help to achieve overall savings in the length of the examination process. As stated earlier however, when considering the use of concurrent sessions, the Examining authority will have due regard to enabling any interested parties who may wish to participate in concurrent sessions to be able to do so.

Compulsory acquisition hearings

94. Where the application includes a request for compulsory acquisition, the Examining authority will, as soon as is practicable after the date specified for the receipt of relevant representations, notify all affected persons of the date by which it is to receive requests to hold a compulsory acquisition hearing.

95. Where the Examining authority receives one or more requests for a compulsory acquisition hearing from affected persons within the date specified, it must cause a hearing to be held at which all affected persons are invited and can make oral representations about the compulsory acquisition requests.

96. Where the application contains a number of requests for authorisation of the compulsory acquisition of land, the Examining authority may choose to consider all requests at a single hearing or at separate hearings.

Open-floor hearing

97. As soon as is practicable after the date specified for the receipt of relevant representations, the Examining authority will notify all interested parties of the date by which it is to receive requests to hold an open-floor hearing.

98. If the Examining authority receives one or more requests for an open-floor hearing from interested parties before the specified deadline, then it must arrange for an open-floor hearing to be held. The Examining authority will invite all interested parties to the open-floor hearing, giving them not less that 21 days' notice. All interested parties will have an opportunity, subject to the Examining authority's powers of control over the conduct of the hearing, to make oral representations about the application.

Procedure at hearings

99. Section 94 of the Planning Act provides that it is for the Examining authority to determine how hearings are to be conducted, including the amount of time to be allowed at the hearing for the making of a person's representations. The Secretary of State considers this to be an important power, as it will enable to Examining authority to ensure that each hearing is completed according to the set timetable – any delays may have an impact on the overall timetable for the examination. The Examining authority is therefore expected to make use of its powers of control over the conduct of hearings to ensure that they are carried out as efficiently as possible, whilst remaining fair to all parties and thorough in their examination of evidence.

100. The Examining authority is expected at the start of the hearing to identify the matters to be considered and those on which it requires further information. The kind of issues which the Examining authority might, in the circumstances, consider appropriate to be dealt with in such manner may include issues relating to the impact of the development on the locality including noise, air quality, quality of life; or whether there is a compelling case for the compulsory acquisition of land. Ultimately it will be for the Examining authority to decide, in light of the particular circumstances of the case, which matters it wishes to receive oral evidence on.

101. The Examining authority will determine the order in which persons entitled or permitted to appear shall be heard, although it is expected that in most cases the applicant will give evidence first and will have the right of final reply, unless the Examining authority in a particular case decides otherwise. The Examining authority will usually try to allocate a specific amount of time for the making of oral representations. The Examining authority must act even-handedly in using this provision and should ensure that the timetable agreed in rule 8 of the Procedure Rules allows reasonable time for persons to make oral representations.

102. Rule 14 of the Procedure Rules requires that oral submissions must be based on an interested parties' relevant or written representation. This is to ensure that the hearing can focus primarily on the matters for which it has been arranged, as set out in paragraph 100. However, subject to the Examining authority's discretion as to the conduct of the hearing, rule 14 does not prevent someone from referring to matters not included in their written representation where it is relevant to the issues under consideration at the hearing, or to the examination more generally.

103. Under section 94 of the Act, the Examining authority may refuse to hear evidence which is, in their view, irrelevant, vexatious or frivolous; relates to the merits of policy set in a National Policy Statement; repeats other representations already made; or relates to compensation for compulsory acquisition of land or of an interest in or over land. Additionally the Examining authority may require any person behaving in a disruptive manner to leave the hearing, or to remain only if that person complies with specified conditions.

104. The Examining authority is expected to use these powers to control the conduct of the hearing reasonably, and where possible allow organisations or individuals with similar interests to have their say on the application, as they may bring different perspectives to bear on a given issue. This should not, however, be at the expense of unnecessary repetition of the same arguments. For example, where the Examining authority is aware that a number of those attending the hearing are likely to wish to repeat other's representations, perhaps because they represent a campaign or a neighbour group opposing the application, it should encourage individuals who intend to submit the same, or very similar evidence to work together to agree upon a spokesperson to put forward a case on everyone's behalf.

105. The Act provides that at hearings it is the Examining authority, or the legal assistance appointed to it, that will probe, test and assess the evidence through direct questioning of persons making oral representations. Normally parties will be invited to summarise their case, made in their relevant or written representations, and then be questioned on the evidence they have put forward to support their case. Again, while truth-seeking, the Examining authority should seek to set an approach which is not aggressively adversarial.

106. It is expected that in formulating their questions, the Examining authority will have discussed with interested parties the issues that require testing – most likely at the preliminary meeting, but this can be anytime throughout the examination process – and the information that may need to be obtained from the person making the oral representations which the parties might require to enable them to present their cases properly.

107. In certain circumstances the Examining authority may allow a participant, or his/her representative, to question a person making oral representations at a hearing (that is, allow cross-examination): it may do so where it considers that this is necessary to ensure the adequate testing of any representations; or where it considers that it is necessary to allow an interested party a fair chance to put the party's case.

108. The Examining authority should carefully consider all requests from parties in this regard and ensure that parties are not denied the opportunity to ask questions to which they require the answers in order to complete their cases. Where the Examining authority permits one party to cross-examine another, there is no presumption that reciprocal rights will apply: the Examining authority will determine where this procedure is necessary, in accordance with the principles set out in paragraph 107. An interested party who is aggrieved by a rejection of their request to be allowed to question persons making oral representations may challenge the Examining authority's decision by way of a claim for judicial review.

109. Where the Examining authority permits a party to ask questions of a person making oral representations at a hearing, it will determine the amount of time to be allowed for the questioning and the matters to which the questioning may relate. The Examining authority should be prepared to intervene if it considers that the questioning is beginning to stray from the

matters which it has allowed the questioning to relate to, or the questioning is taking too much of the examination time and could jeopardise the timetable. The Examining authority must act even-handedly in using this power.

110. Persons who are entitled to appear at hearings do not have an automatic right to call witnesses to corroborate their evidence. The Secretary of State considers that it is for the Examining authority to decide whether other persons (other than the applicant or an interested party) are to participate in the examination of the application, including witnesses. Rule 14 gives the Examining authority the discretion to permit any other person to make oral representations at a hearing.

111. This provision will enable the Examining authority to invite witnesses itself, or on behalf of interested parties who request it, if it considers it necessary to ensure adequate examination of an issue or that an interested party has a fair chance to put forward its case. Where a request is received from an interested party to allow an expert witness to take part in the examination of an application, the request should not be denied unreasonably.

Site inspections

112. It is common practice for the persons appointed to examine applications for development consent (i.e. Planning Inspectors in the current regimes) to make a site visit to familiarise themselves with the proposed development area.

113. Under rule 16 of the Procedure Rules the Examining authority may make an unaccompanied inspection of the land (or place, if offshore) before or during the examination without giving notice of their intention to the persons entitled to take part in the examination. This rule also allows the Examining authority to make accompanied site visits during the examination.

114. The Examining authority will refuse to hear evidence or other submissions during any accompanied visit. It is acceptable, however, for people to draw their attention to particular features of the site and its surroundings.

Procedure after the completion of examination

Status of National Policy Statements

115. Where a relevant National Policy Statement is in place, the Panel or Council of the IPC (whichever is the decision-maker) must take the decision in accordance with that National Policy Statement, unless to do so would:

- lead to the United Kingdom being in breach of any of its international obligations

- lead to the Panel or Council, or the IPC, being in breach of any duty imposed on it by or under any enactment
- be unlawful by virtue of any enactment
- mean that the adverse impact of the proposed development would outweigh its benefits.

116. Where no relevant national Policy Statement has been designated the Panel or Council must make a recommendation to the Secretary of State, who will take the decision. In developing its recommendation, the Panel or Council will have regard to relevant national policy, including any relevant draft National Policy Statement, and will make a judgement as to how that policy should be weighted.

Cases where the Secretary of State is the decision-maker

117. In cases where the Secretary of State is the decision-maker, rule 19 of the Procedure Rules requires reference back to participants where the Secretary of State is disposed to disagree with the Examining authority's recommendation for certain reasons. Such disagreement might be because the Secretary of State differs from the Examining authority on any matter of fact mentioned in, or appearing to be material to, a conclusion reached by the Examining authority or because the Secretary of State proposes to take into consideration any new evidence or any new matter of fact.

118. Where reference back takes place under rule 19 of the Procedure Rules, all persons entitled to take part in the examination of the application and who participated in it will be afforded the opportunity of submitting written representations within 21 days of the notification.

Notification of decision

119. Any persons entitled to take part in the examination of an application and who did take part are entitled to be notified of the decision in writing, whether or not they have asked to be notified. Any other person who took part in the examination and asked to be notified will also be notified. Any written reports of assessors will be appended to the notification of the decision. The decision-maker will also provide each interested party with a copy of the statement of its reasons for its decision to grant or refuse development consent.

Procedure following quashing of decision

120. Rule 20 of the Procedure Rules relates to the procedure to be followed where the original decision has been quashed by a Court. It ensures that those who were entitled to take part in the examination of the application and who did so are given the opportunity to make further comments on

the case, following the Court's decision. The decision-maker will send to those participants a written statement of the matters on which further representations will be invited, for the purposes of further consideration of the application. It is expected that 21 days will normally be allowed for this purpose.

Service of Notices and Inspection of Documents

121. The Procedure Rules provide that the Examining authority may publish notices/information on a website where possible and use electronic transmission to notify interested parties of the procedural steps. The use of the internet and electronic transmission by the Examining authority is encouraged as it will widen the circulation of information that has previously only been available through notices in newspapers and journals or in hard copy.

122. It is desirable that documents/notices published on the internet should be available through a single website, and where the Procedure Rules provide for the Examining authority to publish a notice, the intention is to do so through a single website. It is recognised that not all potential participants will have access to electronic transmission means, and the Procedure Rules retain the provisions for non-electronic communication and hard copies to be available for inspection.

Allowing further time

123. There may, exceptionally, be circumstances where it would be reasonable to allow further time for the taking of any step in respect of which the Procedure Rules specifies a time limit, and rule 23 of the Procedure Rules therefore enables the Examining authority at any time, in any particular case to do so. The Examining authority is expected to be very sparing in the use of this power.

Administration, exercise and delegation of functions

124. The IPC may wish to appoint a secretariat to support the hearing. The secretariat could be responsible for programming, administrative support, managing the library, managing IT, arranging accommodation and so on. An examinations manager may be appointed to head the secretariat. Their primary role is to help the Examining authority to drive the process forward as speedily as possible and to keep within the agreed timetable, whilst maintaining constructive relationships with all participants and liaising between the secretariat and the relevant parts of local and central Government. Where a broader Secretariat is not justified, the Examining authority may appoint a programme officer to act as the interface between it, the participants and the public (including the press).

125. Where the examination of an application is conducted by a single Commissioner, and therefore the final decision is to be taken by the Council of the IPC, it may be necessary to appoint two different secretariats: one to support the Examining authority and another to support the Council.

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