BCLP. Client Intelligent

Insights

DCO JUDICIAL REVIEWS: LESSONS LEARNED FROM RECENT JUDGMENTS

Aug 09, 2023

SUMMARY

The process of securing development consent (a DCO) for a major scheme can take many years. The decision of the Government on whether to grant the DCO is made at the end of that process and is subject to 'judicial review' by the courts, which at its worst can leave a scheme promoter with no consent and a substantial programme issue. So how can you mitigate that risk? This Insight explains some of the principles that will help you, drawing on some recent high profile DCO judicial review judgments.

DCO decisions are often divisive with detractors seeking opportunities to overturn (or delay) them by way of judicial review where they can. This is especially so if the Secretary of State's decision is contrary to the Examining Authority's recommendation or if a project is particularly controversial.

Lessons can be learned from both the successful challenges, for example the court's decision to quash the Secretary of State's decision to grant the DCO for the A303 Stonehenge Tunnel in July 2021[1](which was re-made in July 2023) and to refuse the DCO for the Aquind interconnector[2]in January 2023, as well as the unsuccessful ones, for example the judicial reviews of the DCOs for the Sizewell C nuclear generating station in Suffolk[3]earlier this year and for the East Anglia One North ('EA1N') and East Anglia Two ('EA2') offshore wind farms[4] in 2022.

Examination of these judgments provides a useful reminder for practitioners as to how DCO applications should be prepared (noting that these issues can be 'baked in' long before the application is prepared, and hence these matters should form part of project strategy from an early stage), so they are robust and able to withstand judicial scrutiny. DCO promoters have a large degree of control over the success of their project, and whilst these cases also highlight the inability to completely mitigate all risk because ultimately how applications are considered by the Examining Authority and decided are outside an applicant's control, they demonstrate that there is a great deal

that can be done to inform and guide the decision-making process so that all the legal requirements and considerations are satisfied in the correct way.

In this Insight we consider the recent judgments from the judicial review claims referred to above and draw out some points to assist applicants and their advisors in the preparation of DCO applications.

METHODICAL AND METICULOUS APPROACH

Applicants should ensure that project and consultant teams have the expertise and resources to implement a methodical and meticulous approach to the preparation of DCO applications (including the work associated with scheme evolution and consultation, long before application preparation). This is particularly the case with assessments of alternatives, as required under the Infrastructure Planning (Environmental Impact Assessment) Regulations 2017 and the Habitats Regulations[5]which should be tailored according to the specific facts and circumstances of the proposal, as was demonstrated in both the Stonehenge and Aquind judgments.

As it is the application documents that inform and guide the decision-making process they must be robustly prepared and able to withstand legal scrutiny should the resulting decision be subjected to judicial review.

PROFESSIONAL JUDGMENT

Professional judgment must be applied in the preparation of the application. Applicants and their advisors must be alert to considerations that are ‘obviously material’ and ensure that such considerations are dealt with adequately in the application, notwithstanding that policy may suggest otherwise because policy is easily trumped by law.

This point is highlighted in the Stonehenge decision which held that the Examining Authority and the Secretary of State had failed to assess the relative merits of the scheme and its alternatives, particularly the heritage implications. The NPS for National Networks suggested that a reconsideration of the alternative options was not necessary if a route had already been appraised for RIS (Road Investment Strategy) purposes (which the DCO project route had). However, because the RIS was not a planning document it had did not assess the wider heritage implications of the alternative options and as a result, and particularly because third parties had raised these issues and the Examining Authority had addressed them in its Report, the Judge held that the Secretary of State was irrational not to have properly assessed the alternative options, which were an 'obviously material consideration’.

LEGALLY SUFFICIENT

It is vital that a DCO is prepared so that the decision-maker can apply the correct legal tests and discharge his legal duties within the framework of the Planning Act 2008. These judgments, particularly the Stonehenge challenge, show how if the Secretary of State does not have before him 'legally sufficient material', he is unable to carry out the requisite planning balance in reaching his decision (in this case it was the heritage balancing exercise required by the relevant NPS and s104 Planning Act 2008 that could not be carried out). This contrasts with the EA1N and EA2 windfarm challenge where ample evidence was provided in the DCO application (in this case on noise and flood risks) to show there was no error in the Secretary of State's approach and that his conclusions were not irrational in this respect.

OPTIONEERING AND ALTERNATIVES

The approach to alternatives set out in the relevant NPS should be strictly followed. This is likely to require a thorough and robust optioneering process, such as optioneering workshops where the issues explored can be considered for each stage of the scheme, such as flood risk and heritage impacts, with appropriate weight applied to them and professional judgement exercised. The process should be well documented to ensure there is evidence for all the decisions made.

The challenge to the EA1N and EA2 offshore wind farm was dismissed in part because, in relation to the flood risks, there was ample evidence in the assessment of surface water flood risk, such that it was held the Secretary of State had not erred in his approach and his conclusion was not irrational.

CUMULATIVE ASSESSMENT OF ASSOCIATED WORKS

Cumulative assessments of the environmental effects of a proposed scheme must be carried out in accordance with the legal requirements and the PINS advice note, which includes the careful consideration of the wider works associated with the DCO project. The approach taken to these assessments in the context of further developments coming forward was found to be rational in both the Sizewell C and EA1N and EA2 challenges.

NON-OPPOSITION CLAUSES

The unsuccessful challenge to the decision to grant the DCO for the EA1N and EA2 offshore windfarm also included an important finding on so called 'gagging clauses', commonly used in planning proceedings whereby objectors agree not to object to a proposed scheme as part of a legal agreement.

This claim tested the lawfulness of heads of terms for land option agreements entered into with land owners in parallel to the compulsory acquisition of these interests through the DCO, which contained clauses not to object to the application for the scheme.

The judge found that such agreements are not unlawful and that it 'is normal for concluded option agreements to contain a non-opposition clause'. As a dissatisfied party could refuse to contract and maintain its opposition to the project, there was no procedural unfairness found. In this case, because the alleged non-gagging clauses were contained in Heads of Terms for option agreements they were not legally binding and were stated as being subject to contract, so the parties were not stopped from making representations to the DCO application.

COMMENT

Scrutiny of the DCO decision-making process by way of judicial review is a trend that is unlikely to abate. Applicants and their advisors must always be on guard to ensure DCO applications (and the consultation and scheme optioneering processes upon which the application is ultimately based), have no legal defects and are compiled in such a way that supports the Examining Authority and the Secretary of State in discharging their legal duties. Drawing on past DCO judicial review cases can assist applicants in avoiding pitfalls but also provide confidence that accepted practices are lawful.

FOOTNOTES

[1] The A303 (Amesbury to Berwick Down) Development Consent Order 2020 was successfully challenged in *R(Save Stonehenge Heritage Site Limited v Secretary of State for Transport & others* [2021] EWHC 2161 (Admin)

[2] The refusal by the Secretary of State to grant the DCO for the Aquind Interconnector was successfully challenged in *R (on the application of AQUIND Limited) v Secretary of State for BEIS and others* [2023] EWHC 98 (Admin)

[3] The challenge to the Sizewell C (Nuclear Generating Station) Order 2022 was dismissed in *R (Together Against Sizewell C Limited) v Secretary of State for Energy Security and Net Zero* [2023] EWHC 1526 (Admin)

[4] The challenge to the EA1N Order 2022 and the EA2 Order 2022 was dismissed in *R. (on the application of Substation Action Save East Suffolk Ltd) v Secretary of State for Business, Energy and Industrial Strategy* [2022] EWHC 3177 (Admin)

[5] The Conservation of Habitats and Species Regulations 2017 (as amended by The Conservation of Habitats and Species (Amendment) (EU Exit) Regulations 2019) and the Conservation of Offshore Marine Habitats and Species Regulations 2017 together referred to as the 'Habitats Regulations' in this Insight.

RELATED CAPABILITIES

- Planning & Zoning

MEET THE TEAM

Clare Eccles

London

clare.eccles@bclplaw.com
+44 (0) 20 3400 4267

James Parker

London

james.parker@bclplaw.com
+44 (0) 20 3400 4132