

Insights

DATA CENTRES: “RIGHT TO BUILD” IS NOT “READY TO BUILD”

Aug 10, 2026

Summary

This article considers data centre development projects in England and focuses on the treatment of these milestones in land, development, funding and occupational documents.

The issue

A site can have planning permission and a signed grid connection agreement yet still be years away from construction. A completed building can also remain incapable of supporting customer load because energisation, commissioning, testing or operational handover is outstanding.

That creates three distinct questions. Does the project company have the legal entitlement to carry out the development? Is the project sufficiently defined, contracted, funded and mobilised to start construction? Is the completed facility, building, data hall or capacity block ready for its intended use?

The labels commonly used for those questions are Right to Build, Ready to Build (RTB) and Ready for Service (RFS). None has a settled legal meaning. If a payment, acquisition, funding obligation, notice to proceed, lease commitment or long-stop regime depends on one of them, the relevant document must define the milestone, the evidence required to establish it and the consequences of failure.

Whilst the use of imprecise terminology is an issue. The real question is which development and delivery risks have been resolved, which remain outstanding and which party bears them?

Three milestones, three different questions

Milestone	Core question	Typical evidence	Typical commercial

			consequence
Right to build	Can the agreed development lawfully be implemented?	Planning, land rights, power rights and commencement approvals.	Land acquisition, entitlement payment or recognition of development value.
Ready to build	Can construction properly commence on the agreed commercial and technical basis?	Design, contracts, procurement, funding, insurance and mobilisation.	Notice to proceed, construction funding, development fee or commencement obligation.
Ready for service	Can the defined delivery unit be used for its intended operational purpose?	Energisation, commissioning, testing, handover and operational approvals.	Rent commencement, customer acceptance, service commencement or release of payment or security.

The parties should also identify the relevant unit of delivery. Right to Build may apply to the site or a development phase. RTB may apply to a building or package of works. RFS may apply to a data hall, a defined number of megawatts or a customer capacity block. The milestone should not be assumed to apply to the whole campus.

Right to Build: the legal entitlement to implement the development

Right to Build should mean that the project company holds the implementable planning consent, land rights, power position and other approvals required lawfully to carry out the agreed development. “Entitled to Build” may be used instead, but the transaction documents should select one term and use it consistently.

The concept is narrower than RTB. It should not ordinarily require detailed construction design, an executed building contract or committed construction funding. Those matters concern readiness to proceed, rather than the legal quality of the development opportunity.

Planning and commencement

Planning permission is central to the Right to Build test, but the grant of permission is not conclusive. The permission must authorise the proposed data centre and the infrastructure required to operate it. Depending on the project, which may include substations, transformers, cable routes, standby generation, fuel storage, cooling equipment, drainage, access, security works, ecological mitigation and biodiversity net gain.

The permitted building envelope, use, power parameters and phasing must support the investment case. A valid permission for a smaller or materially different scheme may not provide the development entitlement required by the transaction.

Outline permission may establish the acceptability of development in principle without providing an immediate right to carry it out. If scale, layout, appearance, access or landscaping remain reserved, the relevant approvals may be required before the project can properly be described as having a Right to Build. If outline permission is accepted for the milestone, the documents should identify what remains outstanding and why it does not prevent achievement.

Planning conditions should be reviewed by their legal effect, not their heading. Conditions dealing with drainage, ecology, construction traffic, contamination, archaeology, noise, access or environmental management may prevent lawful commencement even if they are not labelled as pre-commencement conditions.

Planning obligations require the same analysis. The relevant section 106 agreement may have been completed, but payments, notices, bonds, employment plans or infrastructure obligations may remain to be satisfied. The contractual test should identify the obligations that must have been performed, rather than asking only whether the agreement has been executed.

The Community Infrastructure Levy position should also be established, including liability and assumption notices, commencement notices, available reliefs, the applicable payment timetable and the consequences of non-compliance. Commencement may trigger a substantial liability or the loss of relief.

Where statutory biodiversity net gain applies, the Biodiversity Gain Plan will generally need approval before development begins. Any required off-site units, statutory credits, conservation covenants and habitat management arrangements should also be addressed.

Permitted development rights may be available, particularly for some cable works, but their availability and scope should be verified rather than assumed. The documents should allocate the risk that express planning permission or another approval is required.

