CAAV National Tutorial 2024

Development Consent Orders
Detailed Notes

Michelmores LLP
10 Victoria Street
Bristol
BS1 6BN

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Introduction

The Planning Act 2008 reformed the planning system in part, to streamline the development of nationally significant infrastructure projects (NSIPs) in the fields of transport, energy, wastewater and waste infrastructure.

Applications are submitted to the Planning Inspectorate, acting on behalf of the Secretary of State, and allow for a unified consent process, granting an array of consents, that would ordinarily be the subject of separate application processes to multiple authorities. In that respect the process can be considered a "one stop shop".

The Planning Act 2008 sets out strict criteria governing whether a development is eligible for consideration under a development consent order. Projects failing to meet these thresholds will have to apply for planning permission via the conventional means.

Development consent can be a lengthy process, but one that provides more certainty to developers, allowing costs to be estimated more accurately and providing a greater degree of confidence in prospects of receiving consent.

The process is broadly broken down into six key steps which will be the subject of this note, alongside an overview of the law underpinning the regime. From an agent's perspective, you should have an awareness of the process; its advantages and disadvantages and the likely impact a development consent order may have on your client's interest.

For information on the assessment of compulsory purchase related to development consent orders, see the Michelmores CAAV National Tutorial 2024 Detailed Notes on *"Development Consent Orders and Compensation".* The heads of claim arising under compulsory purchase in respect of a Development Consent Order are not covered by this note.

Schedule of Legislation

The Planning Act 2008 – criteria for NSIPs.

Electricity Act 1989 – interpretation of "generating station".

Infrastructure Planning (Applications) Regulations 2009 – procedure governing consultation process.

Infrastructure Planning (Environmental Impact Assessment) Regulations 2017 – DCO's with EIA requirements.

Infrastructure Planning (Applications: Prescribed Forms and Procedure) Regulations 2009 – DCO prescribed form.

Infrastructure Planning (Examination Procedure) Rules 2010

What makes an Infrastructure Project Significant?

The Planning Act 2008 governs the criteria for mandating projects over a certain size as Nationally Significant Infrastructure Projects. The types of the project and size thresholds are set out in Part 3 of the Planning Act 2008, and include:

(a) the construction or extension of a generating station;

(b) the installation of an electric line above ground;

(c) development relating to underground gas storage facilities;

(d) the construction or alteration of an LNG facility;

(e) the construction or alteration of a gas reception facility;

(f) the construction of a pipe-line by a gas transporter;

(g) the construction of a pipe-line other than by a gas transporter;

(h) highway-related development;

(i) airport-related development;

(j) the construction or alteration of harbour facilities;

(k) the construction or alteration of a railway;

(l) the construction or alteration of a rail freight interchange;

(m) the construction or alteration of a dam or reservoir;

(n) development relating to the transfer of water resources;

(na) the construction or alteration of a desalination plant;

(o) the construction or alteration of a waste water treatment plant or of infrastructure for the transfer or storage of waste water ;

(p) the construction or alteration of a hazardous waste facility ;

(q) development relating to a radioactive waste geological disposal facility.

[Section 14 Planning Act 2008]

Sections 15 to 30A cover in detail the specific requirements for qualifying development under the various project types listed above. This note does not propose to cover the details for each type of project but will provide commentary on some of the more common forms of development.

Type of Project	Thresholds	Section of Legislation
Generating Stations	The generating station must: - Be in England; - Must not generate energy as wind - Not be an offshore generating station. - Have a capacity in excess of 50Mw. For offshore generating stations see subsection 3. The relevant criteria is as follows. - It is an offshore generating station; and - Its capacity is more than 100Mw.	s15 Planning Act 2008
Electricity Lines	The electricity line must: - Have a nominal voltage of more than 132 kilovolts; - The length of the line when installed is more than 2km.	s16 Planning Act 2008
Highways	Section 22 provides that highways works falling within the scope of an NSIP include construction, alteration or improvement. Construction falls within the scope of an NSIP if the following conditions are met: - The highway is constructed in England. - The Secretary of State or strategic highways company will be the highway authority for the highway; and - The area of the development is greater than 15 hectares (motorway), 12.5 hectares (for highways other than motorways with a speed limit of greater that 50mph), 7.5 hectares (for any other highways). Improvements of highways are considered NSIPs where: - The highways is wholly in England; - The Secretary of State [or a strategic highways company] is the highway authority for the highway, and - The improvement is likely to have a significant effect on the environment.	s22 Planning Act 2008
Railways	The construction of railways fall within the scope of NSIPs where:	s25 Planning Act 2008

