



Francis Taylor Building

Infrastructure Webinar

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What's in a name? NSIP infrastructure definitions

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The SoS must determine whether to accept an application within 28 days after the following day an application is made (s.55 Pa 2008). One of the four conditions is that:

“(c)that development consent is required for any of the development to which the application relates,....”



To accept or not to accept

Not to accept can be challenged by JR: s.118(3) Decision to accept caught by s.118(7).

Section 55 procedural decision – Inspectorate change mind? See 55(8):

If in response the applicant modifies (or further modifies) the application, subsections (2) to (7) then apply in relation to the application as modified.

(see e.g. Daventry International Rail Freight Terminal resubmission) Some accepted descriptions have been quite vague e.g. generating capacity “around” a certain level).



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Section 160 PA 2008

160 Development without development consent

(1) A person commits an offence if the person carries out, or causes to be carried out, development for which development consent is required at a time when no development consent is in force in respect of the development.



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FTB National Infrastructure Handbook

There is no single, overarching definition of a 'nationally significant infrastructure project' (NSIP) contained in the PA 2008. The closest that the legislation comes to providing the definition as is at PA 2008, s14, of which subsection (1) provides a list of 16 types of development which may potentially comprise an NSIP [p.49]

Sections 15-30

List 16 types:

- Energy
- Transport
- Waste
- Waste Water
- Water



Plus...

- Infrastructure for the transfer and storage of waste water with a capacity over 350,000 cubic metres: Infrastructure Planning (Waste Water Transfer and Storage) Order 2012 made under s. 149 PA 2008.
- Section 26 Growth and infrastructure Act 2013 amended s.35 of 2008 PA to allow SoS to direct that certain businesses and commercial projects be treated as development for which development consent is required.



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Thresholds: “Above and Beyond”

Each of the descriptive categories is also couched in terms of scale and capacity: e.g. For Gas transporter pipelines: s.20 PA 2008 – “only” if “**when constructed**” it “**is expected**” to fulfil following conditions:

Construction of a pipeline by a gas transporter wholly or partly in England. Pipeline is more than 800mm in diameter. Diameter and more than 40km in length **or** likely to have a significant effect on the environment. Must have a design operating pressure of more than 7 bar gauge. Must convey gas to minimum of 50,000 customers.



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Capacity?

Some thresholds are tricky e.g. in the case of extension of a generating station under s.15 – does this require a physical extension or can it be triggered by an ‘extension’ in the capacity of the station? – (see **AG- Ealing Corp** [1924] 2 CH 545 judgment made in other statutory context suggests it might).

Size Isn't Everything

- All NSIP's are by definition 'nationally significant' not all on grand scale.
- Indeed, s.16 thresholds were upped by PA 2008 (NSIP) (electric Lines) order 2013 to exclude lines less than 2km.
- S.20 apparently anticipates that an NSIP gas pipe might not trigger EIA.



Extensions

- Many of NSIP ss. 15-30 categories which include both 'construction' and 'extensions' of a project.
- But such extensions of themselves may not seem very 'nationally significant' in the ordinary meaning of the words.





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Construction or Extension?

Sam Smith's Old Brewery Ltd recently made an unsuccessful costs application in a planning appeal on the basis that the application accepted by the LPA and PINS was in fact a DCO – apparently because SSOB argued that it was not an extension to a rail freight interchange but the construction of a rail freight interchange (s.26). (Costs application in relation to **Appeal Ref: APP/N2739/W/19/3231656 Gascoigne Wood Interchange, Lennerton Lane, Sherburn in Elmet LS25 6LH**). DL dated 15th May 2020.



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The definition of a strategic rail freight terminal was a point that arose both in Selby and also in **Northampton Gateway** examination whether and if so when the warehousing benefits from a rail connection.

Objectors questioned whether a DCO which allows a development with “only a loose commitment” to rail connection at a later stage would be lawful because of the definitions in section 26(4)-(6).

