Landmark CHAMBERS

CHANGES TO SCHEMES

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Introduction

- Will cover changes made to applications after acceptance but before decision

- Then changes to development consent orders which have been made

- Finally, cover briefly changes to proposed schemes before applications submitted

Amendments to application: PA 2008 (1)

- S. 114(1): when SoS has decided an application for an order granting development consent, he or she must either
  - make an order granting development consent
  - refuse development consent

- No explicit power to make order with modifications, but no restriction on making of an order

Amendments to application: PA 2008 (2)

- And s. 114(2): allows SoS by regulations to make provision regulating the procedure to be followed if "proposes to make an order granting development consent on terms which are materially different from those proposed in the application"

- No such provision made (save in relation to compulsory acquisition: Infrastructure Planning (Compulsory Acquisition) Regulations 2010)

- But no statutory requirement to do so and no restriction on granting consent in such terms in absence of regulations

Amendments to application: IP(EP)R 2010

- See too Infrastructure Planning (Examination Procedure) Rules 2010, r. 2:

  "an application for development consent under section 37 (application for orders granting development consent) and includes

  (a) part of an application

  (b) any accompanying documents and further representations made by the applicant; and

  (c) <u>any amendments made to the application</u>" [emphasis added]

Amendments to application: Bob Neill letter (1)

- 28 November 2011, Bob Neill, SoS, wrote to Sir Michael Pitt, then Chair of IPC, giving government view on scope of s. 114:

> "[S]ection 114(1) clearly places the responsibility for making a development consent order on the decision-maker, and does not limit the terms in which it can be made. If follows from this that the decision-maker has them power under section 114(1) to make a development consent order which is different from that originally applied for, and that no regulations are needed under section 114(2) in order to do so. The power to make regulations in section 114(2) is unconnected, and has no bearing on the extent of the s 114(1) power. Section 114(2) merely provides the Secretary of State with a power to make regulations about how material changes should be dealt with, if he thinks it appropriate to do so"…

Amendments to application: Bob Neill letter (2)

"This power provided by section 114(1) is, of course, limited in a number of ways. If the Examining Authority decides to consider material changes to an application as part of the examination, the Examining Authority will need to act reasonably, and in accordance with the principles of natural justice. In particular the principles arising from the Wheatcroft case must be fully addressed, which essentially require that anyone affected by amended proposals must have a fair opportunity to have their views heard and properly taken into account regarding them. …

Amendments to application: Bob Neill letter (3)

"Depending on the circumstances, in accordance with the principles set out in Wheatcroft, the Examining Authority may need to:…

- use the general power to control the examination of an application in section 87(1) of the 2008 Act to make changes to the timetable to allow for representations to be made regarding any such amendments
- exercise its discretion under rules 10(3) and 14(10) of the Infrastructure Planning (Examination Procedure) Rules 2010 to permit representations be made by people who are not interested parties in cases where it is appropriate to do so"

Amendments to application: DCLG Guidance (1)

- Principle of allowing amendments later confirmed in DCLG Guidance for the examination of applications for development consent (2015)[109-115]

  "..The Government recognises that there are occasions when applicants may need to make material changes to a proposal after an application has been accepted for examination. Reasons for this could include, for example, regulatory changes, technical developments or the discovery of previously unknown factors arising from representations received after acceptance or examination submissions"

Amendments to application: DCLG Guidance (2)

- "However, if it is determined that a proposed change is of such a degree that it constitutes a materially different project then the applicant will need to determine how best to proceed…. may decide to withdraw and restart the pre-application process….continue with their application…or…submit an alternative proposal for change….The Examining Authority will not be able to indicate what degree of change would be acceptable in advance of the applicant submitting a proposed change"
- "…Examining Authority will need to ensure it is able to act reasonably and fairly, in accordance with the principles of natural justice and in doing so, there will be a number of factors to consider such as: ● whether the application is still of a sufficient standard for examination; ● whether sufficient consultation… an be undertaken to allow for the examination to be completed within the statutory timetable of 6 months; and ● whether any other procedural requirements can still be met"

Amendments to application: DCLG Guidance (3)

- Introduction of material change during the final stages of the examination period “unlikely to be accepted” because the “application cannot be examined within the statutory timetable without breaching the principles of fairness and reasonableness”

Amendments to application: PINS Advice Note 16 (1)