	- The railway will (when constructed) be wholly in England; - The railway will (when constructed) be part of a network operated by an approved operator; - The railway includes a stretch of track that is a continuous length of more than 2km and is not on land that was operational land of a railway undertaker immediately before the construction work began or is on land that was acquired at an earlier date for the purpose of constructing the railway and the construction of the railway is not permitted development. The same criteria apply within respect to alteration of railways.	
Transfer of Water Resources	Whilst the majority of the power for statutory undertakers to lay pipes and infrastructure derives from the Water Industry Act 1991, projects of significant scale fall within the NSIP regime. The following criteria must be met: - The development must be carried out in England by one or more statutory undertakers; - The deployable output of the development will exceed 80 million litres per day; - The development will enable the transfer of water resources between reiver basins in England or between water undertakers in England; - The development does not relate to the transfer of drinking water.	s28 Planning Act 2008

Projects not meeting the criteria for NSIPs under ss14 – 30A

Where a development does not meet the legislative thresholds, a developer can make a "*qualifying request*" to the Secretary of State, under s35 of the Planning Act 2008, to direct that their project should be considered as a NSIP. The Secretary of State must be satisfied:

(a) the development is or forms part of—

(i) a project (or proposed project) in the field of energy, transport, water, waste water or waste, or

(ii) a business or commercial project (or proposed project) of a prescribed description,

(b) the development will (when completed) be wholly in one or more of the areas specified in subsection (3), and

(c) the Secretary of State thinks the project (or proposed project) is of national significance, either by itself or when considered with—

(i) in a case within paragraph (a)(i), one or more other projects (or proposed projects) in the same field;

(ii) in a case within paragraph (a)(ii), one or more other business or commercial projects (or proposed projects) of a description prescribed under paragraph (a)(ii).

Development Consent Order Application Process

There are essentially 6 steps to the DCO application process; pre-application, acceptance; pre examination; examination; recommendation and decision; post decision.

Stage 1: Pre-application

This is a key stage of the application process requiring developers to consult with a wide range of stakeholders, and parties with an interest, in advance of submitting a formal application to the Planning Inspectorate. The rationale is that by front-loading the process, applications will be better developed and better understood by the public with important issues being identified and discussed prior to the application.

Failure to comply with the pre-application stage of the process will result in the subsequent DCO application being rejected when it is submitted.

Pre-application comprises the running of two consultations. The first is governed by ss42 – 44 of the Planning Act 2008 and requires the developers to consult with "*Prescribed Persons",* local authorities, and persons affected by the development, as defined by section 44.

Prescribed persons are essentially an exhaustive list of statutory consultees contained within Schedule 1 of the Infrastructure Planning (Applications Regulations 2009). Some consultees require consulting regardless of the nature of the development, for example parish councils, and others only require consulting where the development meets specific criteria, for example the Forestry Commission where the application is likely to affect the protection or expansion of forests and woodlands in England.

Section 44 lists three categories of affected persons which must be consulted prior to application. Category 1 individuals include persons known to the applicant after diligent inquiry and is taken to include, the owner, lessee, tenant or occupier of the land of the subject application. Category 2 are persons known to the application after diligent inquiry, that have an interest in the land or have the power to sell or convey the land subject to the application, or to release the land the subject of the application. Category 3 comprises people the applicant thinks that if the development consent order was made and fully implemented would be entitled to make a claim under s10 of the Compulsory Purchase Act 1965, part 1 of the Land Compensation Act 1973 or s152(3) of the Planning Act 2008.