The outcome suggests some flexibility, but this has yet to be tested in court. See the Ex.AR at [11.4.84]+ and the SoS DL at [33].

31 When development consent is required

Phase 1 – ‘salami slicing’

Consent under this Act (“development consent”) is required for development to the extent that the development is or forms part of a nationally significant infrastructure project.



If in Wales ...

- ✓ Check: Position of Associated Development in Wales
- ✓ Check: if not NSIP is it DEVELOPMENT OF NATIONAL SIGNIFICANCE (DNS)





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THE END



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Early entry to land for surveying and advance payments of compensation

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Early entry to land for surveying

- Used to be a range of powers included in eg Water Industry Act, Water Resources Act, etc
- Law reformed by Housing and Planning Act 2016
- Repealed eg Local Government (Miscellaneous Provisions) Act 1976, Environment Act 1995
- Amended eg Coast Protection Act 1949, Highways Act 1980, Electricity Act 1989

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Main early entry powers remaining

- Section 53 of the Planning Act 2008 – unchanged by the HPA 2016
- Section 172 of the Housing and Planning Act 2016
- Some others listed in Sch 14 to the HPA 2016 but now subject to amendment to sit with s172:
- “A person may not be authorised under... to enter and survey or value land... in connection with a proposal to acquire an interest in or a right over land (but see section 172 of the Housing and Planning Act 2016)”

Planning Act 2008 s53: scope of the power

- Any person duly authorised in writing by the SoS may at any reasonable time enter any land for the purpose of surveying and taking levels of it, or in order to facilitate compliance with EIA/Habitats Directives, in connection with (a) an application for a DCO, (b) a proposed application for a DCO, or (c) a DCO including CP powers
- Authorisation may be given re (b) only if it appears that the proposed applicant is considering a distinct project of real substance genuinely requiring entry onto the land

Planning Act 2008 s53: what it allows

- Surveying and taking levels of land
- including power to search and bore for the purpose of ascertaining the nature of the subsoil or the presence of minerals or other matter in it
- Facilitate compliance with EIA/Habitats Directives
- including power to take & process samples of/from water, air, soil or rock, flora, bodily excretions or dead bodies of non-human creatures, or any non-living thing present as a result of human action

Planning Act 2008 s53: guidance requirements

- Explanation of why authorisation is needed, having regard to the criteria for a s53 authorisation – detailed and full justification required
- Details of the proposed surveys and works including methodology, scope, location, timing, duration etc
- Information to demonstrate that Applicant has acted reasonably and has been unreasonably refused access
- Any conditions subject to which the Applicant thinks any s53 authorisation should be granted

HPA 2016 ss172-179: explanatory notes

- Any acquiring authority which is considering using its compulsory purchase powers may need to enter the land to survey and value it before it decides to make a compulsory purchase order
- Sections 172 to 179 introduce a new general power of entry for survey and valuation purposes which is available to all acquiring authorities in connection with a proposal to acquire land

HPA 2016 ss172-179: Hansard discussion

- A new general power of entry which will be available for all acquiring authorities to use prior to acquiring land
- Put all authorities on a level playing field when undertaking or exercising the right to compulsory purchase
- Intention is that all acquiring authorities should, when possible, use the new general power of entry
- Ensure a clear and consistent approach to entering land in such circumstances
- We will amend the existing power so that it no longer applies to the specific purposes for which the general power can be used

HPA 2016 ss172-179: scope of the power

- AA may enter and survey or value land in connection with a proposal to acquire an interest or a right (s172(1))
- Notice of survey must include details of proposals re: (a) searching, boring or excavating; (b) leaving apparatus; (c) taking samples; (d) an aerial survey; (e) any other activities required to facilitate compliance with EIA/Habitats Directive

Survey or value in connection with a proposal to acquire an interest in or a right over land

- “In connection with” is a very wide phrase, but does not have the widest possible meaning
- Requires some nexus between the survey and the proposal to the acquire an interest/right
- Does not extend to any survey required for a project to proceed – must be a survey connected with the proposal to acquire an interest
- Issue was not debated in the *Sawkill* judgment

