



Preparing the draft order and explanatory memorandum

Advice note thirteen: Preparation of a draft order granting development consent and explanatory memorandum

The Planning Inspectorate and nationally significant infrastructure projects

The planning process for dealing with proposals for nationally significant infrastructure projects or 'NSIPs' was established by the Planning Act 2008 ('the 2008 Act'). The 2008 Act process, as amended by the Localism Act 2011, involves an examination of major proposals relating to energy, transport, water, waste and waste water, and includes opportunities for people to have their say before a decision is made by the relevant Secretary of State.

The Planning Inspectorate carries out certain functions related to national infrastructure planning on behalf of the Secretary of State.

Status of this Advice Note

Experience to date has shown that developers and others welcome detailed advice on a number of aspects of the 2008 Act process. This Advice Note forms part of a suite of such advice provided by the Planning Inspectorate.

It has no statutory status.

This version of this Advice Note supersedes all previous versions.



Introduction

Applicants for an order granting development consent for a proposed NSIP must, amongst other documents, include a draft of the Development Consent Order (“DCO”) with their application¹, together with an explanatory memorandum². The draft DCO is a key application document.

The application documents will, amongst other matters, be considered by the Secretary of State in deciding an application. The Secretary of State may amend the draft DCO if development consent is to be granted. The DCO made by the Secretary of State is the primary document which sets the parameters for what is permitted in the event that development consent is granted (and by implication what other aspects of a proposal are not permitted by the DCO and may require further consents).

This advice note has been prepared to provide some assistance to developers when preparing their draft DCO and explanatory memorandum. It is laid out under the following headings:

- The draft order
- Timescale for submission of the draft DCO and explanatory memorandum
- Form of the draft DCO
- Content of the draft DCO
- “Model provisions”
- Other provisions
- The importance of the description of the development
- Compulsory acquisition
- Removal of consent requirements

- The explanatory memorandum.

The draft order

Timescale for submission of the draft DCO and explanatory memorandum

Developers are advised to provide a draft order and explanatory memorandum to the Planning Inspectorate as soon as the details of their proposals have sufficiently crystallised to allow them to prepare meaningful draft application documents. This is likely to coincide with developers preparing their environmental statement, for those proposals requiring environmental impact assessment. Given the long gestation period of proposed NSIPs the Inspectorate would encourage developers to submit successive drafts of DCOs for comment to the Inspectorate at key stages in the refinement of their project at the pre-application stage.

In any event, the Planning Inspectorate would wish to receive a draft order and explanatory memorandum well in advance of formal submission of the application for development consent. It would also be helpful for the Inspectorate to receive copies of the draft land plan and works plan at the same time as the draft order and explanatory memorandum³.

Sufficiently early pre-application submission of draft documents may save time and potential problems during the process of examining an application, where an application is accepted by the Secretary of State. For example, this may avoid the need for a draft order to be substantially re-drafted during the examination, and may prevent an avoidable rejection of an application due to inadequacies in the draft order submitted with it.

¹ See s37(3)(d) and regulation 5(2)(b) of the Infrastructure Planning (Applications: Prescribed Forms and Procedure) Regulations 2009 (“APFP”)

² See Regulation 5(2)(c) of the APFP

³ Required under regulations 5(2)(i) and (j) of the APFP



The Planning Inspectorate would welcome the opportunity to offer comments on technical/drafting aspects of draft orders, but without prejudice to the Secretary of State's eventual decisions on applications. The draft order should also be made available to other parties who may have useful comments on the operation of the order. For example, the relevant local planning authorities should have sufficiently early sight of the DCO's proposed draft requirements.

The Planning Inspectorate would welcome sufficient advance warning of any request for technical/drafting advice on draft DCOs, to assist its resource planning.

Form of the draft DCO

The DCO must be made in the form of a Statutory Instrument ("SI") if it includes "legislation provisions" that e.g. apply, amend or exclude other statutory provisions⁴. Our experience has been that this is usually required. In such cases the draft DCO should therefore be submitted as a draft SI, and follow the statutory drafting conventions.

Guidance on these conventions is available online from the Office of the Parliamentary Counsel. A template for SIs has been prepared by the Office for Public Sector Information; please contact the Planning Inspectorate for details.

Developers are strongly urged to take appropriate legal advice at all stages in the preparation and examination of a draft DCO. Should an order be proposed to be made, this should minimise any need to alter drafting after the close of the examination, to ensure legal compliance. It should also minimise any delays arising from the scrutiny

of an SI by a parliamentary committee, if the order is subject to the special parliamentary procedure.

Content of the draft DCO⁵

The draft DCO should include the following:-

- A full, precise and complete description of each element of the NSIP, preferably itemised in a Schedule to the DCO; and
- A full, precise and complete description of each element of any necessary "associated development"⁶, which should be clearly identified in a Schedule to the draft DCO. Associated development is subordinate to the NSIP, but necessary for the development to operate effectively to its design capacity.
- Guidance has been issued by the Department for Communities and Local Government ("DCLG") on the scope of associated development⁷.
- Each element of the NSIP and each element any necessary associated development should be clearly set out as separate numbered 'works' in a Schedule to the draft DCO, and cross-referenced to the corresponding works shown on the works plan.
- Terms and phrases referred to in the draft DCO should be clearly defined, and used consistently throughout the document.