- "There is no legal definition of 'material' but the tests to apply are whether the change is substantial or whether the development now being proposed is not in substance that which was originally applied for. The former constitutes a material change which – provided there is sufficient time remaining in the Examination stage - can be accommodated as part of the Planning Act 2008 (PA2008) process. The latter constitutes a different project for which a new application would be required. Whether a proposed change falls within either of these categories is a question of planning judgment"

Amendments to application: PINS Advice Note 16 (2)

- That judgment "may be based on criteria including, for example, whether the change would generate a new or different likely significant environmental effect(s). Similarly, whether (and if so the extent to which) a change request involves an extension to the Order land, particularly where this would require additional Compulsory Acquisition powers eg for new plots of land and/ or interests" [2.1]

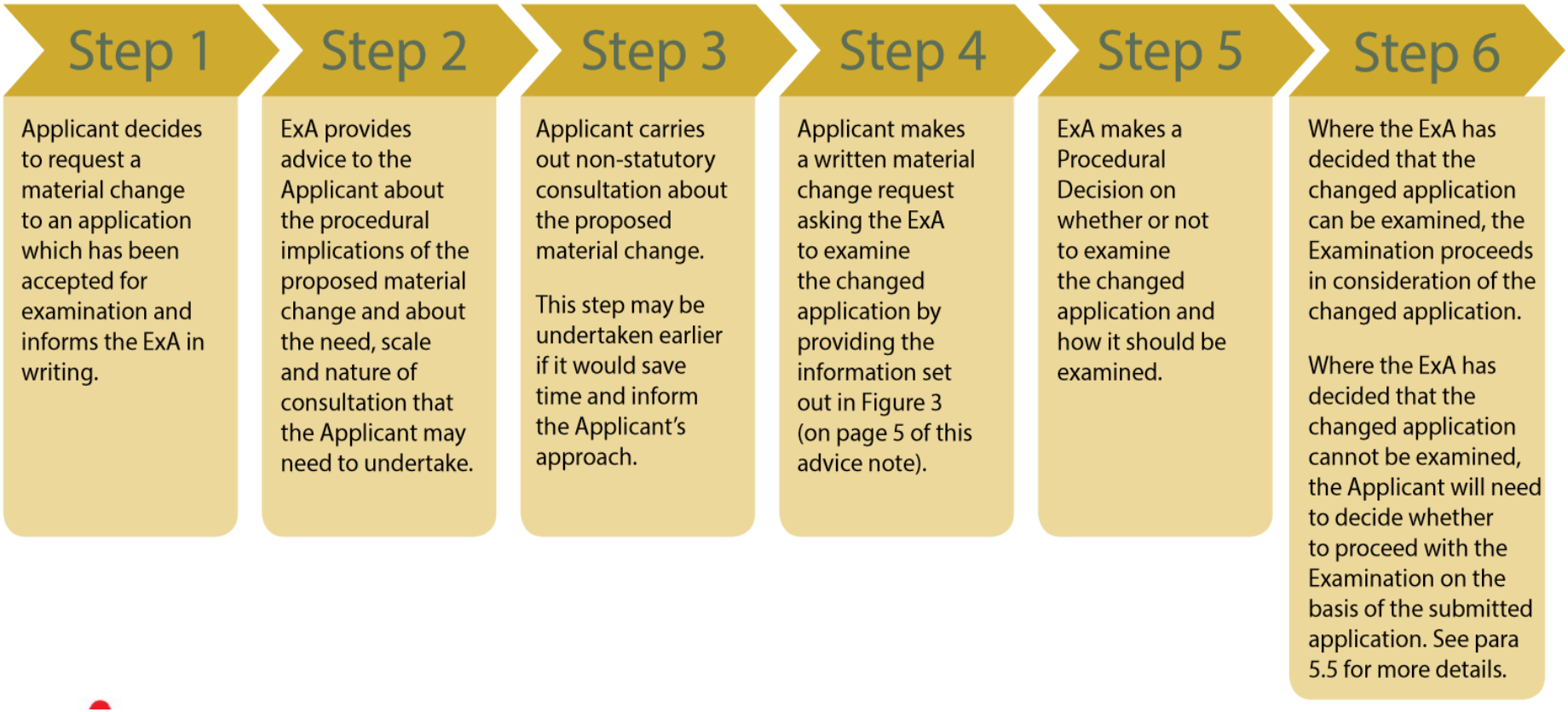
Amendments to application: PINS Advice Note 16 (3)

- "Even if a requested change is not considered to be material there may still be a need, in the interests of fairness, to carry out consultation. An applicant will still need to consider (and ultimately the ExA to decide) whether, without re-consultation on the requested change(s), any of those entitled to be consulted or who were consulted on the original application (including persons who are not an Interested Party in the Examination) would be deprived of the opportunity to make any representations on the changed application[6]"