Sawkill v HECL: facts

- Tunnel under C's land through a chalk aquifer
- Pumping tests on transmissivity of the aquifer
- Pump water from well and discharge it on C's land – C said 45mil'n litres [enough to fill Ashford reservoir in Somerset]
- Measure level and rate of recharge in boreholes
- Authority for tests had been granted under s53 of PA 2008
- But HECL later gave notice of intention to use s172 HPA 2016 power for further tests

Sawkill v HECL: issue 1 arguments

- PA 2008 provides a comprehensive code for DCOs
- HPA 2016 general powers not an alternative to specific PA 2008 powers for a DCO scheme
- *Bennion*: presumed intention that a situation would be dealt with under specific provision in an earlier Act, not general provision in a later Act
- Plns FAQs: policy intention that s53 would be used for DCOs, not s172 of HPA 2016

Sawkill v HECL: issue 1 conclusions

- Not a case of a specific power and a later general power
- The two statutory provisions are overlapping & co-existent alternative powers addressing the same objective
- AA promoting a DCO can choose which to invoke
- Section 172 does not exclude DCO cases expressly
- No material difference between the two powers
- No conflict or inconsistency between the two
- Fewer safeguards in s172 but power only for AAs – s53 power needs supervision as anyone can apply for a DCO

Sawkill v HECL: issue 2 arguments

- Only authority under HPA 2016 to survey
- Survey cannot embrace discharge of very substantial quantities of water on to land
- Not what could legitimately be understood to be a survey
- Would amount to dispossession of the land – survey cannot go that far

Sawkill v HECL: issue 2 conclusions

- HPA 2016 s174(3) contemplates eg excavating, boring, leaving apparatus – plus eg trial trenches
- Section 172 includes activities which would take time, be intrusive and displace the owner
- Proposal within s172 power

Sawkill v HECL: issue 2 queries

- Can a survey really include discharging such large amounts of water on to land?
- Is measuring the transmissivity of the aquifer really “in connection with a proposal to acquire an interest in or a right over land” – rather than in connection with the scheme works more widely?

Advance payment reforms under HPA 2016

- HPA 2016 ss194-198 amended LCA 1973
- Amend'ts apply to CPs authorised after April 2018
- Changes aimed at faster and earlier APs
- Regulations can specify form and content of request under s52ZD – none made yet
- Interest payable if AP paid late under s52B – not yet in force

Advance payments of compensation

- Requires adequate information from claimants
- Obliges promoter to request further information swiftly – within 28 days (s52(2A))
- Allows APs to be made on request at any time after compulsory purchase has been authorised
- Requires AP to be made on notice of entry or GVD, ie before possession is taken



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Competing applications

Hugh Flanagan

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Relevance of alternatives

“A long running debate among planning lawyers (going back back at least to 1963) as to the relevance of alternative sites to the consideration of individual planning applications”

Carnwath LJ in Derbyshire Dales v SSCLG [2009] EWHC 1729



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Legal principles

- Planning legislation does not expressly require alternative sites to be taken into account
- Obligation to consider alternatives may arise from policy
- Otherwise matter of planning judgement for decision-maker
- Inchoate / vague / less than probable schemes unlikely to be relevant

Lisle-Mainwaring v Carroll [2017] EWCA Civ 1315



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- If planning objections, may be relevant and necessary to consider if more appropriate alternative site elsewhere
- *“Instances of this type of case are developments, whether of national or regional importance, such as airports ... coal mining, petro-chemical plants, nuclear power stations ...”*
- *“Compulsory purchase cases are a fortiori to planning cases”*

Trusthouse Forte v SoS (1986) 53 P&CR 293

FCC v SSECC [2015] EWCA Civ 55 (Rookery South)