The duty to consult with these individuals includes providing them with the relevant consultation documents and providing them a period of 28 days to submit their responses. The applicant must set out the timetable for consultation responses when notifying the relevant persons of the project.

The second consultation is governed by s47 of the Planning Act 2008 and comprises a requirement to consult with the local community. As a preliminary to this consultation the applicant must prepare a Statement of Community Consultation providing information on how the applicant proposes to consult about the proposed application, with people living in the vicinity of the land. This consultation should account for any consultation responses received in the previous process. Once the statement has been prepared, the applicant must make the statement available for public inspection in a way that is reasonably convenient for people living in the vicinity, and publish the statement in a newspaper circulating in the vicinity. The applicant must then undertake the consultation in accordance with the proposals set out in their statement.

In tandem to this targeted consultation, the applicant is required to run a more publicised consultation programme. Section 48 of the Planning Act 2008 requires the applicant to publish a notice of the proposed application:

- For at lease two successive weeks in one or more local newspapers circulating in the vicinity in which the land is situated and the proposed application relates.
- Once in a national newspaper.
- Once in the London Gazette.

The notices must contain the following information:

- The name and address of the applicant.
- A statement that the applicant intends to make an application for development consent to the Secretary of State.
- A statement indicating whether or not the application is an EIA development.
- A summary of the main proposals, specifying the location or route of the proposed development.
- A statement that the documents, plans and maps showing the nature and location of the proposed development, can be inspected free of charge on a website maintained by or on behalf of the applicant.
- The address of the website where the documents, plans and maps may be inspected.
- The place on the website where the documents, plans and maps may be inspected.
- A telephone number which can be used to contact the applicant for enquiries in relation to the documents, plans and maps.
- The latest date on which the documents, plans and maps will be available for inspection on the website.
- An indication whether a charge will be made for copies of any documents available for inspection and the amount of any charge.
- Details of how to respond to the publicity notice.
- A deadline for receipt by the applicant of responses to the publicity notice, which must not be less than 28 days following the date the notice was last published.

(Regulation 4 Infrastructure Planning (Applications) Regulations 2009.)

Having completed the pre-application steps the developer may submit a formal application for development consent to the Planning Inspectorate. The application must be in writing and in prescribed form set out in Schedule 2 of the Infrastructure Planning (Applications) Regulations 2009. It must additionally be accompanied by an array of supporting documents including; an environmental statement where applicable (Infrastructure Planning (Environmental Impact Assessment) Regulations 2017) and any scoping or screening opinions/decisions, a draft development consent order with an accompanying explanatory memorandum, a statement of whether the DCO seeks to authorise compulsory acquisition of land or interests in or rights over land, a plan identifying the development and access.

Stage 2: Acceptance

The process then moves through the acceptance stage, where the Planning Inspectorate will review the application papers submitted by the developer to clarify (on behalf of the Secretary of State) whether or not the application meets the standards required for it to be formally accepted for examination. Such standards are set out in s55 of the Planning Act 2008 and allow the Secretary of State to accept the application if:

- It is an application for a development consent order.
- Development consent is required for any of the development to which the application relates.
- The applicant has complied with the pre-application procedure.
- The application is of a satisfactory standard.

If accepted, s56-59 of the Act requires that the application is advertised to the public in the manner prescribed by the Infrastructure Planning (Applications: Prescribed Forms and Procedure) Regulations 2009, and at that time the public are given the opportunity to register with the Planning Inspectorate as "interested parties" and make relevant representations. Only those who register and make a relevant representation within the prescribed timescales are invited to take part in the examination process.

