BRIEFING

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The Role of the Local Authority in the Development Consent Order Process

A Development Consent Order ("DCO") is a statutory instrument made, in this instance, under Part 5 of the Planning Act 2008, as amended by the Localism Act 2011. It is the requisite means of conferring powers for the construction, operation and maintenance of developments that meet the qualifying criteria for Nationally Significant Infrastructure Projects.

A local authority faced with a DCO application for a project within its administrative area has a specific role and particular responsibilities under the statutory consenting process, which it must fulfil regardless of whether or not it supports the scheme for which powers are being sought. This role can be resource-intensive for a cash-strapped local authority. However, the local authority's view carries weight with both developer and decision-maker, and it is possible to maintain an in-principle objection to a scheme, or to object to specific aspects of it, whilst nevertheless engaging fully with the developer and the process. Indeed, such engagement is essential to secure from the developer, on behalf of affected communities, appropriate changes to the proposals, concessions and/or community gains.

A host local authority will be engaged in all stages of the DCO process including:

- Liaising and sharing resources with other affected local authorities;
- Consultation on screening/scoping of the environmental impact assessment;
- Input into the content and methodology of the developer's public consultation exercise;
- Participating in consultation as a statutory consultee;
- Possible submission of an "Adequacy of Consultation" representation;
- Preparation and submission of a "Local Impact Report";
- Evidence planning and preparation of Statements of Common Ground;
- Participation in the examination process; and
- Monitoring and enforcement of requirements once a DCO is made.

Pre-application

First steps

The local authority will need to understand the proposed scheme and to determine whether it supports or objects to the principle of the development. All sorts of questions will arise. Are the objections limited to specific impacts that may, or may not, be capable of mitigation? How is the scheme likely to be received in the community? What would constitute a "win" from the local authority's viewpoint? To be truly effective, the response to a prospective application requires input from most disciplines within the authority including legal, planning, highways and pubic rights of way, education, community and cultural specialities, ecology and accountancy.

Liaison with other authorities affected by the proposals

It will often be the case that it is not only the "host" local authority that is affected by a proposal for an NSIP. Where more than one authority is involved, it makes sense to share resources and, so far as possible, to present a consistent case. It will usually be helpful to appoint a single officer or

core team responsible for managing the response to the application for all relevant local authorities, with clear channels of communication to relevant members.

It follows that it is also at this early stage when audit trails and governance arrangements need to be considered and delegations put in place to allow documents to be signed off, and decisions made, across authorities within the tight timescales that will inevitably follow as the examination process gets under way.

Specialist legal advice

It is likely to be cost effective to instruct a specialist lawyer as soon as possible to provide advice on every aspect of the local authority's response to an application. A professional, who does this every day of the week, will have the experience necessary to ensure that the authority's position and resources are protected and that it gets the best possible outcome.

Scoping of the Environmental Impact Assessment

The host local authority is a statutory consultee for the purposes of both screening (albeit unlikely in the context of nationally significant infrastructure) and determining the scope of the environmental impact assessment to be carried out by the developer. It will have a mere 28 days in which to respond to a consultation request from the Planning Inspectorate, meaning that it is important to enter into a dialogue with the developer well before this stage.

Evidence plan process

Evidence planning is a process by which a developer, local authority and other relevant organisations such as the Environment Agency and Natural England come together, possibly with an independent chair, to agree as much evidence as possible with a view to reducing the scope of the examination questions/hearings and focussing attention on issues where the evidence needs to be tested. This does not form part of the statutory regime, but is becoming standard good practice for DCO applications. The evidence plan process is not concerned with the merits of a scheme and there may well be fundamental disagreements between parties that cannot be resolved by continuing debate. Even so, the focussing of the evidence onto key issues can assist the Secretary of State to make the right decision. The evidence plan will often feed into a Statement of Common Ground.

Preparation of Statement of Community Consultation ("SoCC")

This is the host local authority's opportunity to shape the pre-application consultation process. The SoCC describes how the developer intends to consult with the public regarding its proposed scheme, including how the developer will publicise and consult on preliminary environmental information. A host authority has just 28 days in which to comment on the developer's draft SoCC. In most cases, therefore, the authority's input needs to commence well before the draft is formally submitted to it. A local authority will want to consider monitoring provisions to enable it to see, before the DCO application is submitted, how the consultation exercise described in the SoCC was carried out in practice and how feedback was taken into account. Further, the Planning Inspectorate will direct enquiries from the general public to the local authority so there needs to be a customer-facing team in place, familiar with both the detail of the scheme and content of the SoCC.

