

18 November 2009

Chief Planning Officers in England

Our Ref:
Your Ref:

Dear Chief Planning Officer,

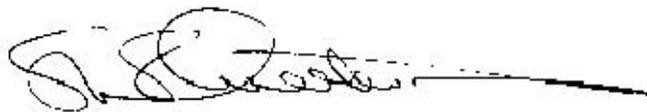
Environmental Impact Assessment (EIA): Implications of recent judgments

Local planning authorities (LPAs) may have become aware of two recent judgments which will affect the way in which EIA applications are handled. One case (see Annex 1) will have an impact on the way LPAs screen (assess) planning applications for changes or extensions to existing or approved development. Another case (see Annex 2) deals with the need to make reasons for screening opinions where EIA is not required available on request to interested parties.

We are currently considering amending legislation to have regard to these judgments. However, I wanted to draw the judgments to your attention now pending any such changes.

Should you have any questions on the issues set out in this letter please contact Kim Chowns (kim.chowns@communities.gsi.gov.uk).

Yours sincerely,



Steve Quartermain
Chief Planner

ANNEX 1

Case 1 - Changes or extensions to existing and approved development

The judgment on 19 February 2009 from the High Court of Justice in *Baker v Bath and North East Somerset Council, Hinton Organics (Wessex) Ltd* (“the Baker case”) concerns the procedure for screening planning applications for changes or extensions to existing or approved development.

The effect of the ruling is that when determining whether EIA is required, planning authorities must look at the effect of the development, as modified, and not just the modification alone, as is currently required under Schedule 2.13(a)(i) to the Town and Country (Environmental Impact Assessment) (England and Wales) Regulations 1999 (SI No. 293). Schedule 2 deals with descriptions of development and applicable thresholds and criteria.

The ruling also applies where the modification does not meet the thresholds or criteria which determine whether a development listed in Schedule 2 to the Regulations needs to be screened for EIA, and for development in, or partly within, a “sensitive area”. Sensitive areas are Sites of Special Scientific Interest, land with Nature Conservation Orders, international conservation sites, National Parks, Areas of Outstanding Natural Beauty, World Heritage Sites and scheduled monuments. In such areas the Regulations’ thresholds and criteria are not applied.

In his ruling, Mr Justice Collins considered that the wording of Schedule 2.13(a), sections (i) and (ii) of the Regulations limits screening to the modification alone, and does not take account of possible likely significant environmental effects of the modification when considered cumulatively with the original development. Mr Justice Collins considered this to be contrary to the purpose and language of the EIA Directive (Directive 85/337/EEC on “the assessment of the effects of certain public and private projects on the environment”, as amended).

Referral to the Secretary of State

Until amending Regulations are brought into force CLG considers that planning authorities must consider a situation where they have an application for a modification to existing development which does not satisfy the appropriate criteria or thresholds set for Schedule 2 development (and is not located in a sensitive area), but is likely to have significant environmental effects.

Under these circumstances the planning authority should ask the Secretary of State to consider making a screening direction under regulation 4(8) stating whether EIA is required.

The wider Implications of Baker

Mr Justice Collins also held that regard must be had to obligations about public participation under Article 10a of the Directive when an application for a modification or a new development did not satisfy the criteria or thresholds in Schedule 2 which determine whether planning authorities issue a screening opinion.

Mr Justice Collins considered that in such circumstances local planning authorities are required to notify members of the “public concerned” who feel that the proposed development would be likely to have adverse effects on the environment, that they have a right to ask the Secretary of State to consider issuing a screening direction under regulation 4(8)) for EIA.

We will be examining further Mr Justice Collins’ comments on how Article 10a of the Directive should be applied when considering possible amendments to the current Regulations.

As the Directive has direct effect¹, the Department considers that planning authorities must satisfy themselves that they have met its requirements, in the light of this Court judgment, when considering applications for changes or extensions to existing development. Local planning authorities should seek guidance from their legal advisers, where they feel this is necessary, in considering the need for EIA of such developments.

A full transcript of the judgment can be viewed on the British and Irish Legal Information Institute website, www.bailii.org/ew/cases/EWHC/Admin/2009/595.html.

¹ Direct effect means that in the absence of national legislation that gives effect in a Member State to the obligations the Directive imposes on them, individuals have the right to rely on, and the Courts take into consideration, the provisions and obligations of the Directive. Individuals could use the Directive against a planning authority.

ANNEX 2

Case 2 – Providing reasons on request for screening decisions where EIA is not required

The European Court of Justice (ECJ) issued a preliminary ruling on 30 April 2009 in Case C-75/08, the “Mellor” case, which can be viewed at http://curia.europa.eu/en/content/juris/c2_juris.htm. The case concerns whether, under Article 4 of the EIA Directive, authorities are required to make available to the public the reasons for issuing a screening opinion where EIA is not required for development listed under Schedule 2 to the Regulations.

Where EIA is required the Regulations require authorities to provide a statement of reasons, and to make that statement available to the public. Communities and Local Government is of the view that there is no similar requirement under the EIA Directive where the authority issues a screening opinion that EIA is not required. However, if such information were to be requested under either the Environmental Information Regulations 2004², or the Freedom of Information Act 2000 it should be released.

The ECJ's preliminary ruling has confirmed CLG's view that there is no need for a negative screening decision to contain reasons; but there is a duty to provide further information on the reasons for the decision if an interested person subsequently requests them. The request may be met not only by a formal statement of reasons, but also by providing information and relevant documents.

The ECJ also considered the information which must be made available where reasons for screening decisions are requested, and held that the information must enable interested parties to decide whether to appeal against the determination, taking into account any factors which might subsequently be brought to their attention.

A further linked case (known as the “Marson” case) which is also concerned with the need to give reasons for negative screening decisions was referred to the ECJ in 2007.

The Court gave judgment in this case on 12 November 2009. The court held that the Commission has withdrawn its complaint alleging that the UK failed to provide in its national law that reasons be given for negative screening decisions in compliance with the EIA Directive.

It therefore is the case that the judgment in Mellor referred to above needs to be considered with respect to the need to give reasons for such decisions. CLG are considering whether and how to amend the Regulations to deal with this matter. In the interim, legal advice should be sought.

² SI 2004 No. 3391