- Fn 6: "Whether or not further consultation is required would depend, amongst other things, on the nature and extent of the proposed changes and their potential significance to those who might be consulted - R. (on the application of Holborn Studios Ltd) v Hackney LBC [2017] QBD and R. (on the application of Moseley) v Haringey LBC [2014] UKSC": see below

Amendments to application: PINS Advice Note 16 (4)

- Figures 1-3 provide further guidance on process. Fig 1:



Amendments to DCO application: PINS Advice Note 16 (5)

- Fig. 3 sets out information to include in a request for a material change, which in summary is:
  - clear description of the proposed change; and statement setting out rationale and need for change
  - full schedule of all application documents and plans listing consequential revisions; and update of any consents/ licences required and whether there will be any impediment to securing the consents/ licences before conclusion of examination
  - track changed version of the draft DCO draft Explanatory Memorandum
  - if proposed change involves changes to the Order land, confirmation of whether Infrastructure Planning (Compulsory Acquisition) Regulations 2010 engaged; if so applicants must provide information prescribed by regulation 5 and clarify how procedural requirements of the CA Regulations can be met….

Amendments to DCO application: PINS Advice Note 16 (6)

- If the proposed change results in any new or different likely significant environmental effects, provision of other environmental information and confirmation that:
  - the effects have been adequately assessed and that the environmental information has been subject to publicity. Whilst not statutorily required, the publicity should reflect the requirements of The Infrastructure Planning (Environmental Impact Assessment) Regulations 2017 (the EIA Regulations [emphasis added]
  - any consultation bodies who might have an interest in the proposed changes have been consulted
  - Where (proportionate) additional non-statutory consultation has been carried out (either voluntarily or at the direction of the ExA) a Consultation Statement confirming who has been consulted in relation to the proposed change

Relationship with case law: introduction

- Recap:
  - Bob Neill letter: the principles arising from the Wheatcroft case must be fully addressed
  - DCLG Guidance refers to "material change" and "materially different project" as well as need to accord with principles of natural justice
  - PAN16: "the tests to apply are whether the change is substantial or whether the development now being proposed is not in substance that which was originally applied for": former is a material change which can be accommodated; latter constitutes a different project for which a new application would be required. Fn 6 in PAN16 refers to R. (on the application of Holborn Studios Ltd) v Hackney LBC [2017] and R. (on the application of Moseley) v Haringey LBC [2014] UKSC

- Review: concept of "material change" not specifically identified in Wheatcroft; and Wheatcroft doubted in Holborn Studios

Relationship with case law: Holborn Studios (1)

- John Howell QC, sitting as Deputy HC judge: necessary to distinguish the substantive and the procedural constraints on power of a planning authority to grant permission for a development other than that for which an application was originally made [64]

- where planning permission granted, application may be amended; permission may be granted for part of what applied for; and permission may be granted subject to condition modifying what applied for. Substantive limitations on such changes "have been variously described but they are all concerned with whether the result is the grant of permission for a development that is in substance something different from that for which the application was initially made" [65]

Relationship with case law: Holborn Studios (2)

- Identified different formulations which had been applied to these methods:
  - "whether the change proposed is substantial or whether the development proposed is not in substance that which was originally applied for" [66]
  - "whether the permission would be for a development that would be substantially or significantly different in its context from that which the application envisaged" [67]
  - And (in context of an application under s. 73 TCPA 1990 to amend conditions), whether this would lead to a "fundamental alteration of the proposal put forward in the original application"[68]
- In addition to substantive limitations, amendments cannot be made that would have the effect of sidestepping the rights of such third parties: their interests must also be fully protected when an amendment is under consideration [71]

Relationship with case law: Holborn Studios (3)

- Referred to Wheatcroft: “72. In Bernard Wheatcroft Limited v Secretary of State for the Environment supra , however, Forbes J conflated the substantive and procedural constraints on the power of a local planning authority to grant planning permission for a development other than that for which an application was originally made….Forbes J stated…

  "The true test is, I feel sure, that accepted by both counsel: is the effect of the conditional planning permission to allow development that is in substance not that which was applied for? Of course, in deciding whether or not there is a substantial difference the local planning authority or the Secretary of State will be exercising a judgment, and a judgment with which the courts will not ordinarily interfere unless it is manifestly unreasonably exercised. The main, but not the only, criterion on which that judgment should be exercised is whether the development is so changed that to grant it would be to deprive those who should have been consulted on the changed development of the opportunity of such consultation”.

