



Requesting changes

Advice note sixteen: How to request a change which may be material

The purpose of this advice note is to provide information to applicants about how to request a material change to an application after it has been accepted and before the close of the Examination.

The government's guidance on the examination of applications for development consent (the Examination Guidance¹) sets out the approach that an Examining Authority (ExA) should take when handling an applicant's request to materially change an application that has been accepted for examination. In particular, paragraph 113 of the Examination Guidance sets down the factors that an ExA will need to consider when deciding whether or not to accept a request for a material change to an accepted application. Paragraph 110 of the Examination Guidance also makes clear that a proposed change may be so material that it constitutes a materially different project. In such circumstances (as explained in paragraph 5.5 of this advice note) the ExA may decide that a proposed change would alter the application to such a degree that it could not be examined without breaching principles of fairness and reasonableness.

This advice note is intended to build on the Examination Guidance and establish a structured approach to provide greater certainty for applicants when making a request for a material change, as well as explaining the implications of doing so. This note is relevant to the Pre-examination and Examination stages since these are the only times when a request to make a material change to an application can be considered by the appointed ExA.



A material change request made in the final few weeks of the examination is unlikely to be accepted by the ExA, and its report and recommendation will be made on the basis of the application as it stands at the time of Examination close.

Applicants wishing to make a material change to a Development Consent Order which has already been made by the Secretary of State should refer to the following regulations:

The Infrastructure Planning (Changes to, and Revocation of, Development Consent Orders) Regulations 2011

The Infrastructure Planning (Changes to, and Revocation of, Development Consent Orders) (Amendment) Regulations 2015

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1. The Planning Act 2008: Guidance for the examination of applications for development consent, March 2015



1. Introduction

1.1 Nothing in this advice note should detract from the importance of submitting applications that have been thoroughly prepared. The purpose of the statutory Pre-application stage is to frontload project development and to require applicants to comprehensively prepare their applications. Technical issues should be identified and resolved as far as possible during the Pre-application stage so that they will not act as an impediment to the examination of the application within the statutory timescales. The government has published guidance on the Pre-application process² for applicants and other users of the regime.

1.2 However, the government recognises that there are occasions when applicants may need to make a material change to an application after it has been accepted for examination. Sometimes a change may result from the publication of new/emerging government policy or on-going negotiations between an applicant and other Interested Parties.

1.3 The justification for making a material change after an application has been accepted for examination must be robust and there should be good reasons as to why the matters driving the change were not identified and dealt with proactively at the Pre-application stage. Before an applicant makes a material change request it should carefully consider how it will impact upon the other Interested Parties and the Examination Timetable.

2. What constitutes a material change?

2.1 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 which 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. Further information about making a material change request can be found in paragraphs 109 to 115 of the Examination Guidance³.

2.2 The submission of new or revised information before the Examination starts or during the Examination⁴ does not necessarily constitute a request to materially change an application. For example, following a decision to accept an application for examination, applicants are often issued with advice by the Planning Inspectorate which may identify errors, omissions and qualitative issues relating to the submitted application documentation. In response applicants may submit errata, amended application documents, plans or environmental information. During the course of the Examination the Examining Authority (ExA) may also request further information or written comments from an applicant or any Interested Party⁵; new information may also be provided in response to an ExA's written questions. Changes to the application documents may not necessarily result in changes to the underlying project.

2.3 The ExA is ultimately responsible for deciding whether new information submitted into the Examination by an applicant constitutes a material change to the application. In the event that an applicant submits new information that may constitute a material change to an application but does not request a material change to an application, the ExA may still ask for the information set out in Figure 3 on page 5 of this advice note before deciding whether and how to examine the new information.

2.4 The ExA will also need to consider whether the combined impact of a series of incremental non-material changes collectively would result in a material change to the original application.

2. Planning Act 2008: Guidance on the pre-application process, March 2015

3. Planning Act 2008: Guidance for the examination of applications for development consent, March 2015

4. For example new versions of the DCO as Articles are reviewed, drafting improved and Requirements or Protective Provisions developed in order to mitigate impacts

5. In accordance with Rule 17 of the Infrastructure Planning (Examination Procedure) Rules 2010



2.5 Note that 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 application⁶.

3. Key steps in requesting a potential material change to an application

3.1 Applicants will need to decide for themselves (taking their own legal advice) whether a proposed change to an application is material and therefore whether to request for the ExA to consider accepting a request to materially change the application. The purpose of this is to provide the ExA with a firm basis upon which to consider the request.

