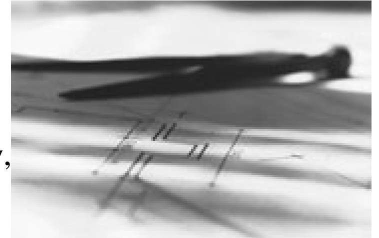
planning approval for reserved matters - new requirement for environmental impact assessment

May 2006

Summary



On 4 May 2006, the European Court of Justice (ECJ) handed down two landmark judgments which could radically impact on the grant of reserved matters approvals pursuant to outline planning permissions – *R (on the application of Barker) v London Borough of Bromley* (Case C-290/03) and *Commission v United Kingdom* (Case C-508/03). Until now, the relevant stage in the planning process at which a local planning authority (LPA) or the Secretary of State considers whether an Environmental Impact Assessment (EIA) is needed for a development is on the grant of full or outline planning permission. The effect of the ECJ's recent judgments is that a planning authority will now additionally need to consider whether an EIA is required at the approval of reserved matters stage. These rulings could affect developers who currently hold outline planning permissions for which reserved matters still need to be approved, particularly if no EIA was carried out at the outline stage (and possibly even if an EIA was carried out at the outline stage).

This briefing examines the effect of the ECJ's judgments on the current UK EIA regime and looks at the impact on developers and LPAs.

The EIA Directive

Article 2 of Council Directive 85/337/EEC (known as the "EIA Directive") imposes an obligation on Member States to adopt all measures necessary to ensure that, before "development consent" is given for a "project" that is likely to have a significant effect on the environment, an EIA of the effects of the project on the environment is carried out. A "development consent" is defined as "*the decision of the competent authority or authorities which entitles the developer to proceed with the project*". A "project" is defined as either:

- "the execution of construction works or of other installations or schemes, or
- other interventions in the natural surroundings and landscape, including those involving the extraction of mineral resources".

The EIA Directive requires a four-stage procedure to be followed if an EIA is required:

1. Compilation of the information obtained from the EIA process "in an appropriate form";

2. Making public the information obtained from the EIA process and the application for development consent to which it relates, and giving public bodies and members of the public the chance to express their views;

3. The decision-making authority must consider the information obtained from the EIA process and all the comments and representations made on it and decide whether to grant a development consent; and

4. The public must be informed of the decision and the reasons for it.

Current requirements to carry out an EIA in the UK

The EIA Directive has been implemented in England and Wales by various regulations, principally the Town and Country Planning (Environmental Impact Assessment) (England and Wales) Regulations 1999 (EIA Regulations). Formal guidance on procedures under the EIA Regulations was issued in respect of England by the then DETR (now the DCLG) in DETR Circular 02/99 and in respect of Wales by the Welsh Office in Welsh Office Circular 2/99. If a proposed development falls within the remit of the EIA regime, an Environmental Statement (ES) containing the information obtained from the EIA process must accompany the planning application. The EIA Regulations do not use the term "project" (as used in the EIA Directive), but instead use the term "development", which is defined in the Town and Country Planning Act 1990 as "*the carrying out of building, engineering, mining or other operations in, on, over or under land*".

An EIA must be carried out for those projects listed in Schedule 1 of the EIA Regulations (which replicates Annex I to the EIA Directive). These projects (which include the construction of motorways, airports, power stations, and oil and gas pipelines) will, by their nature, have a significant impact on the environment and there is no discretion as to whether or not an EIA is required. Schedule 2 of the EIA Regulations (which replicates Annex II to the EIA Directive) lists projects for which an EIA is discretionary (such as gas storage, mining, quarrying, wind farms, urban development projects and industrial estate development projects). The requirement for EIA for such projects is determined on a case by case basis using thresholds and other criteria contained in the EIA Directive and the EIA Regulations. In deciding whether an EIA is required for a proposed development, a developer can apply to the LPA for a "screening opinion" or to the Secretary of State for a "screening direction".

Neither a LPA nor the Secretary of State is permitted to grant planning permission unless and until they have considered the information contained in an ES. Until now, it has been the case that the stage at which the relevant planning authority is required to consider the ES is at the outline planning permission stage. DETR Circular 02/2000 confirms that "reserved matters cannot be subject to EIA". However, this situation has now been found to be in breach of the EIA Directive and is therefore likely to have to change.