Stage 3: Pre - Examination

Once the period for making representations has concluded the Applicant must certify that they have complied with the statutory requirements for giving notice of the accepted application. On receipt of the certificate the Planning Inspectorate will appoint an Examining Authority which will consist of one or more Inspectors, to examine the application (s61 Planning Act 2008)

The examining authority shall make its initial assessment of the principal issues arising on the application, under s88(1) Planning Act 2008. S88 continues to then require the Examining authority to hold a preliminary meeting inviting the applicant, each interested party, each statutory party and each local authority. This preliminary meeting happens three months after the developer has given formal noticed of the acceptance of the application.

The meeting enables the invitees to make representations to the Examining authority about how the application should be examined and to discuss any other matters that the Examining authority wishes to discuss.

Following the preliminary meeting the Examining authority sets a timetable for its examination of the application (often known as the Rule 8 letter due to the regulation under which the requirement arises), specifically detailing:

(a) the date by which written representations must be received by the Examining authority;

(b) the period within which the Examining authority will ask questions in writing and seek further written information about—

(i) any matter contained in the application or a relevant representation;

(ii) any written representation; and

(iii) any other matter it considers relevant to its examination of the application or specified matters;

(c) the period within which the applicant will have the opportunity to comment in writing on—

(i) any relevant or written representations; and

(ii) any responses to written questions received from an interested party or others;

(d) the period within which any interested party will have the opportunity to comment in writing on—

(i) any relevant and written representations; and

(ii) any responses to written questions received from an interested party or others;

(e) the period within which the applicant and any interested party must agree a statement of common ground;

(f) the date by which any interested party must notify the Examining authority of their wish to be heard at an open-floor hearing;

(g) the date by which any affected person must notify the Examining authority of their wish to be heard at a compulsory acquisition hearing;

(h) the date of any issue-specific hearing;

(i) the date by which any summaries of relevant and written representations must be received by the Examining authority;

(j) the date by which any local impact report must be received by the [Secretary of State] and the period within which an interested party will have the opportunity to make written comments on that report; and

(k) such other deadlines as the Examining authority considers necessary.

(*Regulation 8 Infrastructure Planning (Examination Procedure) Rules 2010)*

Stage 4: Examination

The examination process is a period of six months officially commencing on the date of the Preliminary meeting. The examination process will proceed in accordance with the Rule 8 letter. Most submissions made during the examination process are required to be made in writing in accordance with s90 of the Planning Act 2008. The deadlines for written submissions and responses to those submissions as well as submission of the draft DCO itself and further technical documentation will be set out in the Rule 8 letter.

Upon the receipt of written submissions, the Examining authority may deem it necessary to consider oral representations about a particular issue to ensure that the issue has been adequately examined and that the interested party has a fair chance to represent their case.

Stage 5: Decision

The Examining Authority then has a period of three months, once the examination has concluded, in which to prepare a report to the Secretary of State, with a recommendation as to whether the application should be approved. In considering the report the Examining authority must consider the impact of any National Policy Statement effecting the development in question. Whilst this is a clear procedural requirement of the decision process the Planning Act 2008 does not obligate the Secretary of State to make a decision in accordance with any National Policy Statement, but merely to have regard to it. In the Court of Appeal Judgement of *R. (on the Application of Scarisbrick) v Secretary of State for Communities and Local Government [2017]* the court sided with the Secretary of State in a case brought against them for judicial review on a decision made to approve a hazardous waste landfill site under the DCO process. In arriving at their decision, they concluded that *"a proper balancing act had to be undertaken, which was a matter for the SoS's planning judgement in the particular circumstances of the case."* It held that the SoS had not treated the policy as a single decisive factor and had therefore not erred in its approach.