3.2 The ExA should be notified that a request is to be made (Step 1 of Figure 1, page 4). Providing notification of the intent to make a material change request will typically involve a letter or email to the ExA which describes the material change and sets down the likely timescales of when the request will be made. It would also assist if any information about the material change available at that point is also provided to the ExA. The notification letter and any related documentation provided will be published on the National Infrastructure Planning website and made available to other Interested Parties as soon as practicable.

3.3 Before making a written request (Step 4 of Figure 1, page 4) it is recommended that applicants consult all those persons prescribed in the PA2008 under section 42 (a) to (d) who would be affected by the proposed change (giving a minimum of 28 days). It is advised that if a targeted approach to the identification of those affected by the request to materially change the application is adopted then detailed justification should be provided why it is deemed unnecessary to consult all of the prescribed persons⁷. If applicable, applicants should identify any newly prescribed persons ie those who were consulted in relation to the proposed material change but NOT in regards to the original application.

3.4 Consultation about the proposed material change may be done voluntarily by an applicant in advance of seeking procedural advice from the ExA if this would save time. If an applicant is unsure about how to proceed then it may seek the views of the ExA (Step 2 of Figure 1, page 4), via the Case Manager, as to the scale and nature of any non-statutory consultation exercise.

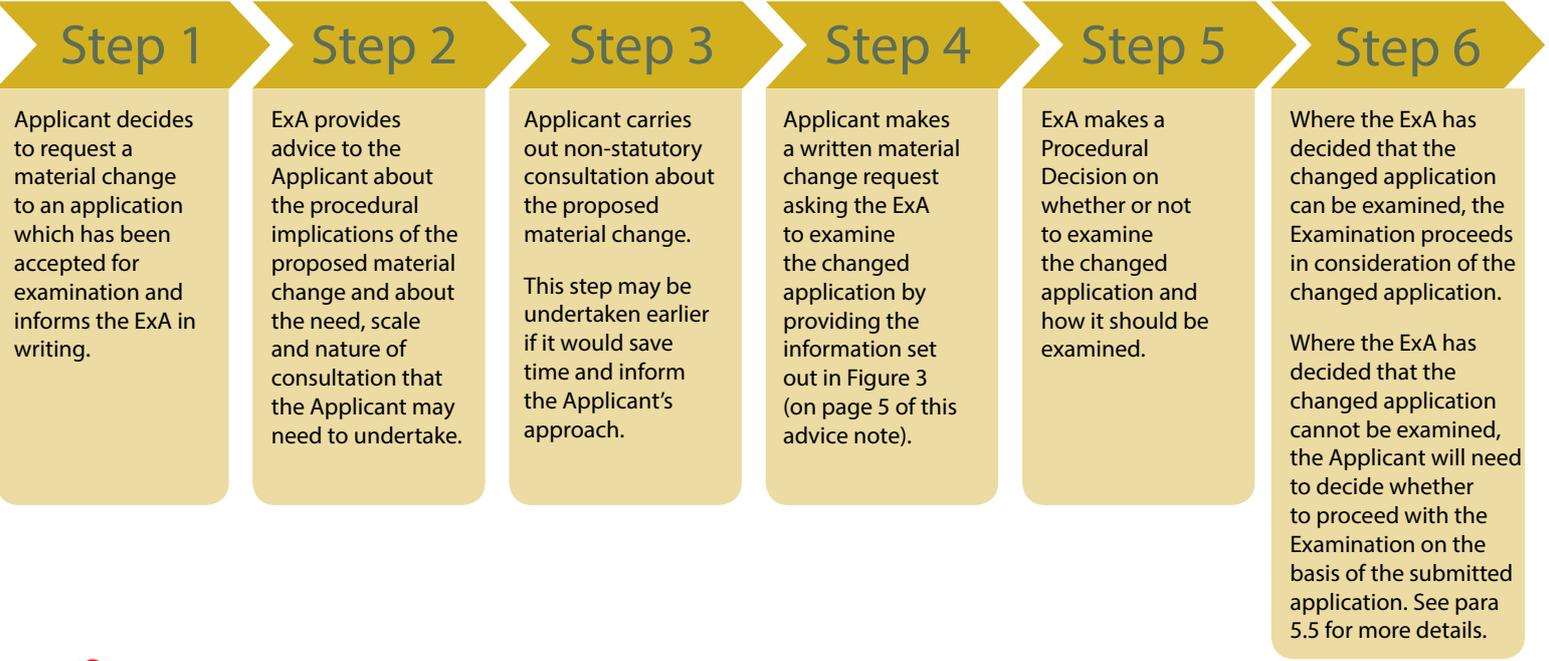
3.5 The ExA may request that further consultation is undertaken if it considers that the steps taken by an applicant have not been adequate to safeguard the interests of and/ or inform those potentially impacted by the material change.

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

7. For example, in the case of Statutory Undertakers, by confirming that the proposed material change would not affect their functions

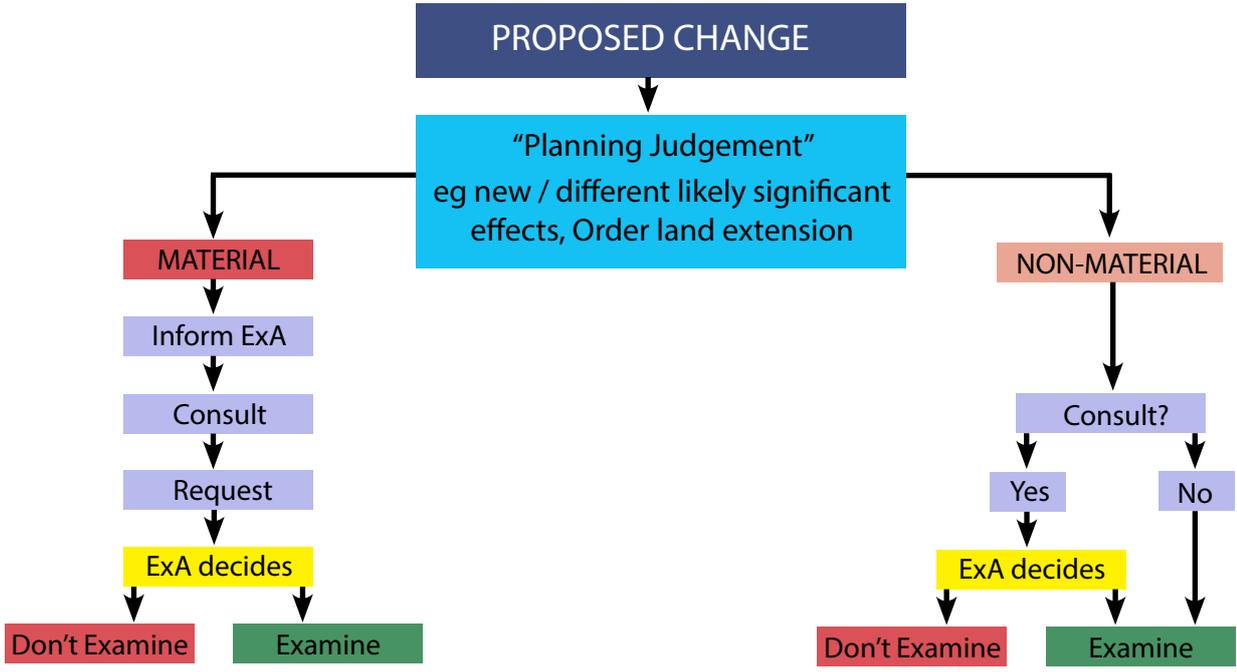


Figure 1: Summary of how to make a request to make a material change to an accepted application



A material change request made in the final few weeks of the examination is unlikely to be accepted by the ExA, and its report and recommendation will be made on the basis of the application as it stands at the time of Examination close.

Figure 2: Change request process





4. Information required with a material change request

4.1 To assist the ExA in making the Procedural Decision referred to in Step 5 of Figure 1, and also to provide clarity for participants in the process, applicants should provide the information set out in Figure 3 and follow the advice in this note.

Figure 3: Information to include in a request to make a material change to an application after it has been accepted for examination

- a. A clear description of the proposed change, including any new/ altered works and any new/ altered ancillary matters.
- b. A statement setting out the rationale and pressing need for making the change with reference to the Examination Guidance, any relevant National Policy Statement(s) as appropriate and any other important and relevant matters.
- c. A full schedule⁸ of all application documents and plans listing consequential revisions to each document and plan or a 'no change' annotation. The schedule should include an update of any consents/ licences required and whether (given the proposed change to the application) there will be any impediment to securing the consents/ licences before the Examination is concluded.
- d. A track changed version of the draft DCO showing each proposed change, and a track changed revised draft Explanatory Memorandum. If drafting changes have been made to the draft DCO during the course of the Examination, applicants should check with the ExA which version of the draft DCO and draft Explanatory Memorandum should be used for this purpose.
- e. If the proposed change involves changes to the Order land⁹, confirmation that the Infrastructure Planning (Compulsory Acquisition) Regulations 2010 (the CA Regulations) are not engaged including if appropriate a copy of the consent obtained from persons with an interest in the additional land. If the CA Regulations are engaged applicants must provide the information prescribed by Regulation 5 of the CA Regulations¹⁰ and should clarify how it is considered that the procedural requirements of the CA Regulations can be met within the statutory six month Examination stage.
- f. If the proposed change results in any new or different likely significant environmental effects, provision of other environmental information and confirmation that:
 - i. 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) and applicants should also submit copies of any representations received in response to this publicity with the change request.
 - ii. any consultation bodies who might have an interest in the proposed changes have been consulted (reflecting the requirements of the EIA Regulations). It is recommended that applicants submit copies of any responses received from consultation bodies with the change request. Applicants should identify those consultation bodies who were consulted on the proposed changes but NOT on the original application.
- g. 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 should be submitted. Copies of any consultation responses received by an applicant should also be included with any request, as an annex.