The ECJ's rulings

In *R (on the application of Barker) v London Borough of Bromley* (Case C-290/03) the London Borough of Bromley granted outline planning permission in March 1998 for the development of a leisure development in Crystal Palace Park, subject to approval of reserved matters. The Council did not, at that stage, require an EIA. In January 1999 the developer sought approval of the reserved matters. Although some councillors expressed a wish that an EIA should be carried out, the Council obtained legal advice that, as a matter of domestic law, an EIA could be carried out only at the outline planning permission stage and could not be required at the approval of reserved matters stage. The Council approved the reserved matters in May 1999.

Ms Barker, a local resident, challenged the Council's decision to approve the reserved matters without requiring an EIA, arguing that a decision on reserved matters may form part of the process of granting the development consent which entitles the developer to proceed. An application for approval of reserved matters could raise environmental issues which should properly be the subject of an EIA at that stage, and domestic law could not, consistently with the EIA Directive, preclude the requirement of an EIA at that stage. Ms Barker's challenge was dismissed by the High Court and the Court of Appeal, both Courts taking the view that it was the outline planning permission that amounted to the relevant "development consent" for the purposes of the EIA Directive. A further appeal was made to the House of Lords, which referred certain questions on the requirement for an EIA at the reserved matters stage to the ECJ.

The ECJ ruled that:

a. The classification of a decision as a "development consent" within the meaning of the EIA Directive must be carried out pursuant to domestic law in a manner consistent with European Community law; and

b. An EIA must be carried out if, in the case of a grant of development consent comprising more than one stage, it becomes apparent, in the course of the second stage (ie, reserved matters stage), that the project is likely to have significant effects on the environment by virtue, inter alia, of its nature, size or location.

On the same day, in *Commission v United Kingdom* (Case C-508/03) the ECJ made a related ruling that the UK had breached European Community law by incorrectly implementing the EIA Directive in domestic law. The European Commission had applied to the ECJ for a declaration to that effect on the grounds that the UK's national rules under which an EIA could be carried out only at the outline planning permission stage (and not at the later reserved matters stage) were in breach of the requirements of the EIA Directive. The ECJ agreed. It noted that a developer could not begin work on its project until it had obtained approval of reserved matters. Until such approval had been granted, the development was still not finally authorised. Accordingly, the two stages together constituted a multi-stage development consent for the purposes of the

EIA Directive, which provided that an EIA could, in principle, be required at each stage if the project was likely to have significant effects on the environment.

Conclusions

The UK Government will now need to amend the EIA Regulations to reflect the ECJ's judgments.

- LPAs face a period of uncertainty. The effect of the judgments is that LPAs are more likely to suspend the determination of approvals of reserved matters pending consideration of compliance with EIA requirements, so as to avoid possible legal challenges. Faced with delays in determinations of approvals of reserved matters, the only option for developers is to appeal to the Secretary of State for non-determination. However, in determining any appeals the Secretary of State will also need to consider whether an EIA is required.

- Developers who currently possess an outline planning permission for which reserved matters approval is outstanding may now be required to carry out an EIA and submit an ES if the LPA considers that the granting of reserved matters approval may result in significant effects on the environment. Compiling an EIA is a lengthy process taking many months, and there is therefore the potential for developments to suffer delays while an EIA is carried out at the approval of reserved matters stage.

- The judgments imply that there may be an EIA requirement for reserved matters approval if the LPA considers that the granting of reserved matters approval may result in significant effects on the environment, notwithstanding the submission of an ES with the application for outline planning permission. This is likely to be the case if the ES submitted with the application for outline planning permission does not cover properly or comprehensively the environmental effects arising at the approval of reserved matters stage.

- Developers could be particularly at risk of being required to carry out an EIA at the approval of reserved matters stage if they hold a "bare" (ie, devoid of any detail) outline planning permission. It should be noted that LPAs are becoming increasingly reluctant to issue these kinds of outline planning permission. The requirement (which comes into force on 10 August 2006) for most applications for planning permission to be accompanied by a "Design and Access Statement" is likely to reinforce this trend.

- If in any doubt as to whether an EIA is required for a development, it is advisable to err on the side of caution, since there is now a risk of an approval of reserved matters made without an EIA being the subject of a successful legal challenge.

- When submitting an ES with an application for outline planning permission, in order to pre-empt any legal challenge at the approval of reserved matters stage, developers should ensure that the ES is as comprehensive as possible, anticipating (if possible) any environmental effects likely to result from the approval of reserved matters.

Contacts

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