Land rights and statutory approvals

Control of the main development site is not sufficient if the project depends on rights over other land. The project company may require:

- construction, permanent and abnormal load access;
- substation, cable and utility corridor rights to and from the connection point;
- drainage, sewer and water rights;
- rights to install, inspect, maintain, replace and upgrade fibre and other infrastructure;
- temporary construction compounds and working areas; and
- visibility splays and rights required by statutory undertakers or adopting authorities.

Those rights should last for the required period, bind successors, accommodate the intended capacity and phasing, permit access for construction and maintenance, and be capable of transfer and funder security.

The same principle applies to statutory permits. Standby generating plant may engage environmental permitting regimes. Other projects may require water, discharge, flood risk, protected species, trade effluent, fuel storage or other approvals. A Right to Build has not been secured if an approval required for lawful commencement remains outstanding and could materially affect design, capacity, cost or programme.

The documents should state the Building Regulations position required at the milestone. A general reference to compliance may be insufficient. The test may need to identify the relevant application, approval, building control appointment, fire safety submission or other project-specific requirement.

Power as part of the Right to Build

The power position is one component of the Right to Build, not necessarily a separate milestone. Its content must be defined for the project.

“Powered land” can describe materially different positions. A site may have an accepted connection offer, an executed connection agreement, reserved capacity, a completed physical connection or an energised supply. Each carries a different risk profile. A headline capacity figure is not enough.

The review of this component should address three areas.

1. Capacity and conditionality. What capacity has been contracted, what conditions apply, if and how capacity ramps over time, and whether the figure refers to import capacity, utility supply or critical IT load.
2. Delivery, phasing and network works. When capacity will be connected and energised, what works remain, who must design, fund and construct them, whether any works costs are at large

and how those costs will crystallise, which payments and securities are due, and which planning, expenditure or construction milestones could affect the allocation.

3. Security, transferability and access. What suspension and termination rights the network operator holds, who owns the connection rights, whether assignment, novation or change of control consent is required, whether funders can take security or exercise step-in rights, and whether substation, cable, access and maintenance rights are in place.

Transfer and enforcement risk

A connection right may not support the transaction structure if it cannot be transferred with the site or project company, made available following funder enforcement or preserved through a change of control. Assignment, novation and consent requirements should be established before a milestone triggers an acquisition, investment or funding obligation.

Ready to Build: closing the delivery gaps

RTB asks whether a project with the Right to Build is also sufficiently defined, approved, contracted, funded and mobilised to start construction on the agreed commercial and technical basis. It does not mean that the facility is energised, commissioned or available for customer use. Those matters belong to RFS.

The content of RTB will depend on the transaction and delivery model. A landowner may focus on planning and power. A developer may require completed design, an agreed price and an executable building contract. An investor may require committed funding and a complete security package. An operator or tenant may require an approved technical solution, a credible power programme and agreed testing criteria. The documents must reconcile those expectations.

Typical RTB requirements

A project-specific RTB test may address the following matters:

- Planning and consents. An implementable planning consent, relevant reserved matters approvals, discharge of conditions required for commencement, performance of relevant planning obligations, and the permits and Building Regulations position required to start the works.
- Land and access. Control of the site and the off-site rights needed for construction, permanent access, utilities, temporary working areas and abnormal loads.
- Power and utilities. A binding connection arrangement for the agreed capacity, a credible delivery programme, payment or provision of charges and securities, and sufficiently developed water, drainage, cooling and fibre arrangements.

- Design and interfaces. A design developed sufficiently to start construction, an agreed specification and employer's requirements, allocated design responsibility, and defined interfaces between the developer's works and operator or tenant fit-out.
- Contracting and procurement. An executed building contract, appointed professional team, agreed construction programme and cost plan, collateral warranties or third-party rights, and suitable arrangements for critical long-lead equipment.
- Funding and mobilisation. Satisfaction of construction funding conditions, required insurance, possession and mobilisation arrangements, construction phase health and safety documents, and authority to issue the notice to proceed.

Contestable works, non-contestable works and adoption

Delivery risk should be assessed by reference to the division between contestable and non-contestable works. Contestable works may be capable of delivery by an appropriately accredited provider. Non-contestable works remain under the control of the relevant network operator and may be dependent on its programme, resources and internal approvals.

Assets intended for adoption may also be subject to network operator design standards, inspection, testing, documentation and acceptance requirements. The documents should identify the responsibility for each category of work, the adoption process and the programme dependencies. They should also allocate the risk of rejected assets, departures from adoption standards and remedial work required before acceptance, connection or energisation.

Connection, adoption, energisation and operational availability should not be treated as interchangeable. They may occur at different times and may belong to different contractual milestones.

