

Insights

UNLOCKING PLANNING FOR THE NORTHERN POWERHOUSE IN A POST COVID-19 AGE

Jun 03, 2020

SUMMARY

The economic crisis of Covid-19 could provide a counterintuitive catalyst for delivering the Northern Powerhouse in the long term. In this blog we explore how the Development Consent Order process could unlock such projects.

Karl Cradick (Savills), Paul Tucker QC and Piers Riley Smith and Sarah Reid (Kings Chambers) contributed to this article.

The Northern Powerhouse, with its objective of levelling up Britain's economy, morphed into a policy cornerstone as Government sought to persuade the so-called "red wall" from North Wales to the North East to remain blue. With the North of England likely to find it harder, and take longer, to ride out the worst of the COVID-19 economic crisis, clamours to make the policy a reality can only grow.

In austerity Britain there never seemed to be the cash to make it happen. Suddenly the UK has an extra £282 billion budget deficit. Government has taken an unprecedented, central role in the economy, intending to issue £225bn of debt over coming months and raise taxes. Could COVID-19 become the catalyst that actually makes it more likely that Yorkshire MP, and now Chancellor, Rishi Sunak could release the cash for Northern Powerhouse projects like the £39 billion east-west rail network to stimulate the economy out of its Coronavirus blues?

Where (sometimes unfairly) maligned "Planning red-tape" might hinder realising the Northern Powerhouse, could the fast track route for Nationally Significant Infrastructure Projects, with applications direct to the Secretary of State under the Planning Act 2008, actually unlock major infrastructure and commercial schemes?

Never volunteer?

A prescribed list of certain infrastructure projects above specified thresholds must always be consented via the “DCO regime”, which results in development consent orders (DCOs) made by the Secretary of State rather than conventional planning permissions.

However, a wider range of infrastructure proposals in the fields of energy, transport, water, waste water or waste can opt in voluntarily. As can certain types of commercial schemes: office, research and development, industrial processes, storage and distribution, conferences, exhibitions, sport, leisure and tourism. All may include up to 500 homes. You can even switch a drifting Town and Country planning application submitted to a local planning authority into the DCO regime.

A one-stop-shop

Amidst a bundle of possible consents within a DCO, an applicant can promote an application for compulsory purchase powers directly, instead of having to persuade the local planning authority to do so on its behalf, including powers to interfere with third party rights subject to compensation, which removes potential ransom positions.

The applicant leads on drafting the DCO itself. This maximises the chances that it is fit for purpose and that the “requirements”, akin to planning conditions, secure control and mitigation measures without impeding delivery.

It is a potentially immediate criminal offence as soon as a term of a DCO is breached “without reasonable excuse”, rather than if an enforcement notice is not complied with as under the Town and Country Planning Act 1990. However, investors and funders are increasingly familiar with such nuances of DCO projects.

Certainty of process and programme

Once an application is made, with limited exceptions, a decision is issued within 15–16 months from submission of the application.

Following pre-application consultation, during which the scheme is developed and refined to reflect the representations of affected persons and relevant statutory bodies, including local planning authorities, the promoter submits their DCO application to the Planning Inspectorate. The Examination that follows has a six month deadline that is politically sacrosanct. Inspectors have three months to prepare a recommendation and the Secretary of State, with limited exceptions, then makes a decision within three months (Coronavirus only having added a couple of months to current determinations).

Political certainty

The DCO regime was created to deliver major infrastructure from the vagaries of local politics. Local planning and highway authorities are important statutory consultees, but not decision-makers. Experienced Inspectors call upon the promoter and third parties to answer questions

overwhelmingly in writing. There are limited hearings based on a triage system isolating outstanding issues not addressed on the papers, a system also being embraced by non-infrastructure planning inquiries during Covid-19. Hearings are being opened to video conferencing. Grandstanding is shut down.

More than 90% of DCO applications have been approved by the Secretary of State, with the few refusals largely the result of economic factors affecting an entire sector.

Council planners are increasingly starting to urge applicants with projects of potential national significance to opt into the DCO regime, knowing this will ease resourcing and political pressures at a local level.

Policy

The cornerstone of the high success rate for DCO applications is that established Planning Act 2008 infrastructure categories have been backed by National Policy Statements (NPSs), underscoring a compelling national need for them. Business and commercial schemes are unlikely ever to have that. These and infrastructure schemes for whom DCOs are not compulsory but opt in anyway may therefore find relying on existing NPSs patchy.

Even so, without any presumption in favour of the local development plan, as under the Town and Country Planning Act 1990, a DCO application could still be a route through an unhelpful local policy matrix: the Secretary of State has greater flexibility to decide what is important and relevant and the weight to be given in the overall planning balance, particularly where a scheme can be shown to align with delivering national policy goals.

Consultation

There must be at least one statutory round of pre-application consultation. On the most complex schemes, this could follow several non-statutory rounds, as the scheme is revised to reflect the responses of affected persons and key statutory bodies.

This is expensive, adds months to programme and means an earlier scheme freeze than in a Town and Country Planning application, a real issue in a consenting regime with limited scope for amendments once an application is submitted during fixed-period Examinations.

To compensate, appropriate scheme flexibility can be baked into a DCO. And it is exactly in addressing exhaustive consultation feedback that DCO promoters can minimise local opposition, reduce consenting risks and benefit from fast-track Examinations and determinations. Might HS2's potential £70bn cost overrun have been more foreseeable had the Hybrid Bill process been able to identify and address issues at the consenting stage as effectively as the DCO regime does, with its "front-loaded" approach to preparing applications, engaging with potential objectors and inquisitorial Examinations?

Social distancing will not bring DCO consultations to a halt, with old-fashioned leaflet drops publicising an innovative combination of the new and the old: livechats, webinars, hotlines, online deposit locations and posting selected hard copies.

Coming down the track...

Across the North DCOs are being used to revitalise existing but ageing energy infrastructure. In 2019 the Secretary of State made the DCO for modifying two coal-fired generating units at Drax Power Station, Selby, to become gas-powered, following DCO authorisation for a similar conversion in Eggborough in 2018 (both in North Yorkshire).

‘Northern Powerhouse Rail’, creating or upgrading railway lines between major Northern cities, is proposed to improve transport connectivity that must be the crux of levelling regional inequalities. This should lead to greater use of existing lines for freight, and DCOs are already being used elsewhere in the country for rail freight interchanges to support the national and localised digital economy.

If the aspirations for the Northern Powerhouse in a post-Covid world are followed through, there should be a spate of transport DCOs coming ‘down the tracks’, using the clear potential for the DCO regime to help transform the economy of the North of England in a way that conventional planning sometimes struggles to do.

RELATED CAPABILITIES

- Planning & Zoning
- Real Estate

MEET THE TEAM



Sheridan Treger

London

sheridan.treger@bclplaw.com

[+44 \(0\) 20 3400 3642](tel:+442034003642)

This material is not comprehensive, is for informational purposes only, and is not legal advice. Your use or receipt of this material does not create an attorney-client relationship between us. If you require legal advice, you should consult an attorney regarding your particular circumstances. The choice of a lawyer is an important decision and should not be based solely upon advertisements. This material may be “Attorney Advertising” under the ethics and professional rules of certain jurisdictions. For advertising purposes, St. Louis, Missouri, is designated BCLP’s principal office and Kathrine Dixon (kathrine.dixon@bclplaw.com) as the responsible attorney.