

The Infrastructure Forum

The Infrastructure Forum Planning Working Group

Judicial Review Reforms Beyond Nationally Significant Infrastructure

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Introduction

1. The Infrastructure Forum (TIF) brings together investors, operators, constructors, lenders and professional advisers involved in the development of Britain's critical national infrastructure.
2. TIF's Planning Working Group, which has prepared this response, comprises members from across the infrastructure sector - both public and private - and is chaired by Robbie Owen, Partner and Parliamentary Agent, Head of Infrastructure Planning & Government Affairs at Pinsent Masons LLP.
3. The Forum supports, in principle, a targeted extension of the recent judicial review reforms for Nationally Significant Infrastructure Projects (NSIPs) to other planning decisions. Major infrastructure projects do not sit within isolated consenting regimes. Preliminary, enabling and associated works are frequently consented under the Town and Country Planning Act 1990 (TCPA), while other decisions required to implement an NSIP may be taken under separate planning, environmental or regulatory powers. Delay or uncertainty in any one of these connected decisions can impede delivery of the project as a whole.
4. However, the reforms should not be extended indiscriminately. The NSIP reforms are still relatively new and there has not yet been sufficient experience to assess their full impact. The first use of the new 'totally without merit' procedure in the Stonestreet Green Solar case is encouraging, but a wider body of cases is needed before firm conclusions can be drawn. Expanding the reforms too broadly and too quickly could dilute the specialist court resource and prioritisation which give them practical value.
5. The Forum therefore recommends a targeted and staged approach. Initially, the reforms should apply automatically to decisions which are directly linked to an NSIP or which have already passed through an existing process that demonstrates their strategic importance. There should also be a route through which an applicant can make the case for a project to receive some or all of the procedural benefits where their importance and the consequences of delay justify this.

Responses to consultation questions

Question 1: Do you think that the NSIP judicial review reforms should be extended to other planning regimes? Please explain your response with reference to the potential benefits and risks of doing so.

6. Yes, in principle, but only through a carefully targeted and staged extension.
7. The current focus on the principal consent decision does not fully reflect how major infrastructure is planned and delivered. Large projects often require TCPA consents for preliminary or enabling works. Heathrow expansion is one such example of a project for which significant preliminary works could be consented through the TCPA. Another project involving separately consented early works was Sizewell C, including the relocation of Sizewell B facilities. Such decisions may be outside the DCO itself but can be indispensable to delivery of the NSIP.

8. The Government should also consider implementation-stage decisions. On HS2, challenges continue to be brought against decisions made by public bodies during construction. Comparable challenges could arise in relation to the discharge of DCO requirements, decisions made under protective provisions or separate environmental and regulatory approvals. In the future, the same issue may also arise for projects authorised directly by Parliament.
9. In the first instance, the reforms should therefore apply automatically where a decision is being challenged that is necessary for, consequential on, or materially connected with an NSIP. A simple and predictable connection test would capture important preliminary, enabling and implementation decisions without bringing the whole planning system within a priority procedure.
10. Other existing mechanisms can also provide reliable markers of strategic importance. These include the use of call-in or recovery of jurisdiction powers by the Secretary of State on a planning application, and the use of a Special Development Order. Where the Government has already in these ways recognised the importance of a project, the procedure for the judicial review of any related decision should be capable of being aligned with the reformed procedures now in place.
11. National Policy Statements (NPSs) could provide a further basis for identifying eligible development. Increasingly, NPSs express policy which is relevant beyond the DCO applications falling directly within their scope. The National Policy Statement for Ports, for example, is relevant to decisions on harbour orders, marine licences and port-related TCPA applications. Where an NPS identifies a type of infrastructure as critical to national policy, the judicial review of related decisions under other consenting regimes should be capable of receiving equivalent procedural treatment.
12. A controlled case-by-case route should supplement these automatic categories. It will not be possible to identify in advance every strategically important project or connected consent that would benefit from the reformed process. Project promoters should therefore be able to apply for a project, or a particular decision relating to it, to be brought within the reformed system as part of initial judicial review procedures. Any such application should demonstrate the project's strategic importance and the material consequences that delay would have for its delivery.
13. The principal risk is over-extension. Priority treatment only works if the courts have sufficient specialist judges and administrative capacity. If too many cases are brought within the regime without additional resource, target timescales will be missed and all parties may receive a slower and less predictable service. The judiciary's assessment of likely caseload, listing capacity and the availability of specialist judges must therefore inform the final scope and commencement of any extension.

Question 2: Do you agree that consideration for further judicial review reforms should be limited to 'major infrastructure projects' consented under the TCPA 1990 and the TWA 1992 and other 'strategically important developments' (as defined by this consultation)?

14. The Forum does not support treating the definitions in the consultation as a closed or exhaustive list.
15. Fixed categories and numerical thresholds can be arbitrary. The importance of a project may arise from its function, location or relationship with other infrastructure rather than its size or capacity. A relatively modest enabling development can be critical to a much larger project, while a development above a general threshold may not justify priority treatment in its particular context.
16. The preferable approach is to use existing decisions and mechanisms which already involve an assessment of significance. A project linked to an NSIP, directed into or out of the NSIP regime, called-in, recovered for ministerial determination, consented by Special Development Order or supported as critical infrastructure by a relevant NPS has already passed through a form of public-interest filter. These markers are more practical and defensible than creating a further set of rigid project categories.

17. The procedure should nevertheless allow other projects to make the case for inclusion. Not every element of the reform package needs to apply in the same way. The removal of the paper permission stage, for example, would need to be determined by applying clear rules before proceedings begin. By contrast, Significant Planning Court Claim designation and expedited case-management or appellate timescales could be applied after a claim has been issued, on evidence of the project's significance and the consequences of delay.
18. The Planning Court should be consulted closely on the practical operation of these criteria, including the likely number and nature of applications for inclusion. The objective should be a clearly defined class of genuinely important cases rather than a broad category which proves difficult to administer consistently.

Question 3: Do you agree that onshore wind projects over 50MW and under 100MW, electricity network projects and large grid-scale battery storage projects with a capacity over 100MW, all of which are currently determined under the TCPA 1990, should be considered 'strategically important developments'?

19. The Forum supports the inclusion of electricity network infrastructure. Grid connections, substations, converter stations and network reinforcement are critical enabling infrastructure for generation, data centres and wider economic development. Opponents have recently focused on a substation or grid connection as a means of obstructing or rendering unviable the development which it will ultimately serve. A challenge to the enabling network infrastructure can therefore have consequences well beyond the works immediately in issue.
20. Eligibility could be based on factors such as a direct connection to an NSIP, support for a project or programme recognised in an NPS, or evidence of a material role in national or regional network capacity and resilience.

Question 4: Should other developments, such as significant housing developments, also be in scope of this review? If so, how should these developments be defined? Please explain your response with reference to the importance of these developments and the potential impact of delays resulting from legal challenge.

21. The Forum's primary focus is economic infrastructure and it does not generally comment on housing policy.
22. One area that the Forum considers presents a strong and immediate case for specified inclusion is data centres. Although there have so far been few judicial review challenges in the UK, the pipeline, scale and political prominence of proposed data centres are increasing rapidly.
23. Some data centre projects may seek a section 35 direction to be opted into the NSIP regime. However, not all will do so and many may continue under the TCPA. Data centres which can demonstrate national or strategic importance should therefore be eligible for the reforms irrespective of their consenting route.
24. The Government should also consider strategically important defence developments. Depending on the circumstances, urgent Crown development and other defence proposals may proceed through TCPA or related procedures rather than the NSIP regime. Where the Government has determined that a defence development is urgent or strategically important, the consequences of prolonged legal uncertainty may justify equivalent procedural treatment.

Question 6: Although to date there have been few challenges against TWA decisions, in your view, is there a risk that the number of challenges could increase in light of changes in the PIA? If so, what would be the potential impact on 'major infrastructure projects' consented under the TWA 1992 regime?

25. The Working Group is not aware of any evidence of a current systemic problem under the Transport and Works Act 1992 (TWA). Only a handful of statutory review challenges could be

identified by this group over the regime's entire lifetime. This is materially different from the evidence which supported reform of DCO judicial reviews.

26. There is nevertheless a credible future risk and the wider environment for infrastructure projects is becoming more litigious. The government should not wait for a substantial body of damaging delay to accumulate if a risk can reasonably be anticipated.
27. An appropriate initial response is therefore not to place every TWA decision automatically within the full reform package. Priority should be given to TWA decisions which are linked to an NSIP, have been subject to another established assessment of strategic importance, or can demonstrate at the outset of proceedings that delay would materially affect a major infrastructure project. The position should then be monitored as projects proceed under the new arrangements.
28. Consideration also needs to be given to the benefit of applying the recent reforms to decisions in relation to TWA Orders, given that those decisions are not challenged by judicial review but under the Part 8 CPR statutory challenge procedure, which does not require permission to be obtained, given that a particular focus of the reforms was on the permission stage of overall judicial review procedures.

Question 7: Should the CPRC be invited to remove the paper permission stage for other planning decisions? If so, do you agree that this change should be limited to 'major infrastructure projects' and other 'strategically important developments' only?

29. The Forum has a mixed view on removing the paper permission stage. It can remove a duplicated stage where claims refused on the papers are routinely renewed orally, thereby reducing cost and uncertainty. On the other hand, the paper stage can provide a quick and inexpensive filter for weak claims, while requiring every case to await an oral hearing may increase pressure on court time.
30. The NSIP change is too recent for the Working Group to offer firm evidence on its practical effect. No member of this group has yet been involved in a case which demonstrated a clear benefit from removal of the paper stage. It is entirely possible that the need to hold an oral permission hearing could mean that some cases take longer than receiving a prompt decision on the papers.
31. The paper permission stage should therefore not be removed across planning decisions generally at this point. If the change is extended, it should initially be confined to a tightly and prospectively defined class of major infrastructure and strategically important developments. The effect on listing times and total time to dispose of judicial review claims should be reviewed before any wider expansion.

Question 8: Should the removal of the right of appeal for 'totally without merit' cases be extended to other planning decisions? If so, should this change be limited to 'major infrastructure projects' and other 'strategically important developments'?

32. Yes. The removal of the right of appeal where a claim has been certified as totally without merit following an oral permission hearing should be extended to planning cases generally, rather than limited to major infrastructure projects and strategically important developments.
33. The threshold is high and is applied by a High Court judge after the claimant has had the opportunity to present an argument at an oral hearing. An arguable claim remains able to proceed in the ordinary way. The Forum could identify no convincing reason why a claim found to be totally without merit after that process should have any further opportunity to prolong uncertainty, whatever the nature of the underlying planning decision.

Question 11: Should the CPRC be invited to extend the target timescales for NSIP judicial reviews in the High Court to 'major infrastructure projects' and other 'strategically important developments'? Please explain your response with reference to any potential risks and resource implications.

34. The Forum supports a targeted extension of the High Court timescales. The principal risk is that extending priority to too many cases will make the targets unachievable and weaken the service received by existing NSIP cases. The Planning Court's assessment of caseload, specialist judicial availability and administrative capacity should be obtained before the scope is settled. Any extension should be accompanied by the resources required to deliver it.

Question 12: Should the CPRC be invited to extend the target timescales for NSIP appeals in the Court of Appeal to 'major infrastructure projects' and other 'strategically important developments'? Please explain your response with reference to any potential risks and resource implications.

35. Yes, on the same targeted basis. There has been experience of important infrastructure cases taking a considerable time to progress through the Court of Appeal even where the project required an early resolution.
36. As in the High Court, this priority must be credible. The Court of Appeal should be consulted on the number and type of cases it can accommodate within the target periods. Automatic eligibility should be limited, with a case-specific route for other projects which can demonstrate exceptional strategic importance and the consequences of delay.