

Development Management

Practice Note

PRACTICE NOTE

18

The Consultation Process and Duty to Respond

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Preamble

This Development Management Practice Note is designed to guide planning officers and relevant users through the consultation process and deals primarily with procedures as well as good practice. It forms part of a series of new practice notes stemming from **the Planning Act (Northern Ireland) 2011** (the 2011 Act) and any related subordinate legislation. The emphasis is very much on advice but where explicit legislative requirements must be followed these will be made clear.

Where appropriate this practice note will therefore highlight:

- Relevant legislation;
- Procedural guidance;
- Definitions;
- Best practice examples / relevant case law

This practice note is not intended to replace the need for judgement by planning officers and those making planning applications. Nor is it intended to be a source of definitive legal advice. Reference should be made to the actual legislation referred to in this document and if any discrepancy or conflict exists between the practice note and legislation the provisions of the legislation will prevail.

1.0 Introduction

- 1.1 Planning officers frequently need to obtain specialist advice to enable them to consider the potential impacts of a development proposal before determining a planning application. Thus they approach persons or bodies who have recognised expertise concerning, for example, roads, water and sewerage infrastructure or environmental issues for advice that is beyond the scope of a planning officer's own professional knowledge.
- 1.2 Under the previous planning system (pre-April 2015) there were two statutory consultees, the council area in which the application was situated and, in certain circumstances, the Health and Safety Executive for Northern Ireland. Other non-statutory consultees provided necessary input into planning applications, often through negotiated agreements, as and when requested.
- 1.3 The 2011 Act has established a number of statutory consultees as well as a statutory duty for consultees to respond within a prescribed timeframe to the council or, as the case may be, the Department.

2.0 Legislative Context

- 2.1 **Section 229(2) of the 2011 Act** commits a council or the Department to consult before the granting of any permission or consent. **Article 13 of The Planning (General Development Procedure) Order 2015** along with **Schedule 3 of The Planning (General Development Procedure) (Amendment) Order (Northern Ireland) 2016¹** sets out the types of development where consultation must take place and the organisation that must be consulted. The GDPO 2015 also sets out the statutory requirement to respond to consultations.

¹ The Planning (General Development Procedure) (Amendment) Order (Northern Ireland) 2016 replaces Schedule 3 in the GDPO 2015 to reflect the reorganisation of government departments from 09/05/2016.

2.2 Under Section **229(3)** of the 2011 Act a consultee is required to give a substantive response within a prescribed time period or in accordance with section 229(3)(b) such period as is agreed in writing between the consultee and the council or, as the case may be, the Department.

2.3 **Article 20 of the GDPO 2015** sets out the time periods for decisions. In relation to planning applications for major development, a council will have 16 weeks from the date the application was received to determine the application and for other applications 8 weeks. Article 20 allows a council to agree an extended timeframe with an applicant unless they have given a notice of appeal to the Planning Appeals Commission.

3.0 **The Role of Consultees**

3.1 It will be necessary to consult with statutory and non-statutory bodies to obtain comments on a development proposal in relation to the consultee's area of expertise. Consultees are required to:-

- Provide a substantive response within set timescales;
- Comment only on matters related to material planning considerations; and
- Not burden the development management process with matters related to the requirements of other legislation beyond the control of planning.

3.2 It is imperative that planning officers provide all necessary information to the consultee with the consultation request and clearly set out the reason why a consultation is necessary. This will assist the consultee in providing a substantive response as required.

3.3 In addressing the development proposal, planning officers should take consultee responses into account as a material consideration in

forming an opinion on the application. The weight to be attached to individual consultee responses is a matter of planning judgement which will rest with the determining council or, as may be the case, the Department.

4.0 Consultation with Statutory and Non Statutory Bodies

4.1 Consultation with statutory and non-statutory bodies should be carried out only when necessary to inform a planning decision. It is important to ensure that the planning system is not burdened with matters that are capable of being addressed under the provisions of other legislation. For example, the need for a Discharge Consent under the Water Order or Environmental Health legislation will be dealt with by the responsible bodies outside of the planning application process.

4.2 Consultation responses will be critically examined to ensure that any further information requested is essential to inform a planning assessment of development proposals and ultimately the decision making process. Any consideration of the advice provided, should be documented and considered in the case officer report before a decision is taken.

5.0 The Statutory Consultee

5.1 **Article 13(1) of the GDPO 2015** requires a council or the Department, to consult the consultee denoted for a category of development as set out in Schedule 3 of the amendment to the GDPO². Schedule 3 Part 1 sets out the consultees that should be consulted where a planning application is to be determined by a council. Schedule 3 Part 2 sets out

² The Planning (General Development Procedure) (Amendment) Order (Northern Ireland) 2016 replaces Schedule 3 in the GDPO 2015 to reflect the reorganisation of government departments from 09/05/16.

the consultees that should be consulted where an application is to be determined by the Department.

