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Sent: 11 July 2019 17:33

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Subject: EN010085 - Cleve Hill Solar Park - Additional Submission by the Applicant

Hefin,

EN010085 - Cleve Hill Solar Park - Additional Submission by the Applicant

As discussed earlier in the week, the Applicant wishes to submit the following documents (6 no.) in advance of the commencement of the examination hearings next week:

- The Applicant's Comments on Responses to ExQ1
- Accompanied Site Inspection Maps
- Equality Impact Assessment
- Updated ES Figure 5.3(a)
- Written Representation by the Applicant on Heritage Policy
- Progressed Statement of Common Ground between the Applicant and the Marine Management Organisation (July 2019)

I would be grateful if you could confirm receipt.

Kind regards,

Mike

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CLEVE HILL SOLAR PARK

**WRITTEN REPRESENTATION BY CLEVE HILL SOLAR PARK LTD
HERITAGE POLICY**

July 2019
Revision A

Submitted: Additional Submission

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1 INTRODUCTION AND SUMMARY

1. This document comprises a written representation by Cleve Hill Solar Park Ltd ("the Applicant") in relation to the policies and legislation regarding cultural heritage where these are relevant to the Development Consent Order ("DCO") application process for Nationally Significant Infrastructure Projects ("NSIPs") in support of its application for a DCO for the Cleve Hill Solar Park ("the Application"). This document has been prepared on behalf of the Applicant by Wessex Archaeology and includes legal submissions prepared by Pinsent Masons LLP.
2. This written representation has been prepared in part as a response to Swale Borough Council's Local Impact Report [REP1-005] relating to the Planning Act 2008 process and the consideration and planning balance that applies in this process, with regard to cultural heritage.
3. This representation gives consideration to the tests required by the National Policy Statement (specifically in EN-1), as well as the requirements of the Planning (Listed Buildings and Conservation Areas) Act 1990 in Sections 66 and 72. Consideration is also given here to the policy tests in the National Policy Planning Framework (NPPF) where this is relevant.
4. Consideration is given to the effects of the Barnwell Manor decision as this is specifically referred to in the submission by Swale Borough Council.
5. This written representation should be read in conjunction with the Written Representation prepared by Arcus Consultancy Service Ltd on behalf of the Applicant and submitted at Deadline 2 [REP2-026] which provides a single point of reference and brings together competent experienced professional submissions on the points, including referenced practice and precedent within the Planning Act 2008 regime. That representation was submitted to ensure there is no misunderstanding of the Planning Act 2008 regime that provides the framework for examination, consideration, reporting, recommendation and determination. The aspects of the regime which are of particular significance to this Examination are the presumption in favour of Nationally Significant Infrastructure Projects and the hierarchy and weight of important and relevant matters.

2 NATIONAL POLICY STATEMENTS (NPS)

2.1 The NSIP Regime

6. The process introduced by the Planning Act 2008 (as amended), requires NSIPs, which are defined in the Planning Act 2008 as infrastructure development which exceeds pre-determined thresholds, to obtain a DCO in order to be consented and delivered. This is intended to be a streamlined planning process whereby applicants are not required to obtain separate planning permission, compulsory purchase orders and other consents which would normally be required for large-scale development.
7. In cases where a National Policy Statement ("NPS") relating to the type of development proposed is in effect, the Secretary of State must have regard to any relevant NPSs, local impact reports, matters prescribed in relation to the type of development proposed and any other important and relevant matters (S104(2) of the Planning Act 2008). For purposes of this document, the relevant NPS is EN-1, and heritage is considered in section 5.8.

2.2 Secretary of State decision making

8. NPS EN-1 sets out the relevant policies for decision making relating to the historic environment in paragraphs 5.8.11 to 5.8.18, and the presumptions and weights are set out in paragraphs 5.8.14 to 5.8.18.
9. NPS EN-1 states in paragraph 5.8.14 that *"there should be a presumption in favour of the conservation of designated heritage assets and the more significant the designated heritage asset, the greater the presumption in favour of its conservation should be"*. Significance of a heritage asset can be harmed or lost through development within its setting.
10. NPS EN-1 uses similar but not identical language to the NPPF (see below) saying that substantial harm to designated assets of the highest significance (including Grade I and Grade II* Listed Buildings) should be wholly exceptional, and substantial harm to Grade II buildings, Park and Garden assets should be exceptional.
11. Paragraph 5.8.15 states that *any* harmful impact on the significance of a designated heritage asset should be weighed against the public benefit of the development. The greater the harm to the significance of the heritage asset then the greater the justification needed for any loss. An application for a DCO should be refused if it will lead to substantial harm to or total loss of significance of a designated asset unless it can be demonstrated that *"the substantial harm to or loss of significance is necessary in order to deliver substantial public benefits that outweigh that loss or harm"*.
12. Paragraph 5.8.16 states that not all parts of a Conservation Area will necessarily contribute to the Conservation Area's significance (and paragraphs 5.8.11 to 5.8.15 of NPS EN-1 only refer to those elements that do so contribute). The Secretary of State should therefore take into account the relevant significance of the element affects and its contribution to the significance of the Conservation Area as a whole.
13. Paragraph 5.8.18 specifically refers to effects on settings (rather than physical effects) of designated assets, stating that the "[Secretary of State] *should treat favourably applications that preserve those elements of the setting that make a positive contribution to, or better reveal the significance of, the asset. When considering applications that do not do this, the [Secretary of State] should weigh any negative effects against the wider benefits of the application. The greater the negative impact on the significance of the designated heritage asset, the greater the benefits that will be needed to justify approval"*.

