

IN THE MATTER OF AN APPLICATION FOR DEVELOPMENT CONSENT IN  
RESPECT OF STONESTREET GREEN SOLAR FARM PINS REF EN010135

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COUNSEL'S NOTE

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Introduction

1. I provide this note for the Aldington and Bonnington Parish Council in connection with the commencement of the Examination of the Stonestreet Solar Development Consent Order Application (“Application”). I deal briefly with the stage that we have reached in the procedure, and then provide my initial comments on the draft Development Consent Order itself (“dDCO”).
2. I note at the outset that I have been instructed by another party to advise in relation to the Application which has given me some background information about the Application. I do not consider that there is any conflict of interest in advising the Parish Council on this limited set of instructions.

Procedure

3. The Parish Council has asked for this advice in time to inform their application, due on 5 November, to participate in an issue specific hearing relating to the drafting of the DCO on. The Examining Authority (“ExA”)’s Rule 6 Letter<sup>1</sup> identifies that the hearing is relates to “the draft Development Consent Order and general principles of the proposed development”. The agenda set out at Annex F of the Rule 6 letter explains the relatively limited scope of the hearing. In particular, the ExA explains that they expect to cover:
  - a. The applicants “overall approach to the Environmental Assessment of the Proposed Development in light of the, so-called, Rochdale envelope. The ExA is particularly interested to ensure that the worst-case scenarios have been assessed;
  - b. The applicant’s “its overall approach to the drafting of the dDCO and clarify what matters are to be secured by alternative methods, such as Planning Obligations and other forms of agreement”; and

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<sup>1</sup> <https://infrastructure.planninginspectorate.gov.uk/wp-content/ipc/uploads/projects/EN010135/EN010135-000610-Stonestreet%20Rule%206%20Letter%20and%20Annexes.pdf>

- c. For the ExA to “ask questions about the dDCO and seek observations from IPs present”.
4. The ExA then makes clear that because “ this hearing is in the earliest stages of the Examination, the primary purpose of this Agenda item will be for the ExA to raise its own initial questions. Other IPs will be welcome to participate but will not be expected to frame their own detailed positions until the submission of their Written Representations...”
5. The Parish Council should make sure that they have this in mind when preparing their submission for the hearing: the ExA does not expect it to have a fully-formed and detailed position at this early stage, and this will not be the only opportunity to comment on the dDCO.
6. I am also very conscious that I have not been provided with a draft of the Parish Council’s written representation, nor any real indication of the particular concerns that the Parish Council has about the Application. The comments that I give below are therefore at a certain level of generality, and have been drawn from my reading of the dDCO itself,<sup>2</sup> the Explanatory Memorandum,<sup>3</sup> the Work Plans,<sup>4</sup> the Land Plans,<sup>5</sup> and the Statement of Reasons.<sup>6</sup>

#### Project description

7. The project itself is described in Schedule 1 to the dDCO as a series of “Works”, numbered 1-8. The primary element of the development, Work 1, is the solar array. I note that this is defined by reference to a minimum output capacity of 50 MW, rather than by reference to a maximum capacity or even to a range of capacity. The developer explains in the Explanatory Memorandum at paras. 1.2.6-1.2.9 on the basis that there is no need to prescribe a maximum, as it may wish to take advantage of technological improvements and innovations that may emerge before construction, resulting, presumably, in the potential for a higher output capacity than envisaged.
8. I understand from my other instructions that the quoted output capacity in the documents relating to this DCO is 99MW, and the extent of the array has been explained by reference to the need to provide “over-capacity” to secure this level of output

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<sup>2</sup> [https://infrastructure.planninginspectorate.gov.uk/wp-content/ipc/uploads/projects/EN010135/EN010135-000399-SSG\\_3.1\\_Draft%20Development%20Consent%20Order.pdf](https://infrastructure.planninginspectorate.gov.uk/wp-content/ipc/uploads/projects/EN010135/EN010135-000399-SSG_3.1_Draft%20Development%20Consent%20Order.pdf)

<sup>3</sup> [https://infrastructure.planninginspectorate.gov.uk/wp-content/ipc/uploads/projects/EN010135/EN010135-000397-SSG\\_3.3\\_Explanatory%20Memorandum.pdf](https://infrastructure.planninginspectorate.gov.uk/wp-content/ipc/uploads/projects/EN010135/EN010135-000397-SSG_3.3_Explanatory%20Memorandum.pdf)

<sup>4</sup> [https://infrastructure.planninginspectorate.gov.uk/wp-content/ipc/uploads/projects/EN010135/EN010135-000391-SSG\\_2.3\\_Works%20Plans.pdf](https://infrastructure.planninginspectorate.gov.uk/wp-content/ipc/uploads/projects/EN010135/EN010135-000391-SSG_2.3_Works%20Plans.pdf)