5.2 The Schedule names the government department or organisation that should be consulted and on what type of development they should be consulted.

5.3 A consultee may not have to be consulted where Article 13(1) (a) to (c) applies. This provides exemptions from consulting where:

- A consultee has previously advised that they do not wish to be consulted;
- The previous development is subject to any standing advice provided by the consultee to the council or Department; and
- The development is not EIA development and is the subject of an application seeking permission to develop land without compliance with a condition previously attached.³

5.4 The first exemption will not apply when under the provision of Article 13(2) where, in the opinion of the council or Department, the development falls within paragraph 3(b)(ii) of Part 1 or paragraph 4(b)(ii) of Part 2 in Schedule 3⁴. This is where the development consists of the modification of an existing establishment which could have significant repercussions on major accident hazards which therefore requires that a consultation with HSENI must be undertaken.

5.5 The exemption regarding standing advice will not apply where the development is EIA development or the standing advice provided by the consultee is more than two years old with no confirmation from the consultee that it is still relevant.

5.6 Where a consultation is necessary, the council or the Department cannot determine an application before 21 calendar days after the date

³ Section 54 of the 2011 Act

⁴ The Planning (General Procedure) (Amendment) Order (Northern Ireland) 2016

on which notice is given; before 28 days where the development is EIA development; or any other date agreed in writing between the consultee and the council or, as may be the case, the Department⁵. To facilitate a timely response planning officers should clearly identify the reason for making the consultation. This will help a consultee to focus on the area where their advice is specifically required. If there is uncertainty as to whether or not a consultation is necessary, planning officers should contact and clarify with the relevant consultee before issuing a consultation request.

6.0 Duty to Respond to a Consultation

6.1 Article 15(2) outlines the timeframe within which statutory consultees must respond to either the council or the Department. As a default position Article 15(2) (a) gives a statutory consultee 21 days to respond to a council or Department from when the council or Department is satisfied that it has supplied the information it believes necessary to enable the consultee to make a substantive response. It should be noted that the 21 days is calendar days and not working days.

7.0 Deadline and Time Extension

7.1 Provision is made for an alternative time period for consultation. Article 15(2) (b) allows for an extension period beyond the 21 days as may be agreed in writing between the consultee and council or Department. It is envisaged that this will be an exception for a minority of cases where it is clear the complexity of the issues to be considered will prevent the consultee from making a substantive response within the 21 calendar day timeframe. The final decision on whether or not a longer timeframe

⁵ For further timescales regarding EIA development please refer to The Planning (Environmental Impact Assessment) Regulations (Northern Ireland) 2015

is acceptable will lie with the council, or as the case maybe, the Department.

7.2 In circumstances where it is clear at the outset that an extended period of time will be necessary to provide a substantive response to a statutory consultation request a consultee should make the relevant council aware of this as soon as possible. The consultee should provide an explanation outlining why it will not be possible to respond within the statutory timeframe. It is considered that this would only take place in exceptional circumstances. Statutory consultees should do all they can to meet the 21 calendar day deadline.

7.3 It is not considered good practice however for a statutory consultee to wait until the 21 calendar day period is coming to a close before initiating such an approach.

7.4 Extensions of time which are negotiated between the statutory consultee and the council will not affect the applicant's right to appeal against non determination.

7.5 Statutory consultees should be aware of the risk that, should they fail to respond within a specified time period, the council or Department may proceed to determine the application in the absence of their response.

8.0 Substantive Response

8.1 Section 229 (3) of the 2011 Act requires the consultee to give a substantive response. Article 15 (5) of the GDPO details a substantive response to be one which:

- States that the consultee has no response to make;
- States that, on the basis of the information available, the consultee is content with the development as proposed;

- Refers the council or Department to current standing advice by the consultee on the subject of the consultation; or
- Provides advice to a planning authority to enable the determination of the application.

8.2 A holding reply requesting additional information will not be taken as a substantive response. The prescribed response time will not be stopped on receipt of such a response. The legislation does not prevent councils from determining applications for planning permissions when a consultee has not responded within the specified time limit. A decision however to proceed to determination in such instances would require a council to exercise its judgement and consider the potential impact of proceeding without the view of a consultee.

8.3 The consultation will only be closed when the planning officer accepts a response as substantive. In practice this will close the consultation as at the date the response was submitted by the consultee.

9.0 Non Statutory Consultees

9.1 Not all of the information required to process an application will be from statutory consultees. There will still instances where non statutory consultees may also need to be consulted on a case by case basis. This, for example, in a council could include other council departments with responsibility for matters relating to environmental health or leisure facilities. Non statutory consultees are not bound by the 21 calendar days for a response, however in order to allow decisions to be made in a timely manner they should be asked to provide response in a similar timeframe and fashion.