14. The interpretation and application of these tests was considered in the case of *R on the application of John Mars Jones v The Secretary of State for Business, Energy and Industrial Strategy* (the Jones case)¹. The Jones case confirmed that the Secretary of State must identify and assess the particular significance of any heritage asset including its setting and that any substantial harm to designated assets of the highest significance should be wholly exceptional. Any harmful impact on the significance of a designated asset should be weighed against the public benefit of the development, recognising that the greater the harm to the significance of the heritage asset, the greater the justification will be needed for any loss.

3 NATIONAL PLANNING POLICY FRAMEWORK

3.1 The role of National Planning Policy Framework

15. The National Planning Policy Framework (NPPF) sets out the Government's planning policies for England and how these should be applied. It provides a framework within which locally-prepared plans for housing and other development can be produced. It does not contain specific policies for nationally significant infrastructure projects which are determined under the NSIP regime as per the Planning Act 2008 and relevant NPS (see paragraph 5 of the NPPF).

3.2 NPPF and Heritage

16. Heritage is dealt with within Section 16 of the NPPF (paragraphs 184 to 202).
17. The NPPF uses similar but not identical language to NPS EN-1.
18. Paragraph 193 of the NPPF states that when "*considering the impact of a proposed development on the significance of a designated heritage asset, great weight should be given to the asset's conservation (and the more important the asset, the greater the weight should be). This is irrespective of whether any potential harm amounts to substantial harm, total loss or less than substantial harm to its significance*". Paragraph 194 of the NPPF requires any harm to, or loss of, the significance of a designated heritage asset should require a "*clear and convincing justification*".
19. Paragraph 195 of the NPPF states that where *substantial harm* to, or total loss of significance of, a designated asset is predicted then consent should be refused unless "*it can be demonstrated that the substantial harm or total loss is necessary to achieve substantial public benefits that outweigh that harm or loss*".
20. Paragraph 196 of the NPPF states that where *less than substantial harm* is predicted "*this harm should be weighed against the public benefits of the proposal*".
21. Paragraph 201 of the NPPF reflects the wording in paragraph 5.8.18 of NPS EN-1 with respect to World Heritage Sites and Conservation Areas in that not all parts may contribute equally to the significance of those designations.

4 PLANNING (LISTED BUILDINGS AND CONSERVATION AREAS) ACT 1990

4.1 Section 66 and Barnwell Manor

22. The Local Impact Report submitted by Swale Borough Council refers to the statutory requirement set out in Section 66(1) of the Planning (Listed Buildings and Conservation Areas) Act 1990 and the Court of Appeal decision in the Barnwell Manor case².
23. Section 66(1) of the Planning (Listed Buildings and Conservation Areas) Act 1990 requires that a decision maker:

¹ [2017] EWHC 1111 (Admin), paragraphs 48-53

² [2014] EWCA Civ 137

"shall have special regard to the desirability of preserving the building or its setting or any features of special architectural or historic interest which it possesses"

24. However, s66(1) of the Planning (Listed Buildings and Conservation Areas) Act 1990 is not relevant to applications for DCOs as it only applies to planning permissions (as defined in the Planning (Listed Buildings and Conservation Areas) Act 1990). The Barnwell Manor cases concerns the interpretation of s66(1) and is therefore not relevant to this DCO application.
25. Instead, the relevant statutory requirement is set out in Regulation 3 of the Infrastructure Planning (Decision) Regulations 2010. Regulation 3 states that:
- (1) *When deciding an application which affects a listed building or its setting, the [Secretary of State] must have regard to the desirability of preserving the listed building or its setting or any features of special architectural or historic interest which it possesses.*
 - (2) *When deciding an application relating to a conservation area, the [Secretary of State] must have regard to the desirability of preserving or enhancing the character or appearance of that area.*
26. In paragraph 53 of the Jones case it was held that duty contained in Regulation 3 has *"to be performed alongside the obligation to decide the application in accordance with the relevant national policy statement"*. Therefore if the Secretary of State had correctly considered the setting of the designated asset when applying the relevant paragraphs of EN-1, the obligation in Regulation 3 would be satisfied.

5 CONCLUSION

27. The NPS EN-1 sets out the necessary tests and direction on the weight to be given to significance of the heritage interested in the balancing exercise when considering applications that fall under it remit.
28. The language used in articulating the tests and the weight given in the balance is similar to that provided for in the NPPF.
29. Both the NPS EN-1 and NPPF state that substantial harm to designated assets of the highest significance (including Grade I and Grade II* Listed Buildings) should be wholly exceptional, and substantial harm to Grade II buildings, Park and Garden assets should be exceptional.
30. Paragraph 5.8.15 of NPS EN-1 states that *any* harmful impact on the significance of a designated heritage asset should be weighed against the public benefit of the development. The greater the harm to the significance of the heritage asset then the greater the justification needed for any loss.
31. The appropriate statutory obligation is set out in Regulation 3 of the Infrastructure Planning (Decision) Regulations 2010. If the Secretary of State correctly considers the setting of the designated asset when applying the relevant heritage tests set out EN-1, the obligation in Regulation 3 will be satisfied.