<sup>5</sup> [https://infrastructure.planninginspectorate.gov.uk/wp-content/ipc/uploads/projects/EN010135/EN010135-000389-SSG\\_2.1\\_Land%20Plans.pdf](https://infrastructure.planninginspectorate.gov.uk/wp-content/ipc/uploads/projects/EN010135/EN010135-000389-SSG_2.1_Land%20Plans.pdf)

<sup>6</sup> [https://infrastructure.planninginspectorate.gov.uk/wp-content/ipc/uploads/projects/EN010135/EN010135-000392-SSG\\_4.2\\_Statement%20of%20Reasons.pdf](https://infrastructure.planninginspectorate.gov.uk/wp-content/ipc/uploads/projects/EN010135/EN010135-000392-SSG_4.2_Statement%20of%20Reasons.pdf)

towards the end of the life of the development. This approach in the dDCO differs from that justification.

9. It seems to me that there would be merit in the Applicant being required to provide at the very least a range of output capacity, based on a reasonable understanding of the technology that exists at present and reasonable assumptions as to future improvements within the next 5 years. This is required to understand properly the public benefit to be derived from the project, and the land-take and other features of the development which are in fact required to provide that benefit.

#### Development parameters

10. Whilst the Applicant suggests that the Application is assessed on the basis of a Rochdale envelope (i.e. a maximum range of parameters, within which the Applicant will then be able to work), it is important to note that these parameters are not defined in the description of development in any way.
11. This is important, as the Work Plans which accompany the dDCO are incredibly generic about the location of key elements of the scheme, merely providing an indicative hatching across most of the site for both the solar array (Work 1) and the battery component of the scheme (included within Work 2).
12. There is no indication (as one might expect) as to maximums of e.g. the heights of different components of the development (including most importantly under Works 1-3); density of arrays (to understand the any of the infrastructure proposed under Work 2 (including batteries, intermediate substations, and water-related infrastructure; or even the number of parking spaces required at the project substation. All these (and other more precise maximum parameters) need to be included in the dDCO so that it is clear (i) what the Rochdale envelope actually is; and (ii) what is to be consented should the Application be granted. What the Applicant is currently seeking is in many ways a blank sheet of paper.
13. In particular, I have concerns about the approach to the battery element of the scheme. First, it appears to have been “rolled in” together with “balance of system” components which are ancillary to the solar panel array itself, such as inverter stations and local intermediate substations. The battery storage element of the scheme is conceptually separate however from the pure transfer of electricity from solar array to project substation: it has its own form and infrastructure needs which are separately identifiable from those of the solar array. The battery storage element should be its own identified Work, allowing it to be assessed as an individual component of the scheme.
14. Secondly, given that there is no number of or approximate locations for the battery storage and connected elements of the scheme, I find it difficult to understand how the Rochdale envelope can be robustly created – is the Applicant going to assume as a

worst-case scenario that *all* the land hatched on the Work Plans for Work 2 will be occupied by batteries and their infrastructure? That would on one level be absurd, but on another, if there is an unlimited number of batteries permitted across that whole area, then that is what the Rochdale envelope requires to be assessed.

15. Thirdly, reiterating the point at para.11 above, it is not good enough for the Applicant in respect of the battery element of the scheme to simply say that “the design and number of BESS Units will depend on the battery technology selected” – the Applicant should be providing the acceptable parameters, informed by the range of technology available, for the number, form, size, and location of these “units” to enable a meaningful assessment of their impacts. At the moment, the dDCO would grant consent for a limitless and vague form of development.

#### Associated development

16. The Applicant should provide further details justification as to the size and nature of Work 2, the battery component, and how Work 2 qualifies as “associated development” (see Explanatory Memorandum para. 1.2.10) within the meaning of the Act.

17. The Government Guidance on this question<sup>7</sup> makes clear that :

- a. “Associated development should therefore either support the construction or operation of the principal development, or help address its impacts” and
- b. “Associated development should not be an aim in itself but should be subordinate to the principal development.”

18. Those that instruct me separately have doubts about the purpose of and the extent to which the battery element is in fact supportive of and subordinate to the solar array element, or whether it is in effect a co-located development with effectively a separate operation. The Statement of Reasons at para. 3.3.8 explains that the battery storage system can store and release energy “generated from the PV panels or imported from the National Grid”. A more detailed justification (and indeed, in the Explanatory Memorandum, *any* justification) for including this as associated development to the solar array should be provided by the Applicant.

