THE IMPACT OF A NEW PLANNING SYSTEM ON CONSTRUCTION IN ENGLAND

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Localism, Planning and Construction

Section 122 of the Localism Act 2011 ("the Act") amended the Town and Country Planning Act 1990 by introducing mandatory pre-consultation requirements for developers to consult local communities before submitting planning applications for certain major developments. This paper outlines these and similar requirements under the Planning Act 2008, and assesses their impact on construction projects in England.

The s.122 pre-consultation requirements for certain types of major developments must be complied with prior to the submission of planning applications, and will involve administrative high costs, time and human resources, if implemented. Early local communities/local councils pre-consultation may influence the quality and suitability of developments, but the process also provides new opportunities for challenges to the planning process. However the government has yet to pass a development order specifying the types of major developments to which the process applies. Instead, it has proposed reforms to reduce the scope of the application of s.122 and expand the range of major developments to be classified as National Infrastructure developments and to be subject to pre-consultation requirements under the Planning Act 2008 as amended by the Localism Act 2011.

This process may prevent challenges to the planning process, and therefore enable more timely completion of much needed developments, e.g., housing and infrastructure. However, the process provides increased avenues for disputes between the local community, the developer and the local authority. The amount of expense and time taken to address such objections may vary, but is likely to considerably delay the planning process and create uncertainty about its viability, funding and completion. The increased risks associated with the project will need to be factored into an assessment of the overall costs of the project. The positive impact of the implementation of s.122 measures in promoting localism may be reduced by recent proposed government reforms.

Keywords: Planning applications, Localism, Construction, Pre-Consultation

1.Introduction

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The United Kingdom government has transferred much decision making and financial powers to local government at the level of local planning authorities, councils and communities (Department for Communities and Local Government, pp.11-7, 2011) with the intention of making the planning system clearer, more democratic, and more effective, and especially to avoid disputes. The vehicle for this transference is the Localism Act 2011 ("the Act"), which received Royal Assent on 15 November 2011. Section 122 of the Localism Act 2011 amended the Town and Country Planning Act 1990 by inserting sections 61W, 61X, 61Y before 62 of the Town and Country Planning Act 1990. It introduces new requirements for developers to consult local communities before submitting planning applications for certain major developments.

The current planning system requires local planning authorities to prepare a Statement of Community Involvement setting out their policy for involving communities in the preparation of local planning documents, and for consulting the public on planning applications (Planning and Compulsory Purchase Act 2004). Local authorities have also required developers on certain projects to prepare a Statement of Community Engagement setting out how they have engaged the community in formulating their planning application (Planning Policy Statement 12: Local Development Frameworks (PPS12)). But pre-consultation has not been a mandatory requirement, and it has been possible for planning applications to be approved and finalised without reference to considerations raised by the local community and interested bodies.

This paper will examine the effect of the s.122 pre-consultation process on the developer and local authorities with reference to a similar process under the Planning Act 2008. It will then consider proposals by the government to address the cost and delay caused to major developments as a result of objections.

Section 62 of the Town and Country Planning Act 1990 concerns how planning applications are made. It has been amended by the Localism Act so that a planning application for certain types of development will be invalid unless it is accompanied by a report detailing certain pre-application consultations which must be carried out in accordance with s. 122 of the Localism Act. Under section 122, 61W subsection (1) states that a person is required to carry out pre-application consultation when *(a) A person proposes to make an application for planning permission for the development of any land in England, and (b) The proposed development is of a description specified in a development order.* Although the proposals to which it applies have yet to be spelt out in a development order, government advice indicates that it is likely that the provision will apply to large scale major applications as defined below:

1. Residential developments of 200 or more new residential units, or (where the number of residential units to be constructed is not specified) with a site area of four hectares or more.

