BDB PITMANS

DLUHC
Infrastructure Planning
Fry Building,
2 Marsham Street,
London,
SW1P 4DF

InfrastructurePlanning@communities.gov.uk

Our Ref
MXC/X35

Date
17 December 2021

By Email

Dear Sirs

Response to Consultation on DCO Process

BDB Pitmans LLP is a law firm that has a market leading practice in advising on the DCO regime. We have been involved with the regime since its inception and have advised on numerous DCO promotions, mostly for promoters but also for other affected parties.

We have always taken a close interest in the regime and its evolution, extending beyond work for our clients to contributing thought leadership and trying to make the regime more effective.

The firm conceived and established the National Infrastructure Planning Association (NIPA) and we are active members of it. Angus Walker, one of our partners in this practice area, served two terms as the elected chairman of NIPA and he has maintained a blog on the regime since 2009. Members of our Planning and Infrastructure team regularly speak at seminars and conferences on many aspects of the regime.

Generally, we take the view that the regime has worked well and fulfilled one of its primary objectives of speeding up decision making, particularly on large schemes and in providing more certainty about the timing of decisions, even if a number of recent decisions have been delayed.

We also take the view that the regime is more inclusive than the broadly similar TWAO scheme, as it is easier for non-professional participants to take part in a DCO examination than a more formal TWAO public inquiry. The use of virtual hearings has also made it easier for the public and others to contribute to the examination of an application.

With reference to the questions put by the Department, we offer the following comments within the 300 word limit.

3. What could government, its arms-length bodies and other statutory bodies do to accelerate the speed at which NSIP applications can be prepared and more generally to enhance the quality of submissions?

As the process is substantially front loaded, there is limited scope for cutting down the pre-application preparation period, particularly as most prospective applicants wish to prepare a thorough and robust submission balancing the need to ensure expeditious delivery.

It is helpful that Planning Inspectorate will comment, at least broadly, on draft documents and it would be helpful for the Inspectorate always to explain, in so far as appropriate and in as much detail as practicable, how documents should be changed to make them acceptable.

Applications should only be refused acceptance if they are clearly deficient and not on account of matters that could, within reason, be addressed before or during the examination. In this context, we suggest that paragraph 114 of the government's guidance on the pre-application process is amended to include reference to the Inspectorate considering whether a deficiency or unresolved matter could be addressed in the pre-examination period including prior to the start of a representation period notified under section 56 of the 2008 Act.

As regards applications meeting a satisfactory standard to be accepted, we appreciate that this will to some extent turn upon the characteristics of each case. However, we consider that there should be consistency and that applicants should be able to place considerable reliance on the amount and type of information that has been considered acceptable in other cases – in short, precedent or established practice. Otherwise it is very difficult for an applicant to know where to draw the line in terms of what documents to produce, bearing in mind particularly the costs and time involved in doing so. This is a matter that could helpfully be addressed in guidance for the benefit of all concerned.

We appreciate there are countervailing considerations on whether there should be a fixed statutory timescale for the pre-examination period. On the one hand, it would provide greater certainty but on the other some projects require a relatively longer pre-examination period to resolve particular matters. Nonetheless, there should be a presumption, established in guidance, that there will be a minimum 3 month pre-examination period. Such a presumption would allow for consideration of whether a deficiency could be resolved in the pre-examination period in line with our suggestion above.

We have found a mixed picture as regards engagement with statutory bodies involved with DCO applications. Funding is clearly an issue in some cases and this has prevented or least contributed to some being unable to engage constructively to a satisfactory extent.

The process for gaining rights of entry to land under section 53 of the 2008 Act could be improved, not least by applications being decided more quickly, so that the procedure is more useful. At present there is often insufficient time to wait for a decision from the Secretary of State, who is under no time limit to provide one. In similar vein the ability to enter and survey land under s172 of the Housing and Planning Act 2016 should be more widely available and not just to "acquiring authorities", although we appreciate that appropriate safeguards would be needed. However s172 would be less relevant if the section 53 process operated more efficiently in practice.

4. Following submission, are there any aspects of the examination and decision process which might be enhanced, and how might these be improved?

We consider that it would be better to revert to a single stage preliminary meeting, or at least minimise the time between two preliminary meetings, unless very exceptional circumstances apply.

Also, with timing in mind, we suggest that the Examining Authority (ExA) could, for smaller schemes, state at the outset (perhaps in a rule 6 letter) that the examination will be concluded within a shorter period than the statutory six months one. Exceptionally, for very large projects, there could be a process whereby the maximum length of the examination, being over six months, is stipulated at the outset. For the very largest schemes six months may well be insufficient to examine the proposal with sufficient thoroughness and without putting an unreasonable burden on participants and applicants in particular, who are required to respond to most of the ExA's questions, often in a very short period of time. An applicant could have the option of making an application to the Planning Inspectorate or the ExA accordingly for either a shorter or longer examination than the standard length.

In the examination itself, it is quite often the case that written responses about a particular issue become repetitive on account of the invitation for all parties to respond to all submissions. The ExA could at an appropriate point close down an issue when satisfied that they have sufficient information for their purposes. Whilst the ExA provides a 'preliminary list' of matters to be examined, this could helpfully be updated, say, 3 months into the examination phase.

We consider that virtual hearings have been very successful and should be retained in part for all examinations. Not least they provide greater accessibility for the general public.

Detailed hearing agendas, provided at the earliest opportunity, are very helpful for all participants and much appreciated particularly by applicants, who have the most to deal with in an examination. They allow for everyone to be better prepared and for the proceedings to be better focused.

Lists of actions arising from a hearing are commonly provided by ExAs and are much appreciated by participants.

As regards decisions, we understand that sometimes the Secretary of State will need more time (and may need more information) to make a robust decision but this should be exceptional, to retain confidence in the process and one of its primary benefits, namely certainty over timing. Moreover the cost of delays to applicants can often be very substantial.

Where a decision is delayed there could helpfully be more certainty about what will happen in the extended period and when, so that all parties are clear. Such a process could be the subject of specific obligations upon the Secretary of State or at least guidance as to the steps that will or are likely to follow from a delay.

Another solution might be to create a requirement that, two months following the provision of the ExA's report, the Secretary of State must consider whether any queries ought to be raised at that point so that promoters and interested parties can comment on a matter before the three month period expires. This might obviate the need for an extension.

5. Where a development consent order has been made, what impediments are there to physically implementing a project which could be removed?

A large number of nationally significant infrastructure projects have interfaces with third party infrastructure. Following the making of a DCO there is often a delay in agreeing the transfer of powers granted under a DCO to third parties to carry out works (e.g., statutory undertakers who wish to carry out works to their own apparatus). The ability to transfer powers to well established utility undertakers, highway authorities, port authorities etc., is found in many DCOs but there is an inconsistency of approach across different departments, and promoters are often asked to justify an approach for a particular project notwithstanding the "in principle" concern which applies across any DCO project.

Moreover, there is a divergence in approach in dealing with how rights which are proposed to be compulsorily acquired are transferred or vested in statutory undertakers. The Compulsory Purchase (Vesting Declaration) Act 1981 could helpfully be amended to ensure that there is no impediment to directly vesting land and rights in third parties which are intended to have the benefit of particular land or rights. Where sections 131 and 132 of the 2008 Act apply (i.e., to special category land), "replacement land" is often automatically vested in a third party (upon which see further, below in response to question 10). The position of a third party, or someone who is anticipated to have the benefit of a private means of access, is no different.

6. How might digitalisation support the wider improvements to the regime, for example are there any specific aspects that you feel could benefit from digital enhancements

We have found all electronic applications to be very helpful. There is no need for hard copies of any documents to be provided, other than exceptionally. The on line digital examination libraries are very helpful indeed. They would be even more so with a back button taking the user back to the link to the document opened.

7. What issues are affecting current NSIPs that would benefit from enhanced cross-government co-ordination including government departments and arms-length bodies

One particular area which merits further consideration is the alignment between environmental assessment requirements and tools, with government policies (e.g. the Transport Decarbonisation Plan, the Net Zero Strategy, and the Energy White Paper). The latter set ambitious targets to ensure that the net zero target is met, whilst the former set requirements for ensuring a robust environmental assessment process. This often leads to a misalignment in assumptions which should be used. Co-ordination and/or agreement, on how the two work together, provided in guidance, would be helpful.

8. Does the NSIP regime successfully interact with other consenting and regulatory processes and the wider context within which infrastructure projects operate?

Generally yes, in that applicants take the necessary steps to get the consents they need in addition to the DCO and we are not aware of cases in which projects have been thwarted by a failure to get an additional consent.

However, given the time and expense involved in promoting a DCO application, it should as far as possible be a one stop shop. The list of consents prescribed under section 150 of the 2008 Act should be re-reviewed accordingly.

On occasion, uncertainty arises on the relationship between a DCO and deemed licences included as part of the Order. For example, arbitration provisions or provisions providing savings for specified parties in the main body of the Order can be wrongly extended to the functions governed by the deemed licence. For example, arbitration provisions could be interpreted as applying to the consenting processes outlined in the deemed licence, which would be incorrect. This is not readily understood by ExAs.

