

December 2022

The Rt. Hon. Michael Gove MP
Secretary of State for Levelling Up, Housing and Communities
and Minister for Intergovernmental Relations

The Infrastructure Forum

1. The Infrastructure Forum (“TIF”) brings together the key players in UK infrastructure, including investors, owners, operators, contractors, economic regulators and professional advisers. It has become the meeting place for confidential and constructive discussion about ways to plan for, promote and deliver infrastructure networks in the UK and to broaden the range of options available to policymakers and regulators.
2. The Planning Working Group of the Infrastructure Forum, which has prepared this response on behalf of the Forum, comprises members from across the infrastructure sector – within both the public and private sectors – and is chaired by Robbie Owen, Partner and Head of Infrastructure Planning & Government Affairs at Pinsent Masons LLP.
3. As set out by the Department for Levelling up, Communities & Housing in its 30 August policy statement, “Faster, better, greener delivery of major infrastructure is essential to support our economic growth, connectivity between places, essential utilities, energy security and Net Zero”. The Government’s aim to speed up planning processes for Nationally Significant Infrastructure Projects (NSIPs) is essential to achieving this. The Infrastructure Forum’s Planning Working Group therefore welcomes the emphasis being placed on informed reform, continued in The Autumn Statement, and wishes to make the following points for the Government to consider in finalising and then implementing its NSIPs reforms Action Plan.

National Policy Statements

4. The Planning Working Group welcomes the Government’s intention of prioritising the delivery of National Policy Statements (NPS) for transport, energy and water resources during 2023. It is clear that one of the most significant ways of speeding up and ensuring robust decision-making in relation to NSIPs, and delivering more predictable outcomes, is setting clear, comprehensive and understandable national planning policy.
5. It is also critically important that NPSs are reviewed on a regular and timely basis, and kept up to date, to improve confidence, reliability and predictability in the system and to ease concerns that impact investment and funding. When the Planning Act 2008 was brought into effect the clear intention was that NPSs would be put in place for all fields of infrastructure and reviewed every 5 years. TIF invites the Government to undertake a cross-departmental review of how the objective of regular reviews can best be resourced and achieved going forward, which we see as critical to ensuring that we are not in this same position again in the medium term, when the NPSs due to be delivered in 2023 will themselves have become outdated.
6. If the Government feels that regularly updating the existing suite of individual sector-specific NPSs is not reasonably practicable then we would encourage it to consider if there is a better and more sustainable way of setting out and then keeping up to date national planning policy for NSIPs. One idea that has been advanced is to have an overarching NPS that sets out policy applying to all fields and sectors, with there then being a series of Appendices or Annexes that deal with policy on a field/sector-specific basis. The overarching element at least could be published as part of the Government’s 5 yearly National Infrastructure Strategy, which is published in response to the National Infrastructure Commission’s 5 yearly National Infrastructure Assessment.

Resourcing Stakeholders

7. Difficulties with engagement are common due to resourcing issues particularly in statutory consultees.
8. It is therefore positive in principle that amendments have recently been made to the Levelling-up and Regeneration Bill to enable “a small number of public bodies to charge for their statutory services to help them provide a better, reliable, quality of advice to developers and support faster planning decisions”. But it is key that these fees are ring-fenced, creating funding for additional resources. With this adequate resourcing in place, statutory consultees should be put under a duty to engage constructively with applicants, Examining Authorities and the Secretary of State throughout the process.

Environmental Data

9. There is a need for better and in particular clearer guidance from Government on the necessary level of baseline environmental data required for environmental impact assessments and Habitats Regulations assessments. It is felt that the expectations and requirements set by Natural England and the Environment Agency are often overly conservative, precautionary, onerous and disproportionate. This approach seems to stem from an excess of caution in the absence of clear guidance, and often translates into a similarly cautious approach by Examining Authorities. It can have a dramatic effect on the amount of work required to be carried out in the pre-application phase, during examinations and afterwards, and therefore gives rise to substantial additional burdens and real delays.
10. Guidance on these matters from Government should help to reduce the work needed in pre-application, focus Examining Authorities on the key environmental data and increase confidence in their judgements, and speed up the whole process of infrastructure consenting and so delivery. It should also help to reduce the likelihood of judicial review based on alleged inadequacies in the environmental information available to the decision-maker.

Options and Alternatives

11. Challenges with considering options and alternatives in the pre-application scheme development phase are a significant issue, causing delays and large expenditure by promoters on commissioning all number of reports and needing to repeat over time. This was at the heart of the Aquind interconnector DCO decision (currently being judicially reviewed) and one of the issues in the successful Stonehenge A303 Tunnel judicial review, and it is a consistent and increasing theme of examinations and applications for judicial review of consents for new NSIPs.
12. Some National Policy Statements include helpful guidance as to the approach to considering alternatives where they do need to be taken into account, but this is not consistent and has been shown to be insufficient in a number of recent judicial reviews of development consent order (DCO) decision-making. In particular, no guidance is offered as to when the common law is likely to require consideration of alternatives and the absence of such guidance makes it harder for Examining Authorities to deal with objectors’ arguments as to potential alternatives with confidence. The recent decision to reject the Aquind interconnector scheme by reference to a potential alternative has tended to compound this difficulty. What is required is comprehensive Government Guidance on what the law is in relation to obligations to consider alternatives. This would helpfully supplement what individual NPSs say on this issue from a policy perspective and provide invaluable guidance to DCO applicants, statutory bodies and other stakeholders, and then to Examining Authorities and Secretaries of State. The Guidance could be updated as required following developments in the law, as happens already with Planning Practice Guidance applicable to decision-making under the Town and Country Planning Act 1990.

Role of Government Guidance

13. Government Guidance on the NSIPs planning regime has been available since 2010, but this has only occasionally been updated, most recently in 2015, and never comprehensively. Whilst the Planning Inspectorate has a helpful series of practical Advice Notes and has been very good at keeping these updated, it is important that the Government realises the key purpose, status and value of formal Guidance given at a national level.
14. Government could make a real and meaningful difference by rejuvenating and re-purposing its own Guidance on the NSIPs regime. It seems to the Planning Working Group that this is a key tool which is being underutilised. Government Guidance that must be taken into account by DCO applicants, statutory bodies and other stakeholders, and then Examining Authorities and Secretaries of State, would provide a much needed missing element of the NSIPs regime and contribute to its efficient working.
15. We have identified in this paper some areas where we think Government Guidance would be particularly useful. There is potential for Government Guidance to do something quite different from the Planning Inspectorate's Advice Notes, looking beyond practical matters and particular stages to take a "bigger picture" perspective of the whole life cycle into implementation and indeed the purpose and desired outcomes of the regime.

Ministerial Decision-making

16. Very often, delays at the Ministerial decision-making stage are the result of factors outside of their Department's control. However, in other cases, issues arise within Departments themselves and this has been a particular focus in some recent judicial reviews of DCO decision-making and criticised for being insufficiently rigorous. The approach officials and ministers should take in analysing reports from Examining Authorities and then making decisions should be subject to clear and robust internal guidance. This could include a decisions checklist, much like the Planning Inspectorate use when they decide whether to accept a DCO application for examination. A collaborative cross-departmental expert resource to work alongside individual subject specialists in decision-making could also be invaluable and create a higher degree of consistency.

Local Benefit and Consent

17. The idea of requiring positive "local consent" or "local support" for rolling out infrastructure projects such as onshore wind is a dangerous one. It will add another hurdle and level of uncertainty to the planning system which will deter investors. This has already been demonstrated by the way in which the requirement to prove "community backing" (brought in via planning policy in 2015) was effective in virtually creating a moratorium for onshore wind in England without actually banning it. The Government must realise that this could have a negative effect on the planning system, and goes against its aims of speeding up and streamlining the process, also creating a risk that the silent majority are disenfranchised. It appears from various government statements that there is a hope that if local people are promised money off their energy bills, or other benefits, they can be induced to give their "consent" for projects. The practical complexities involved are likely to make this unworkable in many cases, but more fundamentally paying people to accept projects flies in the face of the fundamental principle that planning permissions "cannot be bought and sold". A move away from this principle (even if investors were willing to invest on the basis of 'buying' local consent, which we think they would not) would lead to poor planning - infrastructure in the wrong areas for the wrong reasons.
18. It is fundamental that positive local consent or local support is not made a prerequisite for NSIPs to go ahead. We would also caution government against embracing the idea of local consent or support being required for other (non-NSIP) development of any kind, due to the pressure this will generate to roll out this model to all development. If government is vocal about requiring this

approach to ensure a "democratic" approach to onshore wind, why does the same not apply for solar, nuclear, roads, etc. It is possible to improve the way that NSIPs deliver community benefit without making it a material planning consideration and the Planning Working Group recognises the general need for infrastructure developers to do more with and for local communities but this should be left to the discretion of developers and investors. Whilst there are now numerous examples of infrastructure developers adopting innovative and effective means of maximising local benefits, there is a lack of consistency.

19. We consider that there is scope for the Government to promote best practice in the way that infrastructure projects go about delivering benefits for communities. Government should therefore publish guidance on what best practice looks like, with tangible examples included. The use of case studies to inform best practice would look similar to the guidance released on flood risk for example.
20. For a more detailed exposition of the concerns of the Planning Working Group in relation to rolling out the need for local consent or local support, please refer to the article - linked [here](#) - by one of our members, which will be appearing in the *Journal of Planning Law* in January 2023.

Changes to Approved Schemes and Flexibility in DCOs

21. The process for making amendments, material or otherwise, to consented DCOs is not fit for purpose and needs to be thoroughly revisited and changed. It is too complicated, it is too uncertain in its outcomes and it takes too long, given the urgent need to deliver these projects in the national interest. This is causing delays on a number of infrastructure projects needed to increase the nation's energy security, for example.
22. When faced with the opportunity to amend a DCO to improve a project, the wholly disproportionate time and risk associated with seeking changes, particularly material ones, leads promoters to seek alternative "work around solutions" that avoid amending the DCO and that in some instances leads to suboptimal outcomes.
23. The issues with changing DCOs also highlights the importance of DCOs including acceptable levels of flexibility in the first place. This has never been fully embraced by The Planning Inspectorate despite the distinct issues associated with the development of NSIPs and the resulting differences in the approach to consenting which was established by the Planning Act 2008. DCOs were never intended to be equivalent to a detailed grant of planning permission, but all too often that is how they are regarded. It is essential that the approach to examining and consenting NSIPs properly reflects the distinct practical realities associated with their implementation. There is an important role for updated Government Guidance (see above) in this respect.

Pre-approval Application Changes

24. How to bring forward changes to DCO applications before they are approved is another key issue for many applicants. The Planning Inspectorate has a detailed Advice Note on this, but there remains a need for some robust Government guidance on the matter. This is crucial to ensuring that as projects go through the examination process, promoters can respond to criticism of elements of their schemes by making changes if it is considered appropriate to do so. It is important that the planning system does not restrict better outcomes. In improving the situation, the Government should consider setting the framework for a shorter and more streamlined process for consultation and processing of change applications. At present the process for making changes can be overly burdensome and time-consuming, and can serve as an obstacle to resolving concerns ahead of the Examining Authority's reporting period.

Speeding up Examinations

25. The Government has amended the Levelling-up and Regeneration Bill to allow ministers to shorten the timescales of DCO examinations. It is important that the Government understands that there is an associated legal challenge risk that comes with an accelerated examination process, particularly for complex cases.
26. In order to undertake examination within these accelerated timescales, it will need to be a much more targeted and focused process. This also reaffirms the need for the Planning Inspectorate to be properly resourced, with the right sort of inspectors that are properly trained. It is not only training that is important, but also mindset and understanding. For this approach to work, DCOs need to be seen more as an in-principle framework rather than a detailed planning permission (see above) and government needs to consider how the Planning Inspectorate is resourced to facilitate these accelerated timescales.
27. The ever more precautionary and granular approach being taken by the Planning Inspectorate is leading to examinations becoming ever more burdensome. So, it is key that the Government releases some formal Guidance on exactly what is expected of Examining Authorities in an abbreviated examination process; and this would also benefit from being accompanied by an early review and streamlining of the Examination Procedure Rules.

Skills to improve planning and consenting

28. The Major Projects Leadership Academy (MPLA) at Said Business School was set up in light of the National Infrastructure Strategy 2020 to help improve efficiency and capability, helping to deliver major projects on time, on budget and ensuring projected benefits.
29. A key focus of the Academy should be providing the skills needed to improve planning and consenting. This area of improving infrastructure delivery is not given the importance that it needs, as the emphasis is always on procurement, contracting, financing and funding, and yet none of this is possible without effective and successful planning and consenting.

Pre-Application Consultation and Engagement

30. Clearer formal Government Guidance on the purpose, value and role of pre-application consultation, what represents adequate and inadequate consultation and when it is necessary to re-consult on project design changes arising from consultation responses is also much needed. The existing guidance was published in 2015 and would benefit from updating to address issues which have arisen in practice over the intervening period.
31. The complementary role of stakeholder engagement also needs to be further explained and emphasised in updated Government Guidance, informed by experience of the way the system has operated in practice. There may also be benefit of using this Guidance to identify best practice, with case studies used to help others understand what works well. Interested parties need much firmer guidance on the need to respond constructively to engagement even if they retain in-principle objections to the project in question.
32. The Guidance needs to be forward looking to clarify the matters that typically will need to be resolved (preferably) by the end of the Examination, and therefore needs to do more to explain the purpose of engagement. An issue with the NSIPs planning regime is the tendency to consider it stage-by-stage, with pre-application consultation ending in a report that is rarely examined, whereas actually stakeholder engagement is a key activity from pre-application which continues to and then into implementation.