#### Definition of “commencement” and “enabling works”

19. The requirements (Schedule 2) in general prevent the “commencement” of the development until the requirement is fulfilled. The interpretation section of the dDCO

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<sup>7</sup> [https://assets.publishing.service.gov.uk/media/5a7b5f04ed915d3ed9063f36/Planning\\_Act\\_2008\\_-\\_Guidance\\_on\\_associated\\_development\\_applications\\_for\\_major\\_infrastructure\\_projects.pdf](https://assets.publishing.service.gov.uk/media/5a7b5f04ed915d3ed9063f36/Planning_Act_2008_-_Guidance_on_associated_development_applications_for_major_infrastructure_projects.pdf)

(article 2) defines “commencement” as excluding “enabling works”. This is in general an acceptable approach, but the Government Guidance on this explains that:

“The definition of commencement must not provide for preliminary works which are so extensive that they would be likely to have significant environmental effects themselves, and would normally need consideration and approval by the discharging authority prior to such works starting. Typical examples of matters which are not acceptable preliminary works include major earthworks, clearance of trees and ground clearing, activities affecting protected species or archaeological remains, unless appropriate controls are secured in another manner.”<sup>8</sup>

20. The definition of “enabling works” in the dDCO includes “demolition”. It is plain that demolition works can themselves create noise, dust, and transport movements, the sorts of impacts that require to be controlled by the schemes approved under Requirements 6 and 7.

#### Definition of “maintain”

21. The definition within Article 2 of “maintain” appears to be couched particularly widely, to include the ability to “remove, reconstruct and replace” elements of the development. The Applicant should provide further justification as to why these broader provisions are required, in particular a standalone power to “remove” elements of the development.

#### Article 8(7): disapplication of legislative provisions

22. Article 8(7) provides that “any enactment applying to land within, adjoining or sharing a common boundary with the Order limits has effect subject to the provisions of this Order”. The “adjoining” and “common boundary” elements of this provision make it an incredibly broad provision which effectively extends the scope of the Order beyond the Order limits to a whole range of land to which it does not and ought not apply (which is not mapped anywhere but could extend to a significant amount of land), and to the entire panoply of statute law! There is no meaningful justification of this provision, what sort of legal provisions it is supposed to capture, and what sort of problem it is supposed to address. Such a general provision is offensive to

#### Article 9: *Hillside point*

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<sup>8</sup> <https://www.gov.uk/guidance/planning-act-2008-content-of-a-development-consent-order-required-for-nationally-significant-infrastructure-projects>

23. This article is said to address the implications of the decision of the Supreme Court in *Hillside v Snowdonia National Park Authority* [2022] UKSC 30] relating to overlapping planning permissions. This article is novel, and is said to be justified by the novel scenario created by *Hillside*. It is important to note however that the Supreme Court in *Hillside* did not in fact assert any new principle of law, but rather approved the longstanding principles in *Pilkington v Secretary of State for the Environment* [1973] 1 WLR 1527. The fact that the Applicant can cite no precedent for such a clause is important – it cannot identify what the problem is that it seeks to address by this article, nor that such a problem has been identified and deal with similarly in similar scenarios in the past two years since the *Hillside* judgment.
24. This provision seems to be a solution in search of a problem. It appears to me that it is not desirable that, should the development permitted by a DCO be physically incapable of being achieved, the DCO continues to authorise that development. The public benefits that justify the scheme of development need to be secured by the dDCO – if they are not secured, then the justification for granting the DCO in the first place is frustrated. Thus if the scheme permitted by the DCO is physically impossible to achieve, then it could be right as a matter of principle that the *Pilkington* principle should apply.
25. However, (i) there is no authority to suggest that the *Pilkington* principles does in fact apply to consent granted by DCO; and (ii) if the Rochdale envelope approach is properly pursued, it allows a degree of “flexibility” (the Applicant’s word), with detailed design to be determined under Requirement 4. There is no obstacle in the dDCO as it stands to the Applicant submitting different schemes for the design of the project under Requirement 4 if it subsequently becomes apparent that the design previously approved needs to be adapted to reflect changes in the planning position.
26. To the extent that this article appears to allow the Applicant to potentially retain the benefit of the proposed DCO whilst obtaining planning permissions for different or further uses on within the Order limits which would not be considered through this (rigorous) process and which could affect the physical possibility of the DCO development being built it, it should be strongly resisted.

### Conclusion

27. These are my initial thoughts on the drafting of the dDCO and some points of principle in respect of the development. It is highly likely that, as the Parish Council’s position develops and the Examination proceeds, further points relating to dDCO drafting and provisions will emerge and will need to be grappled with carefully.

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5 November 2024

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