

Insights

WILL THE INCREASE IN CLIMATE RELATED CHALLENGES TO DCOS DERAIL NATIONAL INFRASTRUCTURE PRIORITIES?

Oct 17, 2022

SUMMARY

The recent rise in legal challenges to proposed nationally significant infrastructure projects on climate and environmental grounds shows no signs of abating. In this blog we consider whether there is an unavoidable conflict between the Government's environmental and infrastructure agendas and whether there is a legal resolution.

UNAVOIDABLE CONFLICT?

Some perceive there to be an unavoidable conflict between the Government's legally binding environmental protection obligations and the UK's national infrastructure goals and believe this conflict may fuel a rise in climate-related judicial review claims against infrastructure consent applications (DCOs). However, this perception can be dispelled in practice if thorough due process is followed.

LIMITS TO JUDICIAL ROLE

Infrastructure consent applications often raise highly complex issues, which require careful and thorough examination by decision makers before they can apply their judgment and reach a balanced and robust decision. The courts have been clear that they will not step-in and make political, social or economic decisions in judicial review cases, such matters being for Parliament, ministers and public bodies. In addition, the courts consistently state that their role is not to second-guess the exercise of planning judgment exercised by a decision-maker. The court's remit is concerned with and limited to resolving questions of law only.

UNCERTAINTIES IN THE DCO REGIME

Nationally significant infrastructure projects are consented under the Planning Act 2008 which sets out a good framework within which these, often finely balanced, DCO decisions must be taken.

However, there are some uncertainties within the regime that increase opportunities for challenge.

One such area is the statutory requirement (section 10 of the Planning Act) to have regard to achieving the objectives of sustainable development including, specifically, “mitigating and adapting to climate change”.

The need always to consider climate change is placed front and center of the decision-making process by the legislation itself, and there is therefore no avoiding it.

MITIGATING RISK OF CHALLENGE

DCO applications are by their nature wide-ranging. They are, therefore, the ones most likely to have wide environmental impacts (including the impacts on climate change). The wider the scope of impact the greater the opportunity for objectors to argue that the environmental assessment of the project, cumulatively with other projects within the zone of influence, has been conducted in a flawed way. However, thorough assessment of impacts coupled with a full understanding of the procedures to be worked through ought to offer safe passage. Moreover, the Courts are alive to dangers of minute procedural challenges, warning against the “unrealistic counsel of perfection” that assessments must cover every possible impact from every angle.

Promoters of DCOs are right to be wary, but forewarned is forearmed.

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