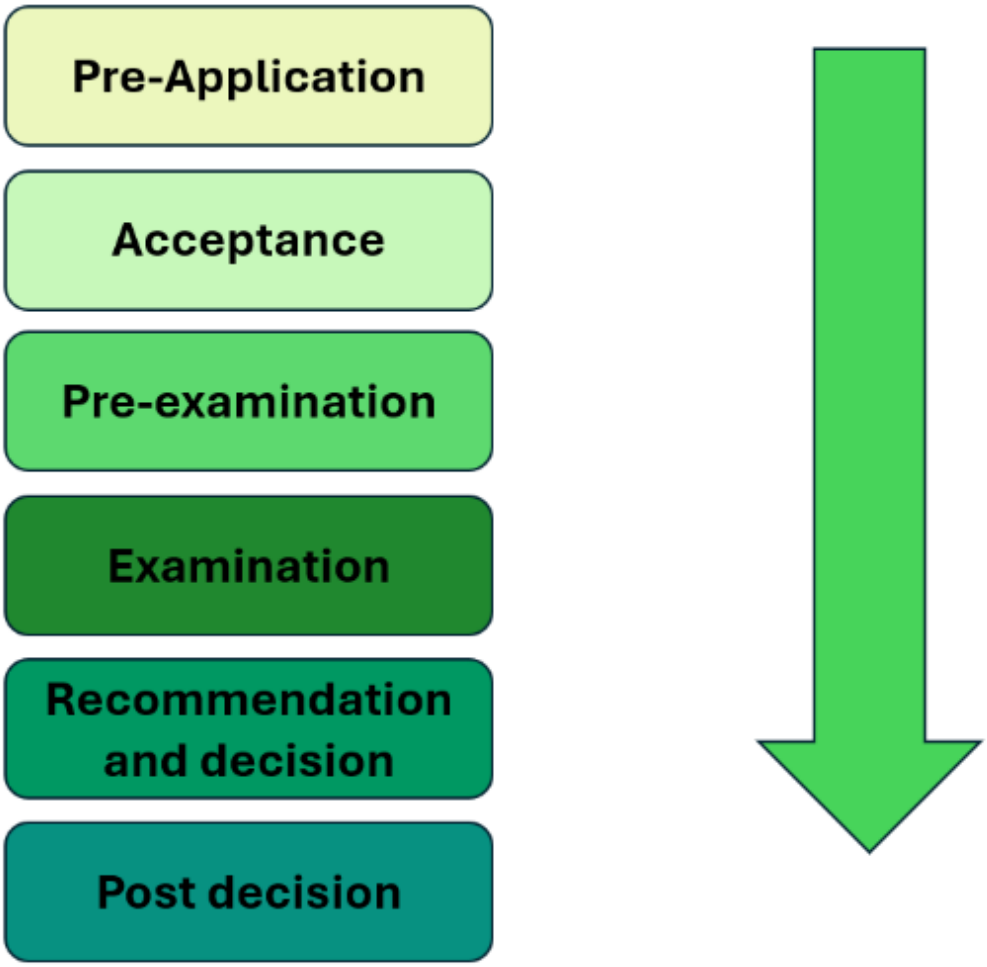
Upon submission of the report from the Planning Inspectorate, the Secretary of State has a further three months in which to make their decision on the application. The rigidity of the timelines is designed to provide applicants with certainty on timelines.

The Secretary of State may either make a development consent order or refuse development consent. The Development consent order may cover development which is associated with the development for which development consent is required and is not construction or extension of any dwellings. The Secretary of State must give reasons for their decision and may impose requirements (which correspond to planning conditions) and ancillary matters. This may include powers of compulsory acquisition.

Stage 6 Post: Decision

Following the issuing of a development consent order there is a statutory six week period whereby the decision may be challenged in the courts by judicial review. S118 of the Planning Act 2008 governs the process.

DCO's and Compulsory Purchase



Six stage application process for DCO's.

The Planning Act 2008 allows for the grant of compulsory purchase powers as part of the Development Consent Order.

The Secretary of State must be satisfied of the merits and need for the overall project before a decision on the compulsory acquisition powers can be made. S122 of the Planning Act 2008 provides that a DCO can only authorise the compulsory acquisition of land where the Secretary of State is satisfied that two preconditions have been met as follows:

- the land is:
    - required for the development to which the DCO relates
    - required to facilitate or is incidental to the development; or

- replacement land to be given in exchange for common or open space land to be compulsorily acquired, and

- there is a compelling case in the public interest for the land to be acquired compulsorily

In each case the Secretary of State must be satisfied that the land or interest to be acquired is no more than is reasonably required for the development.

