DEVELOPMENT CONSENT ORDERS & LITIGATION RISK

20th April 2023

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Risk 1: inside or outside the PA 2008?

- *Stop Stansted Expansion v Secretary of State for Transport* [2020] EWHC 226 Admin
- A case about whether the SoS was entitled to evaluate the runway alteration as not being a nationally significant infrastructure project.
- If yes, Uttlesford retained jurisdiction to determine the planning application under the Town and Country Planning Act 1990.
- If no, the project qualified within the Planning Act 2008 and so denied Uttlesford jurisdiction to determine it.
- Answer: Yes. Because the PA 2008 statutory term "expectation" qualified the mathematical capacity

Risk 2: Habitats Regs. & evidential land mines

- *R (oao Mynnyd Y Gwynt Ltd) v Secretary of State for Business, Energy and Industrial Strategy* [2018] EWCA Civ 231.
- A case about an onshore wind farm that engendered bird strike risk of protected Red Kites – but a lack of survey evidence adduced by the promoter despite NRW having access to a copy of third party surveys.
- SoS refused consent & was entitled to evaluate that the promoter had not shown with clarity that the risk to Red Kites could be excluded in her appropriate assessment.

Risk 3: The risk of not reading the NPS

- *R (oao Stonehenge World Heritage Site Ltd) v Secretary of State for Transport* [2021] EWHC 2161 Admin.
- A case about the scope of NPS NN "alternatives" & the evidential gap created by Highways England failing to adhere to paragraph 4.26 (notwithstanding its option appraisals under paragraph 4.27).
- Court engendered from the pleaded phrase about "alternatives" a new point that resulted in SoS decision being unlawful for want of evaluation of at least one alternative as an obviously material consideration.
- The baked-in error re: paragraph 4.26 came back to bite HA.

Risk 4: Different Policy & Heritage under PA 2008

- *R (oao Substation Action Save East Suffolk Ltd) v Secretary of State for Business, Energy and Industrial Strategy* [2022] EWHC 3177 Admin
- A case about an offshore windfarm and whether the SoS entitled to evaluate flood risk and heritage matters as he had done. He was.
- On Flood Risk: the NPS sequential approach requires surface water flooding to be accounted for in considering the location of the development. Some surface water flood risk did not require demonstrable lack of sites elsewhere. Contrast, the NPPF (2021).
- On Heritage: Infrastructure Planning Regulations 2010, Regulation 3 required no more than "to have regard to" the desirability of preservation and did not engender a presumption nor considerable weight against a proposal. Contrast section 66 Listed Building Act.
- Requirements: imposition of requirements is an evaluative planning judgement for the SoS.
- Flexibility of Generation: SoS could evaluate broadly generation volume.

Risk 5: The Decision-maker's duty to inform & risk of scrambled reasoning

- *R (oao Acquind Ltd) v Secretary of State for Business, Energy and Industrial Strategy* [2023] EWHC 98 Admin
- A case about whether the SoS was entitled to evaluate an alternative site based on incomplete or unmade clear information adduced by the developer.
- He was not. *Tameside* required him to clarify the situation first.
- The SoS is subject to the *Tameside* Duty to Inform himself of all relevant information – and here did not ask Aquind for clarity on its post-Hearing representations, so as to misunderstand their meaning when considering NPS EN-1 Section 4.4, paragraphs 4.4.2 and 4.4.3 "alternatives".
- Not a case about CPO alternatives as not mentioned in Judgment.
- A live case. I & my Blake Morgan Team sunk the DCO the first time for the principal landowner objector. Can it be done twice? Watch this space.

Risk 6: Dysfunctional Drafting (or, Be careful what you draft for …)

- *Tidal Lagoon (Swansea Bay) PLC v Secretary of State for Business, Energy and Industrial Strategy* [2022] EWCA Civ 1579
- Was the developer entitled to a declaration that its tidal lagoon generating station DCO (and CPO) remained alive?
- No. The tidal lagoon DCO collapsed.
- Developer tried to 'carve-out' (aka s.106 TCPA) preliminary works to avoid (not stagger) simultaneously trigger of pre-commencement Requirements.
- Developer drafted a "artificial and dysfunctional state of affairs" in the use of "begin" and "commence" to creating *divergent time limits* 21 days apart in seeking carve out of preliminary works to avoid commencing the DCO development. DCO powers would "in effect" but unable to be exercised.
- Developers DCO SI simultaneously could: a) be "begun" under section 154 of the PA 2008 but b) not "commenced" under Requirement 2 of the DCO, contrary to "essential principle" of time limits for DCO powers & certainty.
- Coincidence of time limits is required for DCO commencement.
- No section 153 application for extension made before DCO elapsed.

Conclusions

- A project under the Planning Act 2008 is not a project under the Town and Country Planning Act 1990.
- The complex and interwoven DCO process stages are a litigation trap for the unwary.
- Cases show an increasing appetite for Court intervention (not before existing) to quash decisions and difficulties in their being defended successfully.
- Securing a DCO that can be kept requires:

Good Advice, Early.