2. Any non-residential developments providing 10,000 square metres or more of new floor space or with a site area of two hectares or more. (Pre-application consultation with communities, p. 2, 2011; Localism Bill: compulsory pre-application consultations between prospective developers and local communities, 2011)

2. The Developer's obligations

2.1 Who should be consulted?

Some guidance is given under s. 122 of the Localism Act as to who should be consulted by a person wanting to make a planning application in order to comply with the s.122 pre-application consultation process. S. 61W (a) states that applicants "must publicise proposals in such manner as the person reasonably considers is likely to bring the application to the attention of the majority of persons who live at or occupy premises in the vicinity". The wording suggests that it is up to the person making the application to decide which measures are likely to bring the proposal to the attention of the relevant majority of persons. It seems therefore that a subjective test is to be applied. But this is surely not what the legislation intended, as It has been usual for councils to advise developers how to carry out adequate pre-consultation, such as arrangements for notification of the proposal on the Council's web-site; placing an advertisement in a local newspaper; positioning notices in and around the site; and holding public meetings or forums (Peterborough City Council, 2012).

There is no 'general principle that it is for the decision-maker alone to decide whom to consult' (R (Milton Keynes Council) v Secretary of State for Communities & Local Government [2011] EWCA Civ 1575, the Court of Appeal (per Pill LJ at [32]). Where there are large numbers of individuals who are affected, it may be appropriate to consult with their representatives such as professional bodies: British Medical Association v. Secretary of State for Health [2008] EWHC 599 (Admin) per Mitting J.

2.2 Contact and timeframe for response

Under section 61W(4) the person is required to set out in the consultation documentation/publicity information about how he may be contacted by persons wishing "(a) to comment on, or collaborate with the person on the design of, the proposed development" and "(b) give such information about the proposed timetable for consultation as is sufficient to ensure that persons wishing to comment on the proposed development may do so in good time".

The phrase 'in good time' does not specify how long the pre-consultation process should take. But it does indicate that those wishing to comment be given an adequate period of time within which to communicate their views to the person proposing to make the planning application. Failure to do so could result in a planning decision being quashed and reviewed. For example, in R (Kelly) v Hounslow London Borough Council [2010] EWHC 1256 (Admin), the local authority's statement of community involvement stated that objectors would be invited to the committee meeting, and that they would have the opportunity to make representations at the meeting. The letter informing the Kellys that they would be invited to the planning committee meeting was sent by second class post four business days before the meeting. The Kellys did not receive it until the night of the meeting. The High Court agreed that the Kelly's had indeed been prejudiced by the local authority's breach of the Kelly's legitimate expectation, and quashed the defendant local authority's grant of planning permission for an extension to a neighbouring property.

The Government Code on Practice Consultation 2008 states at p.8 that the public sector and government departments must provide a minimum of 12 weeks for public consultation exercises. The courts may consider this an appropriate guideline when considering whether or not the 'in good time' element has been satisfied. But the length of consultation will depend on the nature of the development and whether the responses justify a further round of consultation.

2.2.1 Taking responses into account

Under 61X the person has a legal duty to take into account the responses received from those who live at or occupy premises in the vicinity. The planning application must consequently be accompanied by a statement covering the type of the publicity and consultation carried out; who was notified; the location and duration of any event held; a summary of all comments received and issues raised, and a clear explanation of how, if at all, the proposals have been amended as a result of comments received, as well as any criticisms received regarding the public engagement process, and presumably why some responses haven't been taken into account. Communities will therefore be able to raise issues of concern for the developer to consider, and hopefully, make suggestions to improve the development. (IPB Communications, December 2011.)

However it should be noted that it is the responsibility of the local community to provide feedback and comments to the developer applicants. The local councils cannot accept representations or objections to a proposal at this early stage, and communities will not be permitted to veto the submission of a planning application.

3. Benefits of the pre-consultation process

It is only fair that those responsible for the development should be made accountable to those who will be affected by it, before the development begins to affect their local community. The process should assist developers to identify local issues of concern, of which they may have been unaware, and the resolution of which may be important for the viability of the development. The local community may raise concerns about the environmental impact on habitats, or the effect of a commercial development on the volume of traffic in the area, or whether a new private sector housing estate will increase the burden on local amenities, schools and hospitals. Early consultation may avoid later costs and delays to development caused by disputes and litigation. The process provides them with the opportunity to improve their proposal and submit an application that is less likely to be rejected. This process should therefore assist a timely and positive decision from the planning authority.