Where powers of compulsory acquisition have been granted under a DCO section 123 of the Planning Act 2008 clarifies that a DCO can authorise compulsory acquisition where one of the following conditions is met:

- the DCO included a request for compulsory acquisition powers.
- All persons with an interest in land consent to the inclusion of the provision, or
- The prescribed procedure (under the Infrastructure Planning (Compulsory Acquisition) Regulations 2010 has been followed in relation to the land.

The criteria under s122 of the Planning Act 2008, whereby there must be a "compelling case in the public interest for the land to be acquired compulsorily", is essentially a balancing exercise between the public benefit associated with the development and the private interests of those whose land is being acquired. In determining where the scales tip, consideration is given to the need, as set out by the National Policy Statement for the relevant development, and the proportionality of the developers approach, in that they seek to acquire no more that is absolutely required for the project. The developer must have also considered alternatives to compulsory acquisition, both in the form of private negotiations with the landowner and in terms of alternative locations for the project.

Powers afforded to developers under the Planning Act 2008 are not perpetual. The Infrastructure Planning (Interested Parties and Miscellaneous Prescribed Provisions) Regulations, allows five years of compulsory acquisition powers to be exercised, beginning on the date on which the DCO is made.

Other Consents Arising Under Development Consent Orders

Development consent orders are a beast with many faces. One of their perceived advantages is that they are a one-stop-shop, enveloping a variety of consents in one place. We have considered already their application in respect of compulsory acquisition consent, but what other provisions are allowed for in an order? This is governed by s120 of the Planning Act 2008, which sets of the lawful extent of a development consent order. Subsection 5 states:

(5) An order granting development consent may—

> *(a) apply, modify or exclude a statutory provision which relates to any matter for which provision may be made in the order;*
>
> *(b) make such amendments, repeals or revocations of statutory provisions of local application as appear to the [Secretary of State] to be necessary or expedient in consequence of a provision of the order or in connection with the order;*
>
> *(c) include any provision that appears to the [Secretary of State] to be necessary or expedient for giving full effect to any other provision of the order;*
>
> *(d) include incidental, consequential, supplementary, transitional or transitory provisions and savings.*

Subsection 6 confirms that the term "*statutory provision"* means provision of an Act or of an instrument made under an Act. This broad definition may include such matters as Listed Building consent or consent for works on trees arising under a tree preservation order. Indeed, the legislation qualifies itself at section 8 limiting the extent of its reach by excluding certain statutes and stating the order cannot give consent for the *"provision creating offences"*.

Pros and Cons of Development Consent Orders

Pros	Cons
Unified Authorisation Process or "One-stop-Shop". – all consents necessary for carrying out the development can be gained in one place.	**Cost** – the process is expensive.
Certainty of Outcome – If the proposed development is in accordance with a National Policy Statement on the type of development there is a presumption in favour of granting consent for the development.	Limited flexibility to amend the scheme once the application has been submitted
Certainty of timeline – once the application has been submitted the statutory timeline applies: 6 months determination, 3 months for the Minister	**Less flexibility for post-consent alterations** – for non material changes an application need to be made to the Secretary of State along with an application fee. For material changes a more extensive process is undertaken akin to the steps for applying for the DCO in the first place.
Compulsory purchase powers – rights and land, including temporary interests in land – helpful for the delivery of linear infrastructure such as grid connection cables	**Duration from start to finish** – front loading of the application process, with heavy duty consultation requirements. Assuming it is an EIA development it might take 18 months to design the scheme, consult and refine the application. It can take up to 15 months to obtain a DCO following making the application provided there are no judicial review proceedings.
BNG – not currently required under DCOs.	**Scale** – DCO's are only available for projects falling within the NSIP thresholds. For generating stations this includes projects of 50MW or over. Unless a section 35 ruling is secured.