10.0 Consultation by the Department

10.1 The vast majority of consultations will be undertaken by planners working in local government. However, the Department will also require consultation with statutory consultees when determining regionally significant applications and those it has called in. Schedule 3 Part 2 of the GDPO (amended) 2016 sets out who the Department must consult.

10.2 As a statutory consultee to the Department, the relevant council will also be bound by the requirements to provide a substantive response within 21 calendar days or seek an extension to this time period.

11.0 Consultations for other Planning Consents

11.1 As well as the requirement to consult on planning applications received there will also be a need for councils to consult on other planning consents and determinations that they will process and determine.

Listed Buildings Consent (LBC)

11.2 **Regulation 6 of the Planning (Listed Buildings) Regulations (Northern Ireland) 2015** requires the council to consult with the Department for Communities⁶, prior to making any determination. In determining the application, the council, must take account of any representation made to it by the Department for Communities. Where the Department for Communities has been consulted on a LBC it must respond to the relevant council within 21 calendar days or such other period as is agreed in writing.

Hazardous Substance Consent

11.3 **Regulation 11 of the Planning (Hazardous Substances) (No 2) Regulations (Northern Ireland) 2015** requires a council to consult with the Department of Agriculture, Environment and Rural Affairs

⁶ Regulation 2(2) of the Planning (Listed Buildings) (Amendment) Regulations (Northern Ireland) 2016 transfers the consultation obligation to the Department for Communities.

(DAERA)⁷, the Health and Safety Executive for Northern Ireland (HSENI) and the Northern Ireland Fire and Rescue Service (NIFRS). In the case where an application has been called in, the Department must consult with DAERA, HSENI and NIFRS.

Advertisement Consent

11.4 **Regulation 10 of the Planning (Control of Advertisement) Regulations (Northern Ireland) 2015** requires the council before granting advertisement consent to consult:

- (a) any neighbouring council, any part of whose district appears likely to be affected;
- (b) the Department for Infrastructure⁸ where the council considers that a grant of consent may affect the safety of the persons using any road;
- (c) where the council considers that a grant of consent may affect the safety of persons using any railway, waterway, dock, harbour or aerodrome (civil or military), the person responsible for its operation and, in the case of coastal waters, the Commissioners of Irish Lights; and
- (d) the Department for Infrastructure⁹ where the application relates to an advertisement with moving features, moving parts or flashing lights, and is visible from a road.

11.5 The council shall give to those consulted at least 14 days notice of the consideration of the application and shall take into account, in dealing with the application, any representations made in response to that consultation.

⁷ The Planning (Hazardous Substances) (No.2) (Amendment) Regulations (Northern Ireland) 2016 transfers the consultation obligation from the Department of Environment to the Department of Agriculture and Rural Affairs as such NIEA functions moved to this Department on 09/05/16.

⁸ Department of Regional Development is now part of the Department for Infrastructure from 09/05/16

⁹ Department of Regional Development is now part of the Department for Infrastructure from 09/05/16

12.0 Environmental Impact Assessment (EIA)

12.1 The legislative basis for consultation on matters relating to an EIA application is contained in **The Planning (Environmental Impact Assessment) Regulations (Northern Ireland) 2015** (the EIA Regulations).

12.2 **Regulation 4** of the EIA Regulations prohibits the granting of planning permission for EIA development unless environmental information has been taken into account by the council, Department (or Planning Appeals Commission) as the case may be in making that decision.

12.3 Regulation 22 (3) of the EIA Regulations states that not less than 4 weeks notice must be given to bodies consulted under the environmental regulations.

12.4 Neighbouring European states are not statutory consultees in terms of the GDPO and therefore not subject to the Duty to Respond. However consultation with the Republic of Ireland is a requirement for the council and Department, if it is considered that a proposed development in Northern Ireland, that is the subject of an EIA, is likely to have significant effects on a neighbouring EU member. Regulation 27 of the EIA Regulations covers development in Northern Ireland likely to have significant effect on the environment in another EU state, with Regulation 28 covering the actions required by councils and Department when projects in the Republic of Ireland are likely to have significant effects on the environment in Northern Ireland.

13.0 Monitoring of the Consultation Process

13.1 Article 16 (1) of the GDPO requires each consultee to provide the Department with a report as to that consultee's compliance with Section 229(3) of the 2011 Act. The report has to be submitted to the

Department not later than 1st July of each year and cover the period of twelve months commencing on 1st April in the preceding year. This will be the standard 'reporting year'. Article 16 (3) (a) to (d) outlines the contents of the report:

- A statement as to the number of occasions on which the consultee was consulted by the council or, or as the case may be, the Department;
- A statement as to the number of times a substantive response was given to the council or, as the case may be, the Department within the reporting period referred to in Article 15(2) (a) (b);
- In relation to occasions on which the consultee has given a substantive response outside any of the statutory or agreed timeframes, a summary of the reasons why the consultee failed to comply with the duty to respond within those periods; and
- Any other information as the Department may direct.