⁴ S117(4) and s120(5)

⁵ See generally s120

⁶ See s115

⁷ "Guidance on associated development applications for major infrastructure projects" (April 2013)



The draft DCO should also include:-

- Provisions giving the developer authority to take actions necessary for the project to be implemented satisfactorily. These might include, for example, authority to compulsorily acquire land, or to stop-up streets or extinguish private rights of way, or to carry out protective works to buildings⁸;
- Other provisions which are necessary for the purposes of the project for example, applying or amending existing legislation, or protecting the interests of persons potentially affected by compulsory land acquisition;
- "Requirements" to which the development authorised by the DCO is to be subject. Requirements are similar to conditions under existing consent regimes, for example specifying the matters for which detailed approval needs to be obtained before the development can be lawfully begun, for example a detailed landscaping scheme. The developer should seek to agree wording for proposed requirements with the body to whom details are to be submitted for subsequent approval, and in any event seek the local planning authority's views on proposed requirements as they will enforce any breach of the terms of any order granted.

"Model provisions"

Model provisions were set out in the Infrastructure Planning (Model Provisions) (England and Wales) Order 2009 (SI 2009/2265). They included provisions which could be common to all NSIPs, others

which relate to particular infrastructure development types, in particular railways and harbours, and model provisions in respect of requirements. The Localism Act 2011 removed the requirement for the decision-maker to have regard to the prescribed model provisions in deciding an application for development consent.

Model provisions were intended as a guide for developers in drafting orders, rather than a rigid structure, but aided consistency, and assisted developers to draft a comprehensive set of lawful provisions.

In the absence of relevant guidance published by DCLG, it would be helpful for the Planning Inspectorate to receive a track-change draft of the DCO showing any departures from the model provisions. The Planning Inspectorate would wish to receive such a track-change draft of the DCO both at the pre-application stage and with the formal submission of the application for development consent.

Other provisions

Provisions used in 'predecessor' regimes such as for Transport and Works Act Orders or Harbour Empowerment Orders may be helpful in the drafting of a DCO. Developers should though satisfy themselves that the inclusion of particular wording is appropriate and relevant in all the circumstances of a given project. The relevant precedent and the rationale for including the particular wording of a provision will need to be set out and justified in the explanatory memorandum.

The importance of the description of the development

⁸ See s120(3) and (4), and Schedule 5

⁹ Regulation 5(i) and (j) APFP



The description of the proposed development together with the provisions of the DCO (including requirements) will determine what is authorised to be carried out. It is the responsibility of developers (not the Planning Inspectorate) to ensure that the draft order applied for would provide them with all the necessary powers and authorisations to implement and use their scheme.

Developers are therefore strongly advised to engage a person with the necessary legal expertise and relevant experience to draft their order sufficiently early at the pre-application stage. Clarity and precision in the description and drafting of the provisions can, for example, prevent future uncertainty over whether development and other activities are carried out within the terms of the order.

It is essential that the drafting in the order accurately defines the land over which powers are required and is consistent with the approach taken in the land and works plans which must also be submitted with the application⁹, and with any other plans and drawings that the developer considers are necessary to describe their proposals.

Compulsory acquisition

Guidance has been issued by the Department for Communities and Local Government ("DCLG") on procedures for compulsory acquisition¹⁰.

If a DCO seeks to include the compulsory acquisition of certain special categories of land, such as local authority, statutory undertaker, National Trust or common land,

then additional procedures apply. These are either that a provision authorising the compulsory acquisition of such land cannot be included in an order unless the appropriate certificate of authorisation is issued by the Secretary of State; or in some cases once a decision to grant an order is made, the order will be subject to special parliamentary procedure before it comes into effect¹¹.

Developers should obtain any required certificate before submission of the application wherever possible (under s127 and/or s131) or at least have made some progress towards obtaining any necessary certificate.

The explanatory memorandum should confirm the stage reached in these procedures.

Removal of consent requirements¹²

It is also possible for a draft order to include provisions which remove the need to obtain certain additional authorisations. It is necessary for the authority responsible for granting the authorisation to consent to this process. The list of authorisations which can be treated in this way is contained in Schedule 1 of the Infrastructure Planning (Miscellaneous Prescribed Provisions) Regulations 2010.

The explanatory memorandum should identify the authorisation, the reasons why the developer is following this route and should state how close the developer is to achieving the consent of the authority concerned.

¹⁰ "Planning Act 2008: guidance related to procedures for the compulsory acquisition of land" (DCLG September 2013)

¹¹ ss127-132

¹² S150



Where a developer is seeking separate authorisations or licences these should be separately listed in the application submitted to the Planning Inspectorate¹³.

The explanatory memorandum

The draft order must be accompanied by an explanatory memorandum¹⁴ explaining the purpose and effect of each provision in a draft order (explaining, for example, why it is considered necessary).

In addition to including any comments on special category land, authorisations under s150 and 'legislation provisions' explained above, the explanatory memorandum should identify relevant precedents for any provisions.

¹³ See "Planning Act 2008 : Nationally Significant Infrastructure Projects ; Application form guidance" (DCLG June 2013)

¹⁴ Regulation 5(2)(c) APFP

Further information

The Planning Inspectorate, National Infrastructure Directorate, Temple Quay House, Temple Quay, Bristol BS1 6PN

Email: enquiries@infrastructure.gsi.gov.uk

Telephone: 0303 444 5000

Web: <http://infrastructure.planninginspectorate.gov.uk>

This advice note was republished in March 2012 with changes to reflect the IPC being abolished and the work of the IPC transferring to the Planning Inspectorate under the Localism Act 2011.