5. The role of the Examining Authority

5.1 The ExA is appointed following a decision to accept an application. As such, it will be in place early in the Pre-examination stage. This will facilitate early consideration of how a material change request is dealt with.

5.2 The ExA must ensure that the rights of Interested Parties and anyone else that could be affected by a proposed change are protected. The principles of fairness and reasonableness, as established by relevant case law, will guide the ExA in their consideration of a material change request.

8. Applicants may find it helpful to mirror the information required on the prescribed application form – paragraph 1 of Schedule 2 of The Infrastructure Planning (Applications: Prescribed Forms and Procedure) Regulations 2009
9. Being land over which it is proposed to exercise powers of Compulsory Acquisition
10. Namely a supplement to the submitted Book of Reference, a Land Plan identifying the additional land, a Statement of Reasons as to why the additional land is required and a statement indicating how it is proposed to fund acquisition of the additional land (a Funding Statement)



5.3 Procedural requirements as they relate to the CA Regulations (where the change involves additional land¹¹) and the EIA Regulations (where a change requires submission of environmental information¹²) will also be significant factors in deciding how a change will be dealt with.

5.4 Where an applicant makes a request for a change which an applicant considers to be material, and has consulted on that change, the ExA will need to consider whether (and if so how) to examine the changed application. In deciding whether or not the changed application can be examined, the ExA must consider whether the change is so material that an applicant is effectively seeking consent for a different project and therefore one which has not been subject to the Pre-application statutory procedures. If this were the case, it would not be capable of being examined within the statutory timetable without breaching principles of fairness and reasonableness. Whether the proposed changed application still constitutes the same project or not is an ExA decision based on planning judgment. The ExA will not normally need to consult Interested Parties about issues of materiality particularly if responses to any non-statutory consultation by an applicant have been provided as part of the request.

5.5 If the ExA decides not to accept the changes put forward by an applicant, then the Applicant will need to decide whether to proceed on the basis of the submitted application, to withdraw the application or to submit a lesser change request. If an applicant decides to promote a lesser change then consideration should be given to the time available to request the lesser change. The later in the DCO application process that a DCO application is withdrawn, the greater the risk that an Interested Party may successfully recover their costs. The government has published guidance about the award of costs¹³.

6. Timing implications

6.1 The following section highlights the implications of making a material change request at different stages of the process, after an application has been accepted for examination. It also sets out the various procedural opportunities and powers that an ExA can use to help facilitate consideration of a material change request.

6.2 A request to make a material change to an accepted application will be considered within the existing fee structure as set out in the Fees Regulations¹⁴. However, applicants should be aware that one of the implications of introducing a material change request to an application is that additional time may be needed (within the statutory maximum six months Examination stage) to examine the application, which may have the effect of increasing the examination fee based on the applicable daily rate under Regulations 8 and 9 of the Fees Regulations.

The Pre-examination stage

6.3 Applicants should notify the Planning Inspectorate about a proposed material change in writing as soon as possible after the application has been accepted and follow the steps in Figure 1. The Pre-examination stage is not driven by a statutory deadline and can therefore provide time for applicants to undertake any non-statutory consultation with Interested Parties and others as per Step 3 in Figure 1. It can also represent an opportunity for applicants to take stock of the Relevant Representations and on-going negotiations. Therefore, proposing a material change at this point can reduce the impact on the statutory timescale during the Examination stage. However, applicants should ensure that any delay to the start of the Examination is kept to a minimum in accordance with paragraph 45 of the Examination Guidance.

6.4 If an applicant wishes to proceed with a request in advance of the Preliminary Meeting, as much information as possible (see (a) to (g) of Figure 3) should be provided with the request.

