

24 August 2010

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Dr Bill Temple-Pediani  
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Dear Dr Bill Temple-Pediani,

Thank you for your email of 19 August 2010.

### **s.51 Planning Act 2008**

Firstly, we should note that any advice given by the IPC to potential applicants and others under s.51 of the Planning Act 2008 (the 2008 Act) will be published on the Commission's website. The Commission is not under s.51 able to advise on the merits of an application or proposed application, and any advice given under s.51 does not constitute legal advice upon which persons can rely.

We would also note that the IPC has an openness policy which means that any documents passed to us, whether or not considered by you to be confidential, may be put on the Commission's website. As you will be aware the Commission is also subject to the requirements of the Freedom of Information Act 2000 and the Environmental Information Regulations and so any information received by us may be released if a relevant request is received by us.

### **Future of the IPC**

The Government has made a commitment to integrate the IPC with the Planning Inspectorate in a revised Departmental structure. Primary legislation will be required to achieve this. It is expected that the new arrangements will not be in place until March 2012. A commitment to ensure smooth transitional arrangements for cases has been made. A primary policy aim is to ensure that all decisions will eventually be made by the relevant Secretary of State. Under current arrangements, where an NPS is designated, the IPC will both examine and decide on the application.

### **Specific Legal Considerations**

With regards to the specific questions raised in your letter, we would firstly refer you to sections 31 and 32 of the 2008 Act, which set out when development consent is required for Nationally Significant Infrastructure Projects (NSIPs) and the meaning of development for the purposes of the 2008 Act regime. Section 14 of the 2008 Act sets out the various categories of NSIPs, which include the construction or extension of a generating station (s.14(1)(a) and s.15).

'Generating Station' in the 2008 Act (s.235(1)) has the meaning given by Part 1 of the Electricity Act 1989. You will have to consider and decide whether the proposed scheme involves the "construction or extension of a generating station" within the meaning of s.15.

s.15(2) set out the circumstances in which the construction or extension of an onshore generating station may require development consent under the 2008 Act.

With regards to the criteria set out in s.15(2) we would comment as follows:-

- a) the proposed development in question is wholly in England;
- b) the proposed development is not an offshore generating station.
- c) you describe the proposed development as having an electrical generating capacity of greater than 50 megawatts.

## **Further Considerations and Next Steps**

We would advise that you should obtain your own legal advice upon which you can rely as to whether development consent under the 2008 Act is required for this proposed development.

You should also take your own legal advice as to whether, if this proposed development does require development consent, any associated development (s.115(2)) should be included within any DCO application, and the scope of this, and whether there are any matters ancillary to any proposed development (see s.120(3), and Schedule 5 which sets out a non-exhaustive list of such ancillary matters).

CLG have published Guidance on Associated Development, which is available on the IPC website. In particular, we would refer you to paragraphs 10 and 11 of this Guidance. Para.10 advises that "Development should not be treated as associated development if it is actually an integral part of the NSIP". Footnote 2 to this paragraph goes on to advise that "Development should not be treated as associated if it is only necessary as a source of additional revenue for the applicant, in order to cross-subsidise the cost of construction of the core infrastructure. This does not mean that the applicant cannot cross-subsidise, but if part of the development is only necessary as a means of cross-subsidising the main development then this part of the development will not be treated as associated development." Para.11 advises that "It is for applicants to decide whether to include something that could be considered as associated development in an application for development consent to the IPC or whether to apply for consent for it via other routes".

Annex A of the CLG Guidance provides examples of the type of development, both in general terms and in NSIP specific terms, that may qualify as associated development. This list is illustrative. It is not an exhaustive list, nor is it prescriptive.

We would also refer you to s.33 of the 2008 Act, which sets out those consents that do not (where relevant) have to be obtained where a development consent order (DCO) is required, and to s.150 which allows for certain other prescribed consents to be included within a DCO where the relevant consenting body agrees (see Part 1 of the Schedule to the Infrastructure Planning (Misc. Prescribed Provisions) Regulations 2010 for the list of these in England). You will note that compulsory acquisition of land or rights over land may also be authorised by a DCO (see sections 122 to 134).

You state that a planning application in respect of the proposed high rise building has already been submitted to LB of Newham as Local Planning Authority (LPA). We also note

from your e-mail that the proposed CHP plant comprises both the basement and ground floors of this building. In view of this, and our comments above, the LPA may wish to consider whether the description of the proposed high rise building accurately reflects the development for which planning permission is required and whether any necessary changes can be dealt with as minor amendments to the submitted scheme. You will also need to take your own legal advice upon which you can rely on this point.

Finally, we would also note that it is an offence for a person to carry out, or cause to be carried out, development for which development consent is required under the 2008 Act and the penalties in relation to such breaches (sections 160 and 161).

We look forward to hearing from you in due course.

Yours faithfully

*Robert Ranger*

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**Case Officer**

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The IPC gives advice about applying for an order granting development consent or making representations about an application (or a proposed application). The IPC takes care to ensure that the advice we provide is accurate. This communication does not however constitute legal advice upon which you can rely and you should note that IPC lawyers are not covered by the compulsory professional indemnity insurance scheme. You should obtain your own legal advice and professional advice as required.

We are required by law to publish on our website a record of the advice we provide and to record on our website the name of the person or organisation who asked for the advice. We will however protect the privacy of any other personal information which you choose to share with us and we will not hold the information any longer than is necessary.

You should note that we have a Policy Commitment to Openness and Transparency and you should not provide us with confidential or commercial information which you do not wish to be put in the public domain.