Relationship with case law: Holborn Studios (4)

- Doubted Wheatcroft:

  "In my judgment this conflation of the substantive and procedural constraints on the powers of the local planning authority is flawed. It is quite possible for a person to be deprived of an opportunity of consultation on a change which would not result in a permission for a development that is in substance not that which was applied for….[and] to say that any change about which others may want to make representations is to be classified as one that involves a "fundamental change" or a "substantial difference" to the application, or one which makes the development something that was not in substance what was applied for deprives such terms of meaning" [73]

Relationship with case law: Holborn Studios (5)

- "76. When there is a statutory duty of consultation, the question whether re-consultation is required if there is a change to the proposal on which there has been consultation depends on what fairness requires. That will depend inter alia on the purposes for which the requirement of consultation is imposed, the nature and extent of any changes and their potential significance for those who might be consulted: see eg R (Moseley) v Haringey LBC supra per Lord Wilson JSC at [23]-[24], per Baroness Hale and Lord Clarke JSC at [44]"
- "79. In considering whether it is unfair not to re-consult, in my judgment it is necessary to consider whether not doing so deprives those who were entitled to be consulted on the application of the opportunity to make any representations that, given the nature and extent of the changes proposed, they may have wanted to make on the application as amended" [emphasis added].

Relationship with case law: Holborn Studios (6)

- "80. I do not accept that the test for whether re-consultation is required if an amendment is proposed to an application for planning permission is whether it involves a 'fundamental change' and involves a 'substantial difference' to the application or whether it results in a development that is in substance different from that applied for. These are three potentially different tests that have been suggested as stating the substantial constraint on what changes are impermissible. Depending on how each is interpreted, it is possible that the test would indicate re-consultation was not required when fairness would require it. As I have explained, even if the proposed amendment was not of any these types, a person may still have representations that he or she may want to make about the changes, given their nature and extent, if given the opportunity. In my judgment it is preferable to ask what fairness requires in the circumstances [emphasis added].

Relationship with case law: Holborn Studios (7)

- clear then following Holborn Studios that two aspects to consider with amendments: substantive and procedural
- boundaries of substantive test not precise
- note that reference to “material change” in DCLG guidance and PAN16 will include substantive changes which would not fail Holborn Studios test of whether the amended scheme is “in substance something different from that for which the application was initially made” (NB reference in PAN16 to “substantial” changes which may still fall on right side of the line)
- and that whether or not substantive test is met there will be a need to consider procedural fairness to public

Conclusions on amendments after acceptance

- Important to consider both substantive and procedural aspects of proposed change
- Ensure plan EIA/HRA of proposed changes (and potential changes to application material) - may assist in demonstrating that substantive as well as procedural tests can be met
- Also necessary to plan timings of consultation; and consider implications for examination deadlines and hearings
- Set out summary of position in initial request for advice from ExA, transparently following advice in PAN16

Amendments to DCOs after they are made: introduction

- Once a DCO has been made, SoS may make changes to (or revoke) it: PA2008 s. 153 and Schedule 6

- Procedure including consultation requirements set out in Infrastructure Planning (Changes to, and Revocation of, Development Consent Orders) Regulations 2011

- DCLG "Guidance on changes to development consent orders" (2015)

Amendments to DCOs: non-material changes (1)

- Schedule 6 para. 2(1): authorises SoS to make a change to a DCO if "satisfied that the change is not material"
- in deciding whether material, "must have regard to the effect of the change, together with any previous changes made under this paragraph, on the [DCO] as originally made": para. 2(2)
- may impose new requirements or remove/alter existing requirements: para. 2(3)
- power only exercisable on application by applicant or its successor in title, a person with interest in land or any other person for whose benefit DCO has effect: para. 2(4)

Amendments to DCOs: non-material changes (2)

- 2011 Regulations:
  - form of application: reg. 4
  - publication: reg. 6
  - duty to consult: reg. 7:
    - each person for whose benefit the DCO, to which the application relates, has effect
    - each person that was, in accordance with section 56, notified of the application for the DCO which is the subject of the application
    - any other person who may be directly affected by the changes proposed in the application
  - must be accompanied by consultation and publicity statement: reg. 7A: including statement setting out how reg.s 6 and 7 met
  - no timetable for decision but guidance [37] says decision normally 6 weeks from closing date for publicity/consultation

Amendments to DCOs: non-material changes (3)

- Guidance advises on what changes are likely to be material [11]-[16]:
  - change should be treated as material if would require an updated ES to take account of new, or materially different, likely significant effects on the environment
  - or if likely to invoke the need for a Habitats Regulations Assessment or a new or additional licence in respect of a European Protected Species
  - change should also be treated as material if it would authorise the compulsory acquisition of any interest in land
  - potential impact of the proposed changes on local people and businesses will also be a consideration; examples might include those relating to visual amenity from changes to the size or height of buildings; impacts on the natural or historic environment; and traffic impacts

Amendments to DCOs: material changes (1)

- Schedule 6 para. 3(1): SoS may by order make changes to, or revoke a DCO
- can be made without application being made if SoS satisfied that:
  - DCO contains significant error and would not be appropriate to correct it under Schedule 4 para. 1 (or Schedule 6 para. 2): para. 3(3)
  - if development carried out in accordance with DCO there would a contravention of relevant retained EU law or any of the Convention rights, or there are other exceptional circumstances that make it appropriate to exercise the power: para. 3(7)
- application can be made by same range of applicants as for non-material change [para. 3(4)]; and on application by LPA if SoS satisfied that
  - DCO grants consent for development on land all or part of which is in LPA area
  - Development begun but abandoned [not defined]
  - Amenity in LPA area or adjoining area is adversely affected by condition of land: para. 3(5)

Amendments to DCOs: material changes (2)

- SoS may refuse to exercise power if considers proposed change should be subject of application under PA2008 s. 37 for DCO: para. 5(2) and see guidance [17]-[20]

- Power may not be exercised after end of period of 4 years beginning with date on which the relevant development was substantially completed

- Includes powers to change requirements: para. 5(3))

Amendments to DCOs: material changes (3)

- 2011 Regulations:
  - Duty to consult: reg.s 10-11
  - Publicity for proposed application and requirement t have regard to relevant responses: reg.s 14-15
  - Form of application: reg. 16
  - EIA development: application shall be treated as subsequent application for purposes of IP (EIA) Regulations 2009
  - Notice of application: reg. 19
  - Publicity: reg. 20
  - Notice of persons interested in land where new request for compulsory acquisition: reg. 21

Amendments to DCOs: material changes (4)

- SoS may consider it unnecessary for ExA to examine application: give notice to applicant and representors and publish on website: reg. s 21A-B
- where examination takes place, procedures set including PIM, timetable, written reps, issue-specific hearings, CA hearings, open floor hearings (and see generally reg.s 22-41)
- ExA must complete examination within 4 months of start day (ie PIM) and report to SoS within 2 months of completion of examination (or deadline for completion, whichever earlier): reg. 43
- SoS must make decision in similar way to DCO (ref 47) and decide application within 2 months of receiving report from ExA (or deadline for receipt whichever earlier): reg. 49(2)
- If SoS determines without examination, must do so within 2 months of issuing notification under reg. 21A that no examination necessary: reg. 49(1)
- May change deadline for decision and make statement of HoP: reg. 49(6)

Amendments to DCOs: material changes (5)

- Compensation: Schedule 6 para.s 6-7: if DCO is subject to material change or revocation, and power has been exercised due to significant error (para 3(3) or would be contravention of EU law/ECHR (para. 3(7)
    - compensation payable to any person with an interest in the land or for whose benefit the DCO has effect
    - where they have incurred expenditure in carrying out abortive work or has otherwise sustained loss directly attributable to the change or revocation
    - No compensation payable in respect of works done or omitted to be done before DCO made (other than in relation to depreciation, as to which see reg. 7)

Changes before application submitted (1)

- Deal with this out of chronological order because less likely to arise as an issue; but needs to be considered as proposals being worked up

- The DCLG Guidance "Planning Act 2008: Guidance on the pre-application process" (2015) advises on procedural implications changes to proposals in response to the formal statutory public consultation:

  > "Applicants are not expected to repeat consultation rounds set out in their Statement of Community Consultation unless the project proposals have changed very substantially…."

Changes before application submitted (2)

- "However, where proposals change to such a large degree that what is being taken forward is fundamentally different from what was consulted on, further consultation may well be needed. This may be necessary if, for example, new information arises which renders all previous options unworkable or invalid for some reason. When considering the need for additional consultation, applicants should use the degree of change, the effect on the local community and the level of public interest as guiding factors"
- Guidance consistent with approach of Courts when considering need for further consultation where proposals change (see eg (R (Smith) v East Kent Hospital NHS Trust [2002] EWHC 2640 (Admin))

Thank you for listening

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