Statutory consultation

Developers have a statutory duty to consult all relevant local authorities on the scheme proposals generally. The authority's response must be made in the context of any relevant National Policy Statement and guidance, as these dictate which considerations are relevant and frame the scope of what a local authority may object to in a scheme. Consultation provides the opportunity to secure an appropriate suite of agreements with the developer such as a planning performance agreement, section 106 agreement and agreements for community enhancements and/or mitigation of adverse impacts of the scheme, possibly by means of an independently run Community Benefit Fund.

Importantly, and often overlooked, this is a key stage when the local authority can use its position to seek direct input into the content of the detailed provisions of the draft legislation (the DCO itself) that will authorise the construction and operation of the scheme, including powers to acquire and use land and rights in land and to carry out the works described in it. For example, the "requirements" in the DCO are akin to planning

conditions and a local authority has a stake in ensuring the requirements are appropriate and fit for purpose. Unlike planning permission, a DCO can override other, usual, statutory consenting regimes and the normal protection that the public has against nuisance. For this reason, a local authority may want to replace its usual powers by means of equivalent requirements or controls within the order (e.g. local authority consents for traffic regulation measures).

Application

Adequacy of consultation representation

A local authority will be invited to make an adequacy of consultation representation. This can make a difference as to whether an application for a DCO is accepted or rejected. If a local authority wants to make such a representation, it has 14 days to do so from the date of the invitation. The narrowness of this window highlights the need to include monitoring provisions in the SoCC because, if a local authority has concerns about the way the public consultation has been handled (including how community feedback has been taken into account by the developer), it will need to have started work on this document before the application for DCO is even submitted.

Relevant Representation

A local authority is automatically an "Interested Party" for the purposes of the examination process and is not required to put in a preliminary "relevant representation". Nevertheless, it is advisable to do so in order to make the Examining Authority aware of the local authority's position and to put its concerns or support on the Examining Authority's agenda.

Preliminary meeting and draft examination timetable

Attendance at the preliminary meeting is essential to get a say on the way the examination of an application is carried out (for example, to make the case for certain issue specific hearings).

Consideration of the Environmental Statement

The Environmental Statement ("ES") is frequently a source of material for challenging a proposed development and putting pressure on the developer. The local authority will want to be confident that the environmental impact assessment been carried out in accordance with the scope and methodology set out in the Scoping Opinion or agreements entered into by the developer with stakeholders such as the local authority and environmental bodies. There may be additional information required to ascertain particular impacts on the authority's administrative area.

Local Impact Report

Relevant local authorities will be invited to submit local impact reports (LIR) by a specific deadline. Both the Examining Authority and Secretary of State are required to have regard to its contents. The Planning Inspectorate advises local authorities to prioritise preparation of the LIP irrespective of whether it considers the development will have a positive or negative impact on its area. Where more than one local authority is affected, consideration should be given to the pros and cons of submitting a joint LIR.

Examination – maximum 6 months duration

The Examining Authority is responsible for setting the examination timetable. As the examination gets under way, the participants will become involved in a treadmill of preparing detailed written representations on the application, responses to the written representations of others, responses to the Examining Authority's written questions and responses/comments on the responses of others to such questions, and so on. This is a daunting process for all concerned, and it is all too easy to get caught up in the minutiae rather than thinking strategically about what each document needs to achieve. In addition to this paperchase, there may be site visits, and an authority can expect to attend at least some of the issue specific, compulsory acquisition or open hearings into the application. Whilst largely inquisitorial, there are occasions when cross examination is allowed and the hearings may become adversarial.

Statement of Common Ground (SoCG)

It is increasingly common to start work on this at an early stage of the process, and as part of evidence planning. It is often most relevant to the environmental impacts of a development upon a particular administrative area. If submitted early, it can greatly reduce the workload on both developer and local authority in responding to Written

Questions. A SoCG may be an iterative document and updated as the application proceeds.

Post-decision

The statutory timescale for a decision on a DCO application is 6 months (3 months for the Examining Authority to issue its report and recommendation and 3 months for the Secretary of State's decision and statement of reasons). After this, assuming the DCO is made and implemented, the local authority will have an ongoing responsibility for monitoring, discharge and enforcement of any requirements. The local authority can also expect to be notified of, and involved in, any applications by the developer to change the DCO.

Conclusion

The DCO process can be daunting and needs to be properly managed by both developers and local authorities. Teamwork is essential, but timely and appropriate advice can also be invaluable.

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