

NATIONAL TUTORIAL 2024

DEVELOPMENT CONSENT ORDERS

MODEL ANSWER

This is an Outline Answer, covering the points raised in a very broad problem.

Please see the separate, Detailed Notes for further information- the detailed notes are essential for setting out the basics and the procedural matters which should be set out in answering a question about this.

Following the solar companies' visit, they have followed up to say that they are interested in exploring solar opportunities at the Estate. They have instructed their in-house planning team to develop a proposal. It will either be for an application for planning permission or a development consent order.

On your tables, consider the points which might be relevant in advising the Estate on its position, including the procedure for promoting and obtaining a DCO, and any advantages or disadvantages of the process as against a planning application.

- The Planning Act 2008 introduced a system of unified development consents for nationally significant infrastructure projects (NSIPs).
- Section 15 of the Planning Act 2008 governs the eligibility of generating station projects in respect of the NSIP regime.
- Section 15(2) states that a generation station is within this subsection if –
 - It is in England.....
 - It does not generate electricity from wind
 - It is not an offshore generating station
 - Its capacity is more than 50 megawatts.
- Anything below this threshold requires planning permission via the conventional means.
- Alternatively, the Secretary of State can direct that a project be treated as a NSIP under s35 of the Planning Act 2008 if it meets the relevant criteria under s35 of the Planning Act 2008.

DCO Process

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

Pre-application

- As a first step the developer must notify the Planning Inspectorate that it considers that the proposed project is a NSIP in accordance with s46 of the Planning Act 2008.

- Following notification to the Planning Inspectorate the developer must undertake two formal pre-application consultations. The first, governed by s42 of the Planning Act 2008, is with statutory consultees, landowners and significantly affected persons. The second, governed by s47 of the Planning Act 2008, is with the local community in accordance with a Statement of Community Consultation which is agreed pursuant to the application and contains specific requirements about the publicity that must be given to the consultation process which includes publicising in local and national press.
- The Statement of Community Consultation must provide sufficient detail of the project and should refer to the positive and negative elements. The scale of the proposal should be described, as well as the information that will be provided through the consultation process.
- The consultation process is usually accompanied by a Preliminary Environmental Information Report (PEIR) and a non-technical summary which describes the anticipated environmental impacts of the proposal to inform consultees when considering the proposal.
- Once engaged in the DCO process a developer can rely on section 53 of the 2008 Act whereby they can be duly authorised by the Secretary of State to enter onto land for the purposes of surveying. This is a critical power enabling the developer the ability to prepare their DCO application if they cannot otherwise negotiate the access they need. It is an offence to resist this access if granted. Compensation is payable to the owner if damage is caused as a result of this access.
- Having completed this the application may submit the formal application for development consent to the Planning Inspectorate.
- There is then a period of 28 days for the Secretary of State to consider whether the application has met the standards required to be formally accepted for examination.

Acceptance

- The test for determining whether an application should be accepted is based on legal criteria listed in s55 of the Planning Act 2008. The following criteria are considered:
 - Is the application for an order granting development consent?
 - Is development consent required for any of the development?
 - Has the applicant complied with the pre-application procedure?
 - Is the application and its supporting documentation of a standard that the Secretary of State considers satisfactory?
- The application will be accompanied by a draft of the Development Consent Order and a consultation report showing that the pre-application steps have been met.
- Acceptance of the application must be published by the Applicant in accordance with s56 of the Planning Act 2008. This is a critical point as once accepted the only mechanism for challenging is via judicial review.

Pre-examination

- Once accepted for examination the public are able to register with the Planning Inspectorate to provide a written summary of their views on the application. Those that are validly made are known as "relevant representations".

- When the period for making representations has concluded the Applicant must certify that it has complied with the statutory requirements for giving notice of the accepted application.
- On receipt of this certificate the Planning Inspectorate will appoint an Examining Authority, which will consist of one or more Inspectors, to examine the application. The Examining Authority has 21 days to review the application and all relevant representations and identify the principal issues for examination.
- Once the principal issues for examination have been identified, the Planning Inspectorate will convene a Preliminary meeting to consider how the Application will be examined. This sets out details such as the timetable for examination and practical arrangements – it is not a forum to discuss the merits of the application.
- The Examining Authority will then set out the various stages of the examination including the periods allowed for submission of further written evidence and any hearing that the Examining Authority will hold. Applicants and Interested Parties must comply with the timetable.

Examination

- This commences on the date of the Preliminary Meeting and must be completed within 6 months of that date.
- It is a formal legal process where the Examining Authority carefully considers all of the important and relevant matters relating to the application including relevant representations.
- The Planning Inspectorate has six months to carry out the examination. During the examination period, those who have registered to have their say are invited by the "examining authority" to provide more detail on their views.

Decision

- Within 3 months of the end of the 6-month examination period the Planning Inspectorate must prepare a report on the application including a recommendation to the relevant Secretary of State. The Secretary of State then has a further 3 months to make a decision on the application.

Post Decision

- Once a decision by the Secretary of State has been issued there is a 6 week period within which those aggrieved by the decision can apply to the High Court for a judicial review of the decision.

Pros and Cons of DCO's

- **Pros:**
 - Unified Authorisation Process or "One-stop-Shop". – all consents necessary for carrying out the development can be gained in one place.
 - 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.

- Certainty of timeline – once the application has been submitted the statutory timeline applies: 6 months determination, 3 months for the Minister
- Compulsory purchase powers – rights and land, including temporary interests in land – helpful for the delivery of linear infrastructure such as grid connection cables
- BNG – not currently required under DCOs.
- **Cons:**
 - Cost – the process is expensive.
 - Limited flexibility to amend the scheme once the application has been submitted
 - 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.
 - 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.
 - 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.

Pros and Cons of Planning Application

- **Pros:**
 - Scale – more flexible dependant on the scale of the project.
 - Cost – significant less costly than a DCO.
 - Flexibility – applications can be varied in a more expedient and less formal manner, .
 - Appealability – refusals can be appealed.
 - Time – theoretically should take less time, but the reality is that it can take just as long.
- **Cons:**
 - No guarantee of outcome – a more subjective process, no support from the NPS
 - No certainty of costs – conditions may be imposed requiring additional surveys/expert reports.
 - Consents may be required from other bodies.

Conclusion and Advice to the client

Based on the anticipated scale of the development it is likely that the solar companies will elect to submit a Development Consent Order. This provides the developer with a greater degree of certainty as to the prospects of success, timescales and costs. The agent would be well advised to inform their client of the impact such an application will have on the estate and the potential that the developer will seek powers of compulsory acquisition as part of their application to the Planning Inspectorate. The client should be advised of their ability to make their views heard in respect of the proposal, which comprise representations made during the pre-application consultation period and their responses during the pre-examination period, which may enable them to attend and speak at the examination hearing.

Holistically speaking, the agent should always be mindful of their client's ambitions for the estate and consider the impact of any transaction in respect of those ambitions. The pre-reading indicated that the client wished to continue farming, wanted a tax efficient estate and wanted the children to pursue their passions. With these in mind, the agent would be well advised to consider how the farming system would integrate the development. Whether changes need to be made to the livestock enterprise, for example, whether grazing of sheep can be negotiated or reserved in the prospective lease to the developer. Agents should also advise their clients on the anticipated rental income that would be generated from the solar lease and the impact the lease may have on their taxation position, e.g. potential loss of APR and BPR.