11. As defined in Regulation 2 of The Infrastructure Planning (Compulsory Acquisition) Regulations 2010

12. As defined in Regulation 3 of The Infrastructure Planning (Environmental Impact Assessment) Regulations 2017

13. Awards of costs: examinations of applications for development consent orders, July 2013

14. The Infrastructure Planning (Fee) Regulations 2010 (as amended by The Infrastructure Planning Fees (Amendment) Regulations 2017)



Request made before the invitation to the Preliminary Meeting is issued (Rule 6 letter¹⁵)

6.5 Ideally a request to materially change an application should be made by the Applicant before the Rule 6 letter has been issued to the Interested Parties. This would allow the ExA to include information about the material change request in the Rule 6 letter and to direct Interested Parties to information provided by an applicant about the material change request. It would also allow the ExA to take account of the request in the draft Examination Timetable and include time for discussion about the examination of the proposed change in the draft Preliminary Meeting agenda. This would enable all Interested Parties to be fully informed before the Preliminary Meeting and to facilitate a focussed discussion about how a changed application might be examined.

6.6 Applicants should check with the Case Manager about when the Rule 6 letter is likely to be issued to Interested Parties. An indication that a material change will be proposed may influence the timing of the publication and notification of the Rule 6 letter to Interested Parties.

6.7 If an applicant notifies the ExA of a proposed material change request or submits a request before the Rule 6 letter is issued this may also have a bearing on the timing of the Preliminary Meeting. For example, a period of time may be required in advance of the Preliminary Meeting to allow an applicant to seek advice from the ExA as per Step 2 in Figure 1 and then consult on the proposed change as per Step 3 in Figure 1. This may delay the start of the Examination stage but would mean that Interested Parties and others would have an opportunity to consider the implications of the change before the start of the Examination and minimise the impact on the statutory six month Examination stage.

Request made after the invitation to the Preliminary Meeting is issued (Rule 6 letter)

6.8 If an applicant decides that a material change to the application is required after the Rule 6 letter has been issued the ExA should nonetheless be informed as per Step 1 in Figure 1 as soon as possible in advance of the Preliminary Meeting. Applicants should avoid proposing a material change at the Preliminary Meeting without first notifying the ExA.

6.9 Although Interested Parties may not have had advance warning of the proposed material change in the Rule 6 letter, the ExA can adjust the Preliminary Meeting agenda to provide an opportunity to ask an applicant and other attendees questions about the proposed material change and how it should be examined, with reference to the draft Examination Timetable issued with the Rule 6 letter.

6.10 If the ExA considers that an applicant has provided insufficient information about a proposed change or has not carried out sufficient non-statutory consultation and publicity, the ExA may be able to build time into the Examination Timetable for an applicant to repeat Steps 3 and 4 before making a Procedural Decision (Step 5 of Figure 1). Alternatively, if the ExA decides that all Interested Parties should be given more time to consider the proposed change prior to the start of the Examination the ExA may send a Procedural Decision to Interested Parties advising them of a new Preliminary Meeting date.

6.11 If the ExA considers that the changed application can be examined, it will issue its Procedural Decision in the Rule 8 letter¹⁶ as soon as practicable after the Preliminary Meeting, including an Examination Timetable which will ensure that there is sufficient time for examination of the materially changed application within the statutory timescales. If the ExA decides not to accept the material change requested by an applicant this will also be communicated in the Procedural Decision contained in the Rule 8 letter.

The Examination stage

6.12 The Examination must not last longer than six months and as such any request to make a material change must be made as soon as possible and at a time which will allow the ExA to examine all important and relevant matters raised by the materially changed application. The ExA must notify Interested Parties of any Procedural Decision to accept or refuse a request to make a material change to the submitted application as soon as practicable after the decision has been made.

15. The Infrastructure Planning (Examination Procedure) Rules 2010, Rule 6

16. The Infrastructure Planning (Examination Procedure) Rules 2010, Rule 8



6.13 If the CA Regulations have been engaged the ExA will need to consider whether it is possible to meet the requirements set out in these Regulations within the remainder of the Examination stage.

6.14 During the Examination, a material change request should be notified to and made in writing to the ExA as per the steps identified in Figure 1. In making any request, applicants should consider the extent of consequential amendments required to the submitted application and the time available to produce the requisite documentation; also, the time available for Interested Parties to be able to digest, understand and comment on the proposed change before the end of the Examination, in addition to any other remaining issues.

6.15 Before making a written request, applicants may also wish to inform the ExA at a hearing about the material change request. However, applicants should not rely on the ExA being in a position to be able to make a Procedural Decision at a hearing. If the proposed change has a bearing on the hearing agenda then the ExA may exercise its discretion to adjourn the hearing and/ or amend the Examination Timetable by making a Procedural Decision.

6.16 Once the Examination has closed the ExA cannot accept any further representations or submissions from Interested Parties, including any request by an applicant to make a material change to an application.

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Further information

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