



# A look back at the NSIPs Forum and 10 years of the Planning Act 2008

**Following the Nationally Significant Infrastructure Projects Forum on the 7th-8th February 2018, Ben Lewis, Infrastructure and Energy Director, and Tom Carpen, Infrastructure and Energy Associate from Barton Willmore look back at the conference and the key issues currently facing NSIPs.**

## A look back at the NSIPs Forum...

This November, we celebrate the 10th birthday of the Planning Act 2008. 10 years which have seen the regime grow and mature into the arena in which the delegates at the sixth Annual NSIPs Forum were keen to learn more about. The delegates included those contemplating the use of the regime for the first time with trepidation and those (proudly) bearing the scars of hard work, investment and unspent holiday that are needed to secure a DCO. Looking back on the Forum, we have used the different perspective and insight that comes from a team that has experienced the regime as both poacher and game-keeper.

So, what are the key issues for NSIPs currently, what has the last decade taught us, and how will the regime evolve in the future? These are all issues that we will be exploring in detail this year as we celebrate 10 years of the Planning Act and reflecting on the NSIPs Forum seems like a good way to get the ball rolling.

### So, what were the key issues?

The DCO process is far from straight forward – getting to a decision can feel like an endurance race through a minefield, but there are plenty of booby-traps waiting on the other side, and it is often the case that those traps have been set by the Order itself. As Jen Ashwell (Burgess Salmon) highlighted, making a change to the DCO is onerous, so it's imperative to get it right first time.

But how do you do this? How do you make it through preparation, consultation, submission, examination, decision, implementation and delivery? How do you provide the detail needed for a robust examination whilst maintaining the flexibility that is necessary for large scale projects with long construction periods to be successfully delivered in a world where technological innovation is occurring at breakneck speed?

This year, Liz Dunn (Burgess Salmon) tackled the detail v flexibility conundrum. Liz made it clear in her presentation that flexibility does not mean a lack of detail – a well-crafted and well-planned application knows where to focus. Early Contractor Involvement (ECI) is currently a hot DCO topic, but Anna Pickering's (Highways England) insight showed that it's not the panacea that some believe it to be. There is no dispute that contractors' skills and experience can add a great deal of value to the pre-consent design stage as they can reduce the risk that the approved scheme can't be implemented within the consented parameters. However, trying to set broad parameters to provide with flexibility down the line will require multiple scenarios to be assessed in what will become an unwieldy Environmental Statement, which lacks the focus and consistency of message which such projects demand.

Flexibility and detail are diametrically opposed but that is not to say that they cannot be successfully blended. Finding the right blend is where the challenge lies, a challenge which requires the collaboration and critical thinking of all members of a DCO team – the promoter, the lawyer, the engineer, the environmentalist, the designer, the contractor, the communication team, and the planner. There is a role for PINs and the Examining Authority in this, but it is down to the promoter's team to find the right blend, pull together the justification for it, and communicate it to stakeholders and regulators.

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## What did we learn?

Dr Pauleen Lane, Group Manager for Examining Inspectors, provided an incredibly helpful insight into the way PINs thinks. She also highlighted the key role a planner's thought-processes can play in the regime. As Richard Turney's concise run through of case law showed, the threat of legal challenge has not materialised often (and when it has, it has largely been unsuccessful). The PINs approach is clearly working!

So how do The Planning Inspectorate (PINs) tackle the DCO process? As Pauleen, explained, they do what all good planners do and start at the end (in PINs' case, judicial review) and work backwards.

In our view, Pauleen gave the standout presentation of the conference, emphasising that PINs' work is guided not only by its impartiality but in focusing on what is needed to maintain confidence in the system. Pauleen explained how PINs builds a picture of what the policy and legal framework is likely to be for each project at the point the Secretary of State will make a decision, looks at the risks and areas of potential legal challenge, and builds their work programme from there.

This is no mean feat given the timescales, uncertainty and unpredictability inherent to NSIPs, but it's as essential as coordinating the production of documents. Policy and legislation aren't static and are interpreted differently by different parties, and any emerging policy or legislation (both within and outside the UK) could be considered important and relevant by the Secretary of State. More significantly, if the Secretary of State does not consider emerging policy and seek views of interested parties, it could lead to legal challenge.

Applying this with a promoter's hat on, the end-game for the DCO is delivery. Turning the consent into something real brings all the pre-application negotiations, design and drafting work into clearer focus. Therefore, it is critical that your consenting strategy works backwards from implementation when you first start on the road to a DCO application.

## The future – how can we ensure the process accounts for deliverability?

We are sorry to say that there is no magic bullet, no one size fits all – in our view, strategy and collaboration are key. Ticking the process box is not enough for a project to succeed and managing a DCO application should not be seen as just a project management exercise.

By the same token, it is not just an engineering or design process either, even though these disciplines dominate the infrastructure world. Nor is it a legal process just because the DCO can have statutory instrument status, or because it's a process created by legislation. Environmental assessments may be at the heart of a project but reaching agreements on scope and methodology, negotiating mitigation and mechanisms for further work doesn't happen in a vacuum; it all goes into the planning balance.

This raises the question: is there a profession in the development industry that is adept at strategic thinking and identifying the end-game; that is comfortable negotiating a complex project through the consenting minefield and securing implementable consents; that is used to constructing a narrative that brings stakeholders along for the ride; and that is skilled in the art of negotiation and the presentation of a compelling case to deliver a solution that balances conflicting interests?

We believe there is, and that these questions highlight the significant value that planners bring to the DCO process. As a discipline, planning is characterised by conflict, complexity, ambiguity and compromise. As a profession, we are used to ensuring that the conditions are attached to a planning permission. There is rarely a straight answer that is transferable across projects and context is key. Ultimately, the DCO process is a planning process complete with all the conflicts, nuances and ambiguities you find in complicated Town and Country Planning applications. It just happens to be overlaid by a more detailed legal framework that was designed to provide clarity of process and timescale in the national interest. The RTPI is currently running a campaign to #loveplanning and this is equally as important in the DCO regime as it is in development plans and development management.

Each project does of course raise legal questions, engineering challenges and environmental conundrums, among many other challenges. This is why a collaborative team approach is critical with strong leads across all required disciplines - planning, engineering, legal, communications, land and acquisition, and contracting. Many speakers noted the importance of a skilled team and we support that view wholeheartedly.

The [Nationally Significant Infrastructure Projects Forum](#) will be returning in February 2019.

Find out more about the event and stay up-to-date on the conference [here](#).

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