Moreover the examination by the ExA can pre-empt and wrongly anticipate the later, proper exercise of functions by other regulators when detailed consent or licences are sought.

9. Are there areas where limits in the capacity or capability of NSIP applicants, interested parties and other participants are resulting in either delays or adversely affecting outcomes?

It is difficult to generalise but have found that in some cases some agencies of Government and sometimes local authorities have not been able to participate effectively or assist the applicant appropriately on account of funding issues. We appreciate of course that this is an issue that goes well beyond the scope of this consultation.

10. Is there anything else you think we should be investigating or considering as part of our end-to-end operational review of the NSIP process?

Yes. There are some elements that in our opinion would benefit from a review. In brief:

- The somewhat archaic provisions regarding replacement land (which we appreciate derives from other legislation) and which involve, in effect, imposing land ownership on parties that might not want it. Special category land should be the subject of robust protection but there should be greater flexibility to justify a loss on the basis of the significant benefits of a scheme.

- The inability to compulsorily purchase crown land. Why should this be? Perhaps there should be an additional process before crown land is subject to compulsory purchase powers (there is a broadly similar process in respect of statutory undertakers' land), but a prohibition of compulsory acquisition of crown land is not warranted and puts the crown in an unfairly advantageous position in land negotiations.

- A review of the need for special parliamentary procedure (SPP) in DCO cases. Again, SPP derives from other legislation, but in our view for a promoter have to go through another lengthy and expensive review process having obtained a DCO (at considerable expense) is not justified.

- The Infrastructure Planning (Compulsory Acquisition) Regulations 2010 SI 2010/104 (as amended) should be reviewed particularly with regard to the requirement to notify land owners when a change request is made – the requirement should be confined to affected land owners only. Further, the need for newspaper notices in regulation 8, which turns upon whether the relevant owners have given their consent to the proposed inclusion of additional land, should be reviewed.

- Section 139 of the Planning Act 2008 ("Common land and rights of common") should be amended to permit the dis-application of section 38 of the Commons Act 2006 even where sections 131/132 of the Planning Act 2008 do not apply. The Transport and Works Act 1992 does not contain a restriction on disapplying parts of the Commons Act 2006, and the Hybrid Bills like HS2 often disapply parts of the Commons Act 2006 as well. For example, article four (12) of The London Underground (Northern Line Extension) Order 2014, made under the 1992 Act, disapplies the Commons Act 2006, and article five of the Transport for Greater Manchester (Light Rapid Transit System) (Trafford Park Extension) Order 2016, also made under the 1992 Act, stops future registrations of common land. Section 139 of the Planning Act 2008 creates an anomaly whereby a promoter taking temporary possession of common land under a DCO may need to obtain a consent under section 38 of the Commons Act (unless sections 131/132 apply). Why should a DCO be any different?

- There should be a reduction in the number of application documents required, some of which are rarely referred to in the examination of projects (e.g., river basin plans, statements of statutory nuisance). Similarly, there should be a consolidation of some documents (for example, a funding statement could be merged with the Statement of Reasons).

- Consideration should also be given in scoping opinions as to whether to be prescriptive about outline management plans to be provided. Whilst some projects are likely to require outline management plans, these could often form part of a Code of Construction Practice or an overarching construction management document. Scoping opinions should avoid being prescriptive about the form of commitments and mitigation measures, even if they suggest substantive matters should be managed.

- Whilst it is plainly appropriate for the promoter of each DCO project to justify provisions in its draft DCO; where the substance of the matter is endorsed, there should be an acknowledgement that drafting changes give rise to issues in the interpretation of provisions across DCO projects. The introduction of drafting changes could support the view that there is an intention to change the effect of a provision. This will also help reduce questions, and therefore time, at the examination phase of a project.

- There is scope in our view for re-introducing model provisions for a DCO, even if only on a limited basis to cover, for example, arbitration provisions. Such provisions are broadly similar but seldom the same across DCOs even they largely all serve the same function.

- A significant number of DCOs require Correction Orders because of errors in the drafting of the final order. Such orders also take a disproportionately long time to be made. In many cases, these errors are matters that could have been picked up with a thorough check by those familiar with the scheme – such as incorrect references to local features. Although the departmental lawyers who do check the final order are highly skilled, they are rarely familiar with the scheme itself. Thought should therefore be given to adopting the process followed by various other infrastructure orders, and enabling the promoters' lawyers to review the draft text after the decision has been made, but before the DCO itself is made, so that they can identify any technical errors of this nature.

Yours faithfully

BDB Pitmans LLP
T +44 (0)20 7783 3413
M +44 (0)7717 704234
E MarkCHALLIS@bdbpitmans.com