4. Disadvantages of the pre-consultation process for the developer

4.1 Costs and delay

The government's Impact Report considers that the costs of the complying with the process are likely to be high, but will be relative to the type of development. The Impact Report

estimates that the total cost of undertaking the pre application community consultation alone for large scale major applications is estimated to be £10,000 per application. This involves (a)contacting relevant parties; (b)the preparation of development description and associated explanatory material; (c) Communications (including any public events); and (d) the preparation of Statement of Community Engagement. (Department for Transport, 2012)

These anticipated costs do not include any additional costs, such as the costs of changing the designs for the proposals in response to community views, or addressing objections and ongoing disputes.

4.2 Time

It seems that under s. 122 the extent and impact of the pre-consultation period on the development will vary. It may be extensive due to various reasons, e.g., the scope of the development, or where there is much opposition from the local community. For example, the Toton site development by Peveril Homes has been the subject of significant local opposition because of its plans to build on 103 acres green-belt land. It plans to build 770 homes, a new hotel, primary school and convenience and retail shops. The plans were altered as a result of an extensive public consultation, with education and health sector professionals, community groups and individuals. The plans were submitted to Bruxtowe Borough Council. A decision has not been made yet but residents say they will fight the imposition of the development (BBC News Nottingham, 8 October, 2012).

4.3 When is a second consultation required?

One issue that may arise under s. 122 pre-consultation process is whether a developer has to disclose the changes he has made to his proposal in response to concerns from the local community. S. 122 61X requires that the developer shows what the responses are, and how the responses have been taken into account, when submitting his planning application. It is doubtful that minor changes would require re-advertisement. But does the developer have to consult again where circumstances have changed since consultation began. In R (Smith) v. East Kent Hospital NHS Trust [2002] EWHC 2640 (Admin), Silber J. observed that ‘trivial changes do not require further consideration’ (at [43]) and referred to ‘the dangers and consequence of too readily requiring re-consultation’, and concluded that fresh consultation was only required where there was ‘a fundamental difference between the proposals consulted on and those which the consulting party subsequently wishes to adopt’. What is a ‘fundamental’ change? In R (Elphinstone) v Westminster City Council [2008] EWHC 1287 (Admin) at [62], Kenneth Parker QC (then sitting as a Deputy High Court judge) observed that ‘a fundamental change is a change of such a kind that it would be conspicuously unfair for the decision-maker to proceed without having given consultees a further opportunity to make representations about the proposal as so changed’.

5. Disadvantages of the new process for the local authority

The authority is required to satisfy itself that the pre-application consultation duty of the applicant has been met before it determines the planning application. (Pre-application

Consultation with Communities: a basic guide, 2011). The local authority therefore runs the risk of being challenged on the basis that it failed to consider or satisfy itself that the applicant's pre-consultation duty had been discharged, or that it did not follow internal procedures and policies regarding consideration of the application.

There are many case law examples where claimants have successfully challenged a local authority/Council's decision on a similar basis; for example, in a recent example, R (Vieira) v London Borough of Camden [2012] EWHC 287 (Admin), the High Court found that the local authority had failed to inform the claimants of an amendment to the planning application and had failed to brief councillors about the amendments before determining the application, resulting in a breach of legitimate expectations. The Court decided that the grant of planning permission should be quashed and reconsidered.

6. Pre-Consultation and Nationally Significant Infrastructure Projects- compared to S.122 procedure

If the government has its way, many proposals that would presently come under the s.122 process for major projects will be re-categorised as nationally significant infrastructure projects, and be subject to a more streamlined planning process. This seems to be a move to avoid delays to developments caused by the length of time to reach planning decisions and appeals from planning decisions, which may impact on the economy. (Guidance on the Pre-Application Process, April 2012)

The Planning Act 2008 ('the 2008 Act') established a planning process for dealing with proposals for a nationally significant infrastructure projects (NSIP). It concerns major proposals relating to energy, transport, water, waste and waste water. The process was amended by the Localism Act 2011. It abolished the Infrastructure Planning Commission, moved some of its functions into the Planning Inspectorate and transferred the responsibility for making decisions on applications for development consent orders to the Secretary of State. It includes opportunities for people to have their say before a planning decision is made through pre-consultation. The decision on the planning application is not made by a local planning authority, as under the s.122 process. It is made by the relevant Secretary of State, although, all communication should be directed to the Planning Inspectorate (from 1 April 2012), as it carries out all functions on the Secretary of State's behalf, except for decision-making.

