



Development Department
Planning Division

Victoria Quay
Edinburgh EH6 6QQ

Heads of Planning
Cc; CoSLA
SSDP

Telephone: 0131-244 7710
Fax: 0131-244 7083
Michael.Lowndes@scotland.gsi.gov.uk
<http://www.scotland.gov.uk>

Your ref:
Our ref:

27 July 2006

Dear Sir / Madam,

OUTLINE PLANNING PERMISSION, RESERVED MATTERS AND EIA; INTERIM GUIDANCE

Planning authorities may be aware of the recent judgments handed down by the European Court of Justice (ECJ) in the cases of *ex parte Barker* and *Crystal Palace / White City* which have implications for the way we deal with applications for outline planning permission that require environmental impact assessment. Whilst the judgements concern English cases, given the similarities in EIA regimes north and south of the border they are relevant to the operation of EIA procedure in Scotland. The effect of those rulings is therefore to require that "in some circumstances" consideration may also need to be given to EIA at the reserved matters stage.

This note provides interim guidance for planning authorities regarding reserved matters applications pending any legislative or administrative action which is taken to comply with the terms of these judgments. I would be grateful if you could arrange for it to be circulated to planning officers as appropriate.

The ECJ has ruled in cases C-290/03 (*R v London Borough of Bromley, ex parte Barker*) & C-508/03 (*Commission v UK*) that outline planning permission ("OPP") and the decision that subsequently gives approval of reserved matters must now be considered to constitute a multi-stage development consent within the meaning of Article 1.2 of the EIA Directive. Article 1.2 defines development consent as the "decision of the competent authority or authorities which entitled the developer to proceed with the project".

The full effect of these important judgments may not be clear for some time, but I wanted to draw them to your attention and urge that you draw them to the attention of your planning colleagues. Particular attention should be given to paragraphs 46-49 of the *Barker* judgment and paragraphs 100-109 of *Commission v UK*.

The judgments can be viewed at <http://curia.europa.eu/en/actu/activites/index.htm>

It is clear that in due course we will have to amend our EIA Regulations to address the judgments of the ECJ. To do so at this stage, however, