

Development consent orders and Crown Land

Section 135 of the Planning Act 2008 (as amended) provides some specific protections and constraints in relation to making DCOs which affect Crown land. This advice (which is section 51 under the Planning Act) explains how applicants might draft a DCO and book of reference and how examining authorities need to examine the application and report to the Secretary of State so as to comply with those restrictions.

Background

1. The compulsory acquisition provision in a typical DCO will normally be drafted as follows (see art 13 of Blyth DCO). The power can be exercised over the Order land:

Compulsory acquisition of land

13.—(1) Subject to the provisions of article 16, the undertaker may acquire compulsorily so much of the Order land as is required for the authorised development or to facilitate, or is incidental, to it.

(2) As from the date on which a compulsory acquisition notice under section 134(3) of the 2008 Act is served or the date on which the Order land, or any part of it, is vested in the undertaker, whichever is the later, that land or that part of it which is vested (as the case may be) shall be discharged from all rights, trusts and incidents to which it was previously subject.

(3) Any person who suffers loss by the extinguishment or suspension of any private right of way under this article shall be entitled to compensation to be determined, in case of dispute, under Part 1 of the 1961 Act.

<http://infrastructure.planningportal.gov.uk/wp-content/uploads/projects/EN010016/3.%20Post%20Decision%20Information/Decision/Secretary%20of%20State%20Final%20Development%20Consent%20Order.pdf>

2. The Order land is typically defined as “the land shown on the land plan which is within the boundary of land required for or affected by the proposed development, and described in the book of reference”.

Compulsory acquisition of interests held by the Crown

3. Interests in land held **by** the Crown cannot be acquired compulsorily. So as to ensure that the effect of article 13 is **not** to authorise CA of interests held by the Crown, the book of reference will typically be annotated to exclude that interest, eg “save for any interest of the Crown or held in Crown land”. See plot 6A of the following book of reference where an interest is held by **The Queen's Most Excellent Majesty In Right of her Crown**:

<http://infrastructure.planningportal.gov.uk/wp-content/uploads/projects/EN010016/2.%20Post->

Compulsory acquisition of interests in Crown land held otherwise than by or on behalf of the Crown – s135 (1)

4. An applicant may seek power to acquire compulsorily interests held otherwise than by the Crown, for example a long lease granted by the Crown to a third party. The third party interest will be identified in the book of reference.
5. In such cases the Secretary of State cannot make a DCO which includes a compulsory acquisition provision (such as art 13 of the Blyth DCO above) which would have the effect of authorising compulsory acquisition of the third party interest (being an interest held otherwise than by or on behalf of the Crown) without the consent of the relevant Crown authority. This is because s135 (1) only provides power to include such a provision **if** the appropriate Crown authority consents to the acquisition. See also para 40 of the CLG guidance related to procedures for the compulsory acquisition of land – “Consent to the acquisition of such an interest must be given by the appropriate Crown authority for the land concerned before the compulsory acquisition provision can be included in a development consent order.”
6. Typically, applicants will also agree with the Crown Estate to include an article which protects the interests of the Crown and would prevent the applicant exercising the CA power (ie by taking, entering land etc) without the consent of the Crown Estate Commissioners or Government Department. See article 30 of the Blyth DCO:

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7. Nonetheless, in addition ExAs will also ask applicants to provide evidence of consent and typically would like the Crown authority to identify the relevant compulsory acquisition provision (for example article 13) which would have the effect of authorising the compulsory acquisition of an interest in Crown land held otherwise than by or on behalf of the Crown and confirm that express consent is given pursuant to s135 (1) for the inclusion of the provision. Hopefully, relying on the protective nature of the *Crown interests* article, the relevant Crown authority will be able to provide consent under s135 (1) before the end of the examination.

Provisions applying in relation to Crown land or rights benefiting the Crown – s135 (2)

8. Other provisions of a DCO may “apply in relation to” Crown land. This term isn’t defined but could include for example a power of temporary possession over Crown land to allow construction work to be carried

out. Express consent from the appropriate Crown authority is required before such provisions can be included in a DCO. See also para 7 of Annex B of *CLG guidance* – “the Crown authority should give a final decision on Crown consent by the time the examination of the project is completed.”

9. The onus will be on the applicant to discuss the NSIP with the Crown Authority at an early stage. As discussed above, the typical *Crown interests* article is understood to provide sufficient protections for the Crown. If the DCO is made therefore, even though it may include provisions applying in relation to Crown land or rights benefitting the Crown which might give the applicant the power to use or interfere with (etc) the land or rights, the applicant will still be unable to exercise those powers without the consent of the appropriate Crown authority.
10. ExAs will nonetheless still ask applicants to provide evidence of consent and typically would like the Crown authority to give express consent for the inclusion of provisions in the DCO applying in relation to Crown land or rights benefitting the Crown pursuant to s135 (2). Hopefully (as above) relying on the protective nature of the *Crown interests* article, the relevant Crown authority will be able to provide consent under s135 (2) before the end of the examination. Consent is not required under s135 (2) to include a provision which applies to rights which benefit the general public.