6.1 Effect on Localism

The process the applicant must follow to comply with the amended 2008 process pre-consultation requirement is similar to that under s. 122, but unlike the s. 122 process, there are two separate formal stages of consultation. Firstly, the applicant must also identify and consult statutory consultees, local authorities, landowners and significantly affected persons under s.42; and then, secondly, consult with the local community under s.47. This pre-consultation process therefore includes consultation with both regional and national bodies. Although local authorities are permitted to make representations to the Secretary of State about the adequacy of consultation, they do not have the final say. They can also submit a

Local Impact Report giving details of the likely impact of the proposed development on the authority's area to the Secretary of State, however, again, the local authority has no power over the final planning decision..

Similarly to the s.122 requirement, the appropriate area for consultation must include "people living in the vicinity of the land" (s47(1)). Under s.47(2) the applicant must first produce an SOCC after consultation with relevant local authorities which sets out how it will carry out the public consultation and publicize the application (The Planning Inspectorate, 2012). A similar requirement is not spelt out under s. 122 of the Localism Act, although it states in general terms that applicants should seek local authority advice (S. 122, ss7). Similarly to the process under s122, the developer has a duty under s. 49 to take account of responses to the consultation under s42 and s47 and publicity under s48.

The Planning Act also requires that the applicant must set a minimum deadline of 28 days to receive responses to consultation. More complex applications may need to go beyond the statutory minimum timescales laid down in to provide enough time for consultees to understand a proposal and formulate a response. (Guidance on the Pre-Application Process, pp. 4-5 April 2012). The government guidance states that applicants should consider the degree of change, the effect on the local community and the level of public interest, when considering whether there is the need for an additional consultation round as a result of responses (Ibid., cl. 53, pp. 12.) Neither the explanatory notes nor the guidelines for the s. 122 process provide the level of details as referred above, even though the process also concerns major developments.

The NSIP applicant must finally prepare a consultation report and submit it to the Secretary of State (Ibid). Once the application has been submitted, the Secretary of State has 28 days to decide whether or not to accept it for examination. One of the factors to be considered is whether or not the developer's consultation process has been complied with.

6.1.2 Case Study-HS2

An example where it has been argued that the consultation process has not been complied with, concerns the government proposal to build a high-speed rail line between London and Birmingham by 2026. This rail line referred to colloquially as HS2. HS2 Ltd was set up in 2009 by the Department for Transport to develop plans for a new high speed network and present a proposed route connecting Birmingham and London. It will cut through the Chilterns, an area of outstanding natural beauty, and later be extended to northern England to Manchester and Leeds, including stops in the East Midlands and South Yorkshire (HS2, Investing in Britain's Future). It therefore concerns a nationally significant infrastructure.

The public consultation ran from February until July 2011, apparently in accordance with the Planning Act 2008, and the Aarhus Convention (Convention on Access to Information on Access to Information, 1998). Fifteen borough councils and residents opposed the plans for the rail line, citing environmental reasons and the loss of many homes, businesses and relocations of schools. Resident consultees also argue that they were given insufficient information and that information was withheld during pre-consultation period (Gilligan, Dec.

9, 2012). It is reported that the councils spent £165,000 bringing a judicial review in the High Court, which equates to 9p for every resident who lives in the 15 council areas. It is unclear what costs the Department of Transport will incur (Bucks Herald, 2012).

This is therefore a classic case where all parties have suffered serious costs and delay due to strong opposition and litigation. The government argues that the proposal is in the national interest even though in certain localities, it may cause great inconvenience. Its proposal to put aside up to £1.3bn to reimburse people living close to High Speed Two has not satisfied the complainants (BBC News London, HS2 compensation for Camden 'not enough', 2012).

There have been five judicial reviews over nine days at the High Court in London in December 2012. The fourth case was brought by Aylesbury Park Golf Club. The Club argued that basic rules of fairness were violated, because they had not been told that the proposed route had been changed to take it through the middle of its course, obliterating 12 of its 18 holes, and that 769 alternative route suggestions had been ignored by HS2 Ltd (Op. cit., Gilligan: STOP HS2, 13 Dec. 2012). The judge's decision will be given in early 2013.

6.2 Government responses to planning permission delays

The Growth and Infrastructure Bill currently before Parliament would extend the scope of the Planning Act 2008 so that a wider range of developments can be brought within the streamlined planning regime route for schemes of national significance (Clause 21), rather than under the Town and Country Planning Act 1990 and other existing consent regimes. It would allow developers of nationally significant business or commercial projects to apply to the Secretary of State for the option of using this streamlined planning regime which has a clear statutory timetable. (Department for Communities and Local Government, Nov., 2012)

The list of the types of business and commercial projects which are proposed to be brought under the NSIP process include development, research and development, manufacturing and processing, conference and exhibition centres, where in each case, the gross internal floorspace is over 40,000m2. Projects concerning tourism, leisure and mixed use developments, including a mix of the former uses (but not housing) where the area is over 100 hectares are also involved. This would mean for example, that housing/office schemes in local areas in Reading could be classed as nationally significant infrastructure. (Ibid.) However, the basis for this selection is unclear. The Bill diverts the development's assessment directly away from the local community to central Government. It is a reversion to centralism.

6.2.1 Judicial Review reform

Bringing a claim for a judicial review in the High Court asking is a common means of challenging planning procedure and decisions. The government is concerned at the length of time these proceedings take and the resources they consume ((Ministry of Justice, p.11, para. 33, 2012). The financial viability of developments may be at risk. The government even argues that 'there is some concern that the fear of Judicial Review is leading public authorities to be overly cautious in the way they make decisions. (Ibid, p.11, para.35).

The government intends to introduce reforms to civil procedure rules governing the judicial review procedure to increase charges for applications, shorten the three-month limit on applying for judicial review, and reduce the number of possible planning appeals from four to two. It has been too late to dissuade the HS2 judicial review challenges, but the reforms seem intended to dissuade other 'localism' challenges, when they become law.

7. Conclusion

It is clear that the conduct of any required pre-consultation must be carried out fairly. This requires clearly, fully, and comprehensively informing the local community about the proposal and the consequences of its actualisation, and providing them with a sufficient time of period within which to respond to the proposal.

The pre-consultation process is beneficial in that it will identify the inadequacies of a proposal at an early stage and require their consideration by developers. But if a developer ignores them in his planning application, it is possible that a planning authority could still grant planning permission in which case, communities may have a legitimate case to answer regarding the discharge of the consultation duty, and fairness of the planning process.

It seems that breach of s.122 requirements will provide aggrieved community groups with more tangible opportunities to challenge planning applications and local council decisions through litigation, especially judicial review proceedings. Given increasing concerns about access to environmental justice at a reasonable cost, and the cost of judicial reviews, if the government plans go ahead, claimants may be deterred from challenging the discharge of a pre-application consultation duty. In any case, developers will have added risks and costs to factor into their pre-construction planning, and procurement route.

Whether in the case of an operational s.122 or that of developments categorised as major infrastructure developments, construction companies will need to factor into their budgets, the extra time and preparation for compliance, and for adequately addressing any local community concerns, to avoid costly court challenges to the discharge pre-application duties. Even then, vexatious or ill-informed objections can cause much damage to the viability of a development whether the planning decision is to be made by a local authority, or the Secretary of State. The resulting financial costs and delay are not only issues for the developer, and the decision-maker. They can affect the realisation of infrastructure and other projects crucial to a nation's economic growth.

The government's proposals to speed up the planning process for certain major developments, to increase the types of development subject to it, and to make it more difficult for objectors to bring judicial reviews of planning procedures and decisions in the High Court, recognises the drawbacks of the pre-consultation process and the growing cult of localism. But in doing so, it seems to be throwing out the baby with the bathwater.

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