

PLANNING BULLETIN

Environmental Impact Assessment - Draft Amended Circular And Guidance

In June 2006 the Department of Communities and Local Government (DCLG) published a draft amended Circular on Environmental Impact Assessments (EIA). The new Circular is intended to replace Circular 02/99 and taken into account EIA case law and the need to ensure better publicity at each stage of the EIA process.

Outline Applications/Reserved Matters

The requirements of the circular were drafted prior to Judgements of the European Court of Justice dated 4th May 2006 in relation to cases C-290-03 R(Barker) v London Borough of Bromley and C-508-03 European Communion v UK.

The DCLG recognise that there will need to be changes made to the EIA Regulations to deal with the issues arising from these cases and on 30th June 2006 wrote to all local planning authorities advising them of how to deal with outline applications and reserved matters in the meantime.

The DCLG has advised LPAs to follow the guidance given following the Tew and Milne judgements in respect of outline applications. They have advised that an application for a "bare" outline planning permission (opp) with all matters reserved for later approval is unlikely to comply with the requirements of the EIA Regulations.

When granting opp, the DCLG advise that permission must be conditioned by reference to the development parameters considered in the environmental information provided in the ES.

The DCLG considers that when LPA receives an application for approval of reserved matters, regardless of whether EIA was carried out at the opp stage, it should screen the development again to determine whether all of the likely environmental significant effects have been considered in order to satisfy the requirements of the EIA Directive.

Annex A of Circular 02/99 dropped in favour of new "Checklist" approach

Of particular note is the exclusion from the circular of Annex A to Circular 02/99 which sets out indicative thresholds and criteria for identification of Schedule 2 development requiring EIA. This annex is replaced by a new Annex B which provides guidance on screening. Annex B provides a checklist to assess the potential impact of the proposed development having regard to the characteristics of the development and its environment. The checklist is indicative only and local authorities can devise their own form of checklist.

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Wider interpretation of Schedules 1 and 2 of EIA Regulations

Paragraph 29 states that in determining whether a particular development is of a type listed in Schedule 1 or 2, planning authorities should have regard to the ruling of the EC that the EIA Directive has a “wide scope and broad purposes”. The fact that a particular type of development is not specifically identified in one of the Schedules does not necessarily mean it falls out of the scope of the Regulations.

In particular the term “urban development” in paragraph 10(D) (CHECK D) of Schedule 2 which accounts for the largest proportion of EIA development in England, embraces residential development (houses and flats) as well as development which might be regarded as more obviously urban nature. The term “urban” applies not only to development which is already in an existing urban area. It could apply to out of town development or even rural areas which might have an unbalancing effect on the local environment. This might be the case where development would bring a significant increase in the amount of traffic e.g. an out of town shopping complex.

Definitions

Paragraph 32 clarifies the meaning of the term “Schedule 2 development”. If development is not wholly or partly within a sensitive area and does not exceed the thresholds or meet the criteria in the second column of Schedule 2 it is not Schedule 2 development and therefore does not require EIA. If it is within or partly within a sensitive area or exceeds thresholds or meet the criteria it is Schedule 2 development but will require EIA only if it is screened as being likely to have a significant effect on the environment.

Use of Secretary of State Powers

The amended Circular goes on to state as in Circular 02/99 that there may be circumstances in which developments that are not within sensitive areas and do not meet the schedule on criteria might give rise to significant environmental effects. In these exceptional cases the Secretary of State can use powers under Regulation 4(8) (Paragraph 81) to direct that EIA is required.

Proposed Remediation Measures should be part of EIA not subject to conditions

Reference is made at paragraph 47 to the need to be cautious in terms of the extent to which the screening opinion takes account of proposed remediation measures even where these are intended to be the subject of conditions attached to the planning permission. The courts may quash a permission where EIA has not been required on the ground that any significant adverse effects could be offset by appropriate conditions (*R oao Lebus v South Cambridgeshire DC (2003 2PLR5)*). In such a case the procedure should be to require EIA and enable the proposed remediation measures to be included in the Environmental Statement to allow them to be made available to statutory consultation bodies and the public for comment and taken into account by the authority when determining the planning application.

Complex Conditions may not be implemented

Paragraph 48 of the amended circular refers to extent of proposed remediation measures and their complexities. It cannot be assumed that the measures will be successfully implemented (*Gillespie v First Secretary of State and Bellway Urban Renewal (2003) EWHC 8*).

Powers to change decision on screening opinions

Paragraph 70 states that in exceptional cases where a screening opinion has been issued but

it becomes evident that it needs to be changed, the local planning authority can change the screening opinion provided it either does so within a statutory three week period or has the agreement of the applicant to exceed this period. Where such circumstances cannot be met, the authority may request the Secretary of State to issue a screening direction.

Consultation and Public Involvement

Paragraph 105(c) introduces the need to notify particular persons or bodies (including non-government organisations promoting environmental protection) whom the planning authority is aware are likely to be effected by or have an interest in the application but are unlikely to become aware of it through site notice or local advertisement.

Paragraph 109 requires local authorities (or the Secretary of State) to send copies of ES to any of the consultation bodies that have not received one direct from the developer.

Survey information to be part of ES not subject to conditions

Paragraph 113 refers to the adequacy of the ES in relation to all information being available to enable the likely significant environmental effects to be properly assessed. If tests or surveys are needed the results of these should form part of the ES. Reference is made to the case of *R v Cornwall CC ex parte Hardy* (2001 JPL 786), where a condition attached to a planning permission required surveys to be carried out to obtain information on the likely effects. The permission was quashed on the grounds that the outcome of the surveys and any necessary mitigation measures should have been included in the Environmental Statement, enabling the public to comment and the competent authority to take account of the information in determining the application.

Advertising Additional Substantive Information

Paragraph 115 requires that additional information of a substantive nature must be treated in the same way as information required by the local authority. It should be advertised and sent to the consultation bodies and taken into account in reaching a decision on the application.

Comments

Comments on the draft circular should be sent to the DCLG by 22 September 2006.

New Guide to Good Practice and Proceedings

The DCLG have also published a Guide to Good Practice and Procedures on which we will be separately reporting.

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