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Insights

VARYING DEVELOPMENT CONSENT ORDERS – A HURDLE STILL BETTER AVOIDED THAN JUMPED?

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SUMMARY

This blog explores why the timescales and expense of amending a made DCO make it critical for promoters to consider their original applications very carefully.

CERTAINTY OF PROCESS

For the last seven years, the Planning Act system for consenting nationally significant infrastructure projects (NSIPs) has been promoted by Government as delivering not only certainty of outcome but also certainty of process. This is critical to keeping a project to budget and programme. This has been done by fast-tracking applications for development consent orders (DCOs). 43 of 45 applications have been consented. All have adhered to the six month statutory target for examinations. With limited exceptions, all have been decided in the six month statutory target for determination by the Secretary of State. However, the life of a project does not end on the making of the DCO.

THE INEVITABILITY OF CHANGE...

In many cases, years may pass between a scheme being "frozen" for pre-application consultation and subsequent implementation. In that time, there may have been all manner of commercial, technological or practical changes in circumstance that require amendments to the DCO granted. A promoter may even realise that a key technical element of the scheme has been omitted or needs to be changed. This is certainly not uncommon in the Town and Country Planning process. DCOs may contain scope for outline consent to be sought, with the approval of reserved matters later. Even that scope, however, is increasingly limited by restrictions to works or effects which were environmentally assessed before the application was submitted.

So, what happens to certainty of process when a DCO has to be changed? A DCO which can be varied without programme repercussions and daunting cost and risk, can be make or break for

delivery of any scheme.

A MECHANISM FOR APPROVING PLAN SUBSTITUTION IN THE DCO ITSELF

DCOs can allow a promoter to obtain approval to a change of plans from the local planning authority (LPA) under the terms of the DCO. There is more chance of this being acceptable where there are specific, environmentally assessed parameters to frame the LPA's decision. The scope for doing this otherwise, on any significant scale, is ever narrowing.

APPLY TO THE SECRETARY OF STATE FOR A "NON-MATERIAL" CHANGE

With applications being straightforward, this is the most appealing avenue for formal changes under the Planning Act. After a minimum 28 day period of consultation the Secretary of State can just make a decision. And therein lies the rub. There is no statutory timescale. So far, only three "non-material" change applications have been made. All have been approved, with minimal objections. And yet none can really be described as "fast track" in the context of the fairly minimal changes proposed:

- In early 2015, EDF applied to vary its 2013 DCO for the Hinkley Point C Nuclear Generating Station. Part of a post-Fukushima design optimisation review, changes were needed to servicing buildings (some new; some smaller or larger). Only six representations were made during consultation. None were objections. The Secretary of State agreed that there were no materially different visual impacts. The application was granted in September 2015, after around eight months.

- In July 2015, four months after having applied for a change, Galloper Wind Farm was able to amend its 2013 DCO for an offshore wind turbine generating station in the North Sea. The diameter of the monopole foundation to support the wind farm needed to be increased from a maximum of 7.0 to 7.5 metres. Otherwise geotechnical and turbine design limits could not be met. Again, there was no real objection from key consultees.

- By approval in March 2015 it had taken five months for Lancashire County Council to obtain a DCO amendment to move a slip road to the Torrisholme to M6 link road by just 12 metres, unopposed by any consultees and to avoid having to divert a gas pipeline.

All would have required a fair amount of upfront engineering and environmental work, as well as significant engagement with key statutory consultees. There also always remains the risk that there is no consistent line on what is "non-material", though it is clear that there can be no compulsory acquisition, environmental assessment or habitats angle. This means it is not impossible that the

Secretary of State could decide at the end of his determination that the application should go through the “material” changes process instead, adding delay.

APPLY TO THE SECRETARY OF STATE FOR A "MATERIAL" CHANGE

Nobody has yet sought a "material" change. Though now faster and potentially less onerous following changes made to Regulations in July 2015, the process may involve a form of the original DCO examination and determination process, albeit reduced to a statutory target of eight months overall plus, of course, time preparing the application and arranging the examination, which could mean an application takes almost a year from being submitted.

APPLY TO THE LPA FOR PLANNING PERMISSION

This option is not open to parts of a project which are NSIPs, which must be subject to the DCO regime. It is of course dependent on a favourable LPA (or willingness to appeal via a public inquiry). In any case, not all of the DCO powers may travel well to works now outside of the original DCO, so careful thought is needed.

GETTING IT RIGHT WHERE YOU CAN

None of the above is appetising for a promoter weighing up risk, time and cost. Prevention is always better than cure. Sometimes change is unavoidable. Nevertheless, truism though it sounds, the original application should reflect the scheme which the promoter and funders will want built out. Maintenance and operational personnel should be involved at the earliest stages. It may even be worth looking at bringing forward an element of detailed design. Application materials have to be right first time – "fixing things on the go" is often impossible during the system’s (so far) unaltered six-month examinations. Promoters with a culture of encouraging constructive challenge by internal stakeholders, before applications are submitted, and with experienced planning, environmental and legal teams increase the chances of avoiding, what remains, a hurdle better avoided than jumped.

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MEET THE TEAM

James Parker

London

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

Sheridan Treger

London

sheridan.treger@bclplaw.com
+44 (0) 20 3400 3642
