

## NSIPs: Hot topics

### Pre-application consultation

Tim Buley QC and Zack Simons

Landmark Chambers



## Pre-application consultation

1. Key legal principles.
2. **Port of Liverpool:** *R (Sefton Metropolitan Borough Council) v Highways England* [2018] EWHC 3059 (Admin)
3. **Arundel Bypass (A27):** *R (Tristram) v Highways England* CO/2752/2018



## The 2008 Act

- Requirements for pre-app consultation: ss.41-50 Planning Act 2008.  
+ DCLG 2015 guidance on pre-app process.
- NSIP applications must include “consultation report” detailing:
  - Compliance with consultation requirements (i.e. ss. 42, 47 & 48);
  - Relevant responses (defined by s.49(3)); and
  - Account taken of relevant responses.
- + Many schemes opt for prior non-statutory consultation.







## Planning Act 2008: Guidance on the pre-application process

20. Experience suggests that, to be of most value, consultation should be:
- based on accurate information that gives consultees a clear view of what is proposed including any options;
  - shared at an early enough stage so that the proposal can still be influenced, while being sufficiently developed to provide some detail on what is being proposed; and
  - engaging and accessible in style, encouraging consultees to react and offer their views.



## When should consultation take place and how much is enough?

68. To realise the benefits of consultation on a project, it must take place at a sufficiently early stage to allow consultees a real opportunity to influence the proposals. At the same time, consultees will need sufficient information on a project to be able to recognise and understand the impacts.
69. Applicants will often also require detailed technical advice from consultees and it is likely that their input will be of the greatest value if they are consulted when project proposals are fluid, followed up by confirmation of the approach as proposals become firmer. In principle, therefore, applicants should undertake initial consultation as soon as there is sufficient detail to allow consultees to understand the nature of the project properly.



## Planning Act 2008: Guidance on the pre-application process

70. To manage the tension between consulting early, but also having project proposals that are firm enough to enable consultees to comment, applicants are encouraged to consider an iterative, phased consultation consisting of two (or more) stages, especially for large projects with long development periods. For example, applicants might wish to consider undertaking non-statutory early consultation at a stage where options are still being considered. This will be helpful in informing proposals and assisting the applicant in establishing a preferred option on which to undertake statutory consultation.





## Planning Act 2008: Guidance on the pre-application process

74. Where a proposed application changes to such a large degree that the proposals could be considered a new application, the legitimacy of the consultation already carried out could be questioned. In such cases, applicants should undertake further re-consultation on the new proposals, and should supply consultees with sufficient information to enable them to understand the nature of the change and any likely significant impacts (but not necessarily the full suite of consultation documents), and allow at least 28 days for consultees to respond.
75. If the application only changes to a small degree, or if the change only affects part of the development, then it is not necessary for an applicant to undertake a full re-consultation. Where a proposed application is amended in light of consultation responses then, unless those amendments materially change the application or materially changes its impacts, the amendments themselves should not trigger a need for further consultation. Instead, the applicant should ensure that all affected statutory consultees and local communities are informed of the changes.

## A “fair” consultation: the Sedley criteria

1. The consultation must be undertaken at a time when the proposals are still at a formative stage;
2. It must provide sufficient information, in detail and clarity, for consultees to give the proposals intelligent consideration and an intelligent response;
3. There must be adequate time for the response;
4. The responses must be considered conscientiously and taken into account when the decision is taken.

*R. (Moseley) v Haringey LBC* [2014] 1 W.L.R. 3947



## What to options consult on?

1. Generally, a very broad discretion on what options to consult on.
2. Still, fairness may in some cases require particular options to be consulted on.
3. E.g. in *R. (Medway Council) v Secretary of State for Transport, Local Government and the Regions* [2002] EWHC 2516 (Admin), it was procedurally unfair to rule out expansion at Gatwick airport in circumstances where:
  - a. The SoS knew the Council would wish to advocate for Gatwick;
  - b. Not consulting on Gatwick meant that the Council lost its only real chance to present its case on Gatwick without there being a policy in place which set an unsurmountable hurdle.

## When to re-consult?

1. Generally, fairness only requires re-consultation if there is a “fundamental change”: R. (Smith) v East Kent Hospital NHS Trust [2002] EWHC 2640 (Admin) at §45.
2. Courts accept scheme is often a “moving target” and no need to draw each and every change to public’s attention: R. (M) v Haringey LBC [2013] P.T.S.R. 1285 at §24.
3. If a “new factor” or “some internal material of potential significance” emerges, fairness may require re-consultation: Edwards v Environment Agency [2006] EWCA Civ 877 at §94.
4. The test is whether in all the circumstances, fairness demands that it must (not may) be drawn to the attention of consultees: R. (M) v Haringey LBC [2013] P.T.S.R. 1285 at §24.

NB See very useful synthesis of relevant principles by Dove J in *Keep Wythenshawe Special Ltd* [2016] EWHC 17 (Admin), (2016) CCL Rep 19 CCL Rep 19

## Port of Liverpool: Sefton MBC - background

- Major expansion planned to Port of Liverpool.
- Highways England consulted on options for new access route to the port.
- But did not include a tunnel under the Rimrose Valley – said to be unrealistic and too expensive.
- Proposed instead dual carriageway through Rimrose Valley Park.





## Port of Liverpool: Sefton MBC - findings

- HE has considerable freedom to act in the manner it considers best calculated to perform its duties efficiently and economically.
- HE can narrow the range of options within which he would consult and eventually decide.
- HE not required to consult on the tunnel option on an equal footing with the other options.
- HE informed public what it was considering and why + explained why tunnel option too expensive. That did not prevent contrary argument being made.
- HE entitled to work within budget. Setting the budget is a matter for government, not the court.

## Arundel bypass (A27): Tristram- background

- Long-standing calls to improve A27 around Arundel in West Sussex.
- 2017 consultation identified 3 options. Option 5A picked in May 2018, which runs through South Downs National Park
- May 2018 Scheme Assessment Report included updated traffic modelling, which had not been consulted on.



## Arudnel bypass (A27): Tristram- issues

- Dr Tristram claimed consultation unlawful because:
  - Public had no chance to consider new SAR traffic figures.
  - That was important, because had potential to materially change degree of support for Option 5A.
  - Further, failure to inform public that traffic figures were highly likely to change.
  - Further still, alleged inconsistencies between consultation brochure and detailed technical documents.
- HE consented to judgment and is now re-consulting.
- Shows risks of applying 74-75 of the DCLG guidance. Balancing (i) need to pick a point to consult with (ii) reality that schemes continue to evolve.



**TBuley@landmarkchambers.co.uk**

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**London**

180 Fleet Street  
London, EC4A 2HG  
+44 (0)20 7430 1221

**Birmingham**

4th Floor, 2 Cornwall Street  
Birmingham, B3 2DL  
+44 (0)121 752 0800

**Contact us**

 [clerks@landmarkchambers.co.uk](mailto:clerks@landmarkchambers.co.uk)

 [www.landmarkchambers.co.uk](http://www.landmarkchambers.co.uk)

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