Communities and Local Government

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Sir Michael Pitt
Chair, Infrastructure Planning Commission
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As you know, I have been taking a close interest in the passage of the early cases through the Planning Act regime. I am very pleased to note that the decision on the first project through the system was made within the statutory timetable, and wish to congratulate you and your team on the immense effort you have expended to ensure the major infrastructure planning regime is operating effectively.

Jan Bessell's letter of 14 July to Burges Salmon (acting on behalf of Covanta Energy), in respect of changes to the application proposed by Covanta Energy, has been brought to my attention, and I note particularly the reference it makes to the absence of regulations under section 114(2) of the Planning Act 2008. I thought it would be helpful to set out my views on section 114 and the reasons why I do not believe it is necessary or appropriate to make further regulations under this section.

Before I address section 114, let me first lend support to the Examining Authority's decision in respect of the proposed changes referred to above. I agree that where the Examining Authority determines that proposed changes to an application post submission are such that they effectively constitute a new application, they should not be accepted. Any decision on materiality, including the point at which the materiality of proposed changes reaches this threshold, is for the Examining Authority to make, and I am entirely supportive of the Examining Authority's judgement on materiality in this case.

As you are aware, it is a central tenet of the major infrastructure planning regime that applications should be as well prepared as possible before applications are submitted. However, from time to time, it may become necessary to make material changes to an application after submission through no fault of the applicant, for example where the regulatory environment changes, or information comes to light which could allow the impacts of the project to be reduced. Given this, it is important that the major infrastructure regime allows material changes to be made post application in certain circumstances.

My Department has received representations questioning whether section 114(1) empowers the decision-maker to make a development consent order in different terms from that applied for. This was the subject of an amendment laid at the Lords Report stage of the Localism Bill, and in response, Earl Attlee confirmed the Government's view, that section 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. It follows from this that the decision-maker has the 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 s114(1) power. 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.

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.

I do not believe it would be helpful to make regulations to specify how this should be achieved, beyond those relating to compulsory acquisition in the Infrastructure Planning (Compulsory Acquisition) Regulations 2010, as the impact of any proposed amendments could vary considerably. The Examining Authority will be in a better position to determine what is appropriate on a case by case basis. Depending on the circumstances, in accordance with the principles of fairness and reasonableness, and specifically the principles set out in *Wheatcroft* , the Examining Authority may need to:

- extend the examination using the power in section 98(4) of the Act to consult interested parties on the effect of the proposed amendments, and allow for time to consider any amendments accepted for examination
- take into account what publicity (if any) the promoter has carried out to ensure people who are not interested parties have an opportunity to make representations
- 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 to be made by people who are not interested parties in cases where it is appropriate to do so

The specificity of section 102 of the Act means the power provided by section 87(1) is unlikely to allow for the appointment of new interested parties after the deadline under section 56 has passed (bearing in mind clause 138(9) of the Localism Bill). However, the Examining Authority will nonetheless be able to treat anyone who isn't an interested party, but who wishes to make representations regarding the amended proposals, as if they were.

As I noted above, it is of crucial importance to the successful operation of the major infrastructure regime that applications are prepared to the highest possible standard before submission. But where a pressing need to amend an application arises post submission it should be possible, provided those changes are not so substantial that they constitute a new application, to accommodate them. This will help to protect the many billions of pounds in investment, so important to the UK economy, represented by the cases expected to come forward over the next several years.

BOB NEILL MP