13.2 A consultee will also be able to provide information in their monitoring report beyond the minimum requirements prescribed in legislation if they so wish. Councils should submit their reports within the stated timeframe to the Department at:

Department for Infrastructure,
Planning Policy Division,
Causeway Exchange,
1-7 Bedford Street,
Town Park,
Belfast.
BT2 7EG.

- 13.3 An outline of a statutory consultee performance/compliance report can be found at Annex A.
- 13.4 Reporting data will help identify issues within the overall consultation process, for example, the number of occasions when a response timeframe goes beyond the standard 21 calendar days. It can also be used as a driver to support improvements to the development management process, helping identify areas that have experienced difficulties and the underlying reasons. It will also identify strong areas and provide an opportunity to share good practice.
- 13.5 Whilst the GDPO does not place a council or Department under a specific requirement to publish these reports, it may be good practice to make these reports available to the public.

14.0 Resolving the Differences Arising from Consultation Responses

- 14.1 The purpose of consultation is to obtain all the information needed to arrive at a sound planning decision. The consultation reply will normally indicate whether it raises particular issues which need to be considered in relation to the area of expertise of the consultee.
- 14.2 Resolving differences will require discussion between the relevant consultee and the determining authority. Where conflicting advice has been received, contact should be made directly between those that have provided the response, informing them of the issues and seeking resolution of the conflict.

15.0 Transitional Arrangements

- 15.1 Consultations issued prior to the 1st April 2015 will not be subject to the new statutory duty to respond to consultation arrangements. The need

for a substantive response will not apply, however consultees and planners should endeavour that these consultations are dealt with as expeditiously as possible. Any further consultations on the same application or new application issued after the 1st April 2015 will be subject to the new consultation arrangements.

Annex A – Example of Statutory Consultee Performance/Compliance Report Format

Report for the Department for Infrastructure

STATUTORY CONSULTEE PERFORMANCE/COMPLIANCE REPORT (*insert reporting year*)

Purpose of Report

Under the provisions contained in the Planning (Northern Ireland) Act 2011 and The Planning (General Development Procedure) Order (Northern Ireland) 2015 this organisation (*insert name of organisation*) is required to:

Provide a substantive response within 21 days beginning with the day on which the council or Department is satisfied that it has supplied the information it believes is necessary for the consultee to make a substantive response or any other such period as may be agreed in writing.

Compile a report on an annual basis (not later than 1st July of each year) on compliance with the provisions of Article 16 (3) (a) to (d) of the GDPO.

The purpose of this report is to set out (name of Organisation) performance in meeting the statutory deadline for the period fromto..... The Report consists of the following information:

- The number of registered planning application consultation requests received from councils or, as the case may be, the Department and the number of such consultation requests which were responded to within the prescribed period.
- A summary of reasons why the statutory deadline has not been met in all cases
- Key issues and challenges faced by (name of organisation) as a statutory consultee.

Statutory Consultee Status for Planning Applications

(Name of organisation) is a statutory consultee for planning applications involving:

(Insert outline of the Consultees responsibilities as per Schedule 3)

Overall Performance

This should include:

An analysis of the number of consultations undertaken, making reference to the number of consultations received.

- Analysis of number of consultations responded to within the statutory timeframe.
- Analysis of number of consultations responded to within agreed extended timeframes
- Analysis of number of applications not responded to within the required timeframes.

Reasons for Non compliance with the Statutory Deadline for Consultations

Analysis of length of delay. The consultee should attempt to illustrate how far behind the statutory target the reply was by breaking down the delay into a quantifiable timeframe.

Key Issues and Challenges faced by (Insert name of organisation) as a Statutory Consultee

A consultee should seek to identify the main issues it has in making responses. This could be a lack of decision notices provided by councils or delays in the receipt of information. It may also relate to staffing issues or possible changes in legislation.

Measures to improve consultation arrangements

Consultees can use the report to highlight solutions to the Department that may improve the consultation process. This may be a consultee committing to providing guidance or standing advice for use by planning officers that will negate the need for a consultation to issue or it may propose to deal with consultations within its own organisation in a more efficient manner.

A further example of a Statutory Consultee Performance Report can be found at:

[http://www.britishwaterways.co.uk/media/documents/publications/British Waterways Statutory Consultee Performance Report for CLG 2010-11.pdf](http://www.britishwaterways.co.uk/media/documents/publications/British_Waterways_Statutory_Consultee_Performance_Report_for_CLG_2010-11.pdf)



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