Critical equipment and interim solutions

Transformers, switchgear and other critical equipment can determine the power delivery programme. For long-lead items, the RTB requirements may need to identify whether manufacturing slots have been secured, deposits paid, technical specifications approved, title or vesting arrangements agreed, and inspection, testing, storage and warranty protections put in place.

The documents should also allocate the cost and programme consequences if the power solution or network operator requirements change after an order has been placed.

If temporary generation or another interim power solution is permitted at Completion or RFS, the documents should specify its capacity, resilience, permitted duration, fuel arrangements, emissions and permitting position, operating cost, testing requirements and transition to

permanent power. “Power available” is not a sufficient test without identifying the source, quality and duration of supply.

The answers determine whether the project has secured a deliverable power entitlement or remains exposed to material grid risk.

Utilities and technical interfaces

Utility readiness should be assessed by reference to capacity, resilience, quality, connection point, delivery date and operating cost. A contract or route may exist without being sufficient for the required facility.

Where resilience depends on diverse fibre connectivity, the documents should distinguish between multiple services and genuine physical route diversity. Separate contracts or building entry points do not provide resilience if routes share ducts, chambers, bridges or another common point of failure.

For a powered shell, pre-let or build-to-suit project, the boundary between the developer’s works and the operator’s or tenant’s fit-out must be clear. Structure, electrical distribution, cooling, controls, security, fibre entry and commissioning must function as an integrated system. Unclear interfaces result in duplicated scope, omitted works and completed facilities that do not satisfy the required performance criteria.

Completion is not RFS

If the transaction also uses Completion, that term should be defined by reference to the relevant contract. It may mean practical completion of the building contract works, completion of the developer’s works under a development agreement or satisfaction of a bespoke completion test. Those concepts should not be assumed to be identical.

Completion and RFS may occur at different times. A facility may be complete for construction purposes while utility energisation, integrated systems testing, defects correction, operator training or customer acceptance remains outstanding. Equally, the parties may agree that RFS can occur despite limited defects that do not affect safety, resilience, capacity or operation.

Any requirement relating to assets intended for adoption should be stated expressly in the Completion test. Adoption, connection and energisation should not be folded into Completion unless that result is intended.

Ready for Service: operational readiness

RFS marks the point at which the defined facility, building, data hall or capacity block is available for its intended use. Depending on the delivery model, the RFS test may address:

- permanent power or a contractually acceptable interim solution;
- demonstration of the agreed utility and critical IT capacity;
- commissioning and integrated systems testing;
- operation of life safety and statutory systems;
- remediation of defects that materially affect service, resilience or safety;
- availability of the required fibre and telecommunications infrastructure;
- commissioned cooling systems capable of supporting the required load and resilience;
- operational water supply, storage, treatment and discharge systems;
- delivery of as-built information, operating manuals and asset data;
- approved operating, maintenance and emergency procedures;
- staff training and operational handover;
- customer or tenant acceptance testing; and
- all permits required for operation.

References to commissioning levels such as L1 to L5 or L0 to L6 should be used only if the agreement defines their content. Industry terminology varies between operators, commissioning agents and customer standards.

Documenting the milestones

Heads of terms and preliminary documents

The first substantive use of RTB often appears in a letter of intent or heads of terms. The label attached to the preliminary document is less important than the commercial position it records.

The document should state whether Right to Build and RTB are separate milestones, what each is intended to measure, which party is responsible for achieving it and what commercial consequence follows. It should identify the target date, long-stop date, permitted extensions and the process for determining achievement.

It should also address expenditure before RTB, including planning costs, grid payments, design work and long-lead procurement. Authority to incur early expenditure does not establish that RTB has occurred. The parties should agree who may approve the expenditure, any monetary limit and

who bears committed or abortive costs if the definitive documents are not signed or the milestone is not achieved.

References to “customary RTB requirements,” “market-standard RTB” or RTB to a party’s satisfaction should be avoided. Projects differ too widely in scale, power structure, technical solution and delivery model for those expressions to provide a reliable test.

The definitive agreement and RTB schedule

The agreement for lease or development agreement should treat RTB as a gateway into construction. It should preserve the distinction between the unconditional date, Right to Build, RTB, Completion and RFS.

A detailed schedule should identify, for each requirement:

- responsibility for performance;
- the required deliverable and objective test;
- evidence to be supplied;
- any required third-party approval;
- the target date and long-stop date;
- whether waiver is permitted;
- any permitted exception; and
- the consequence of delay or non-compliance.