Policy

- **National Networks NPS**
“All projects should be subject to an options appraisal Where projects have been subject to full options appraisal in achieving their status within Road or Rail Investment Strategies ..., option testing need not be considered” (4.27)
- **Cf. nuclear NPS EN6:**
“the Government does not believe that there are any alternatives to the listed sites all eight are required to be listed in this NPS” (2.4.3-4)



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EIA: alternatives and cumulative impacts

- “a description of the **reasonable alternatives** ... and an indication of the main reasons for the option chosen” (reg. 14 Infrastructure EIA Regs 2017; also Sch.4)
- “a description of the likely significant effects ... resulting from ... the **cumulation of effects with other existing and / or approved projects**” (Sch.4)

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HRA

- “is likely to have a significant effect ... (either alone or in **combination with other plans or projects**)” (Conservation of Species and Habitats Regs 2017 reg.63)

Other policy

- Eg flood risk sequential assessment

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Guidance

- **PINS Advice Note 17: Cumulative Effects Assessment**
 - 4 stage approach to CEA: long list; short list; information gathering; assessment
 - Likelihood of emerging projects: Tiers 1 - 3



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Information gathering

- To assess cumulative impacts / support own scheme / undermine competitor
- Public information
- *“Direct liaison with other stakeholders including ... relevant applicants / developers” (Advice Note 17)*
- Request under Environmental Info Regs 2004



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Heathrow – ICO FER0844872 February 2020

- Request by rival infrastructure promoter for Heathrow expansion transport model and outputs
- Heathrow public authority for purpose of EIR
- EIR likely to extend to all statutory undertakers, including many infrastructure providers
- Privatisation of utilities / public services does not take providers beyond reach of EIR

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Application and examination

- **Timing important**
- **Northampton Gateway SRFI (DL 9.10.19)**
 - SoS: not appropriate to compare application to “*putative proposals*” for Hinckley SRFI (no application had yet been submitted)

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- **Rail Central scheme next door:**
 - No reliable data on which to base cumulative traffic effects; *“this will be for the relevant examining authority to assess when considering RC’s application”*
 - Requirements imposed on DCO to avoid prejudicing RC scheme / ensure compatibility if both schemes came forward

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Infrastructure spending at a time of economic constraint:

Proposals for infrastructure delivery in a post-Covid-19 world

Rebecca Clutten

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Infrastructure delivery in a post-Covid 19 world

- Review of the pre-CV19 position
 - National Infrastructure Assessment, July 2018
 - Government's Interim Response, October 2018
- Developments in Q1 2020
 - Delay to the National Infrastructure Strategy
 - March 2020 Budget
- Can and will the pre-CV19 priorities be delivered?
Should they be?

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Review of the pre-CV 19 position

- National Infrastructure Assessment, July 2018
 - Output of review undertaken by NIC following Government commission
 - Intended to redress previous lack of cross-sectoral consideration to infrastructure delivery and delays in provision
 - Intended to provide clear strategy from 2020-2050
 - Fiscal remit – spending at 1-1.2% GDP pa including existing committed infrastructure spending

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Review of the pre-CV 19 position

- National Infrastructure Assessment, July 2018
 - Proposals related to digital connectivity; regional transport; transition to a low carbon economy; and resilience to flooding and drought
 - In particular:
 - Nationwide full fibre broadband by 2033
 - 50% renewable energy by 2030 – specifically in preference to additional nuclear and carbon capture storage (CCS)
 - £43bn long term stable transport funding for regional cities
 - Funding for Crossrail 2 and Northern Powerhouse Rail (NPR)
 - Preparing for 100% electric vehicle sales by 2030

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Review of the pre-CV 19 position

- Government response to the NIA
 - Original commitment of response within 6 months (with a deadline of 1 year)
 - Interim response issued in October 2018
 - Promised formal response in 2019
 - Identified areas where Government was already spending on identified priorities
 - E.g. Increase in Transforming Cities Fund to £2.5bn (providing for intra-urban connectivity); extending Housing Infrastructure Fund to £5.5bn and providing for an additional year's operation; NPR