The schedule should align with the development programme, responsibility matrix, employer’s requirements, grid documents, funding conditions and building contract. If those documents use different tests, the milestone may become impossible to certify or may be certified before the project is genuinely capable of proceeding.

Evidence, certification and disputes

Where the milestone triggers a material payment or obligation, certification should not depend solely on a developer certificate. Different workstreams may require different expertise. A monitoring surveyor may confirm receipt of documents but may not be qualified to determine whether a grid agreement provides a sufficiently secure capacity entitlement.

The agreement should state the certifier’s remit, the evidence to be reviewed, whether the certifier determines compliance or confirms receipt, whether a certificate may identify agreed exceptions,

and whether certification is conclusive or subject to manifest error. Technical disputes may be suitable for expert determination, while questions of contractual interpretation may require a different process.

Examples of evidence include planning decisions and condition discharge notices, executed easements and wayleaves, connection agreements and payment confirmations, construction contracts and purchase orders, funding confirmations, insurance certificates and the notice-to-proceed package.

Approval rights and changes

Approval rights should identify the documents requiring approval, the grounds on which approval may be withheld, the response period and the effect of silence. Approval should test compliance with agreed requirements. It should not permit a counterparty to introduce new requirements without accepting the resulting cost and programme effects.

Changes after RTB should pass through a formal procedure dealing with additional cost, extensions of time, abortive work, power and cooling consequences, planning requirements, procurement delay and revised testing.

Failure, waiver and permitted exceptions

Failure to achieve RTB by the target date need not result in immediate termination. The appropriate response depends on the cause and extent of the failure. Defined extensions may apply for planning, grid, authority, change or counterparty delay. After the long-stop date, remedies may include termination, step-in, compulsory transfer, price adjustment or continuation at a reduced capacity.

An outstanding matter should prevent achievement if it materially affects lawful commencement, safety, capacity, resilience, cost, programme, fundability or the ability to achieve RFS by the required date.

Any permitted exception should identify the responsible party, remediation date, estimated cost, security or retention, effect on the programme and consequence of failure. A general reference to minor outstanding matters provides little protection.

Waiver should be express and informed. The waiving party should receive sufficient information about the cost, programme and operational effect of accepting the outstanding matter. A requirement should not ordinarily be waived if its absence prevents lawful commencement, requires material redesign, reduces agreed capacity, places connection rights at risk or undermines construction funding.

Phased projects and shared infrastructure

Campus projects may achieve Right to Build, RTB, Completion and RFS in stages (or phases). The documents should therefore state whether there can be phase RTB, partial Completion, phased energisation or capacity-block RFS.

Shared infrastructure requires particular attention. A first building may be operational while later campus works continue. Construction of later phases should not interfere with the access, security, resilience, cooling, fibre or power arrangements serving an operational phase. The documents should contain appropriate interface, cooperation and non-interference obligations.

Five questions for every transaction

1. What precisely must have been achieved?
2. To which site, phase, building, data hall or capacity block does the milestone apply?
3. What objective evidence proves that it has been achieved?
4. Who certifies achievement, and how are disputes resolved?
5. What happens if a requirement is delayed, waived or remains outstanding?

Practical takeaway

Right to Build, RTB and RFS address different categories of risk. Treating them as interchangeable, or leaving any of them undefined, creates uncertainty about what has been achieved, which risks remain and what the parties must do next.

The transaction documents should define the requirements, evidence, certification process and commercial consequence for each milestone. They should also identify the relevant unit of delivery and deal expressly with phased achievement, shared infrastructure and permitted exceptions.

The framework should be established in the heads of terms and carried through consistently into the development programme, grid documents, building contract, funding conditions and occupational arrangements. That alignment is the best protection against payment, completion or operational obligations arising before the project is capable of delivering the outcome for which the parties contracted.

Related Capabilities

- Data Centers

Meet The Team



Kenneth Addly

Of Counsel, London

kenneth.addly@bclplaw.com

[+44 \(0\) 20 3400 4846](tel:+442034004846)



Kimberly Roberts

Partner, London

kimberly.roberts@bclplaw.com

[+44 \(0\) 20 3400 4627](tel:+442034004627)



Rachel Sheridan

Senior Associate, London

rachel.sheridan@bclplaw.com

[+44 \(0\) 20 3400 3654](tel:+442034003654)



Ollie Greaves

Senior Associate, London

ollie.greaves@bclplaw.com

+44 (0) 20 3400 3021

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.