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Developments in Q1 2020

- UK leaves the EU on 31 January 2020
- National Infrastructure Strategy (NIS) anticipated to be published alongside Spring Budget
- Court of Appeal's decision in Heathrow litigation – failure to take into account Paris Agreement commitments (i.e. 'net zero')
- Parts of Europe begin to enter 'lockdown' in response to CV19 – e.g. Italy (9 March), Spain (14 March)
- Likely delay to NIS widely reported in media pre-budget

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Developments in Q1 2020

- Spring Budget published on 11 March 2020
 - Principal announcements related to CV19 support measures –£12bn economic support package
 - GDP growth forecast at 1.1% for 2020
 - OBR forecasts referenced 1% reduction in GDP
 - Deficit noted as having been reduced from c.10% GDP in 2009/10 to 1.8% in 2018/19
 - Borrowing for 2020 predicted to be £47.4bn
 - Record levels of employment reported

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Developments in Q1 2020

- Spring Budget published on 11 March 2020
 - NIS promised 'later in spring'
 - Substantial package of infrastructure spending also announced (though query what was new?)
 - Green economy measures – CCS Investment Fund and Green Gas levy
 - Commitments in relation to electric vehicles
 - Rapid car charging network
 - £532m in consumer incentives for electric vehicles

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Developments in Q1 2020

- Spring Budget published on 11 March 2020
 - Other measures included:
 - Substantial investment in local transport funding
 - £800m spending for bus and cycling provision
 - 'Double the funding recommended in the NIA' for flood resilience measures



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Can and will pre-CV19 priorities be delivered?

- Substantially changed economic outlook, even since Spring Budget
 - Furlough scheme estimated to cost £12bn/month
 - Borrowing reported at £62bn in April 2020 alone – some scenarios suggest 14% of GDP for 2020
 - ONS reported 20.4% reduction in GDP in April 2020 – down 24.5% on April 2019
 - Government receipts likely to decline
 - Transport operators have seen income plummet



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Can and will pre-CV19 priorities be delivered?

- All factors point to less funding available for infrastructure delivery for the foreseeable future
 - 10% reduction in GDP would equate to c.£2.6bn reduction in annual infrastructure spend (assuming 1-1.2% remains the intention)
 - Equivalent to av. annual expenditure of TFL for 2020-2025 (NIA Table 7.1)
- Brexit means lack of access to European Investment Bank on the same terms as previously
- Likely to be some losers – e.g. London projects, aviation?

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Can and will pre-CV19 priorities be delivered?

- But – there are reasons to be optimistic
- Grant Shapps statement on 14 May 2020
 - £2bn walking and cycling programme, with £250m emergency spending underway
 - April infrastructure improvements worth £550m (NR) and £200m (HE)
 - £2bn to upgrade roads and railways, inc. £1.7bn for local roads (query, does this include £500m previously announced?)
 - Reference (again) to the rapid-charging programme

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Can and will pre-CV19 priorities be delivered?

- But – there are reasons to be optimistic
- Fundamentals underlying NIA remain
 - Need for improved digital connectivity – possibly more than ever?
 - Electricity needs continue to rise
 - Climate change and the need for green economy remains high on the political agenda – possibly more than ever?
 - Potential for a radical improvement in intra-city cycling infrastructure?

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Can and will pre-CV19 priorities be delivered?

- To quote Mr Shapps:
 - *“...the long-term transport trend and the pressing need to level-up communities across the country, dictate that infrastructure will be even more important in stimulating our recovery and supporting new jobs”.*
- Supported by evidence:
 - ICE note that ONS estimates of multipliers for infrastructure spending range between 1.5 – 2.7 (£1 spent creates additional demands of £1.50 - £2.70)
 - Every 1000 construction jobs equates to 2053 jobs in the wider economy

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Can and will pre-CV19 priorities be delivered?

- Government is clearly committed to infrastructure delivery
- Tried and tested means of providing necessary economic stimulus
- Only question is of what the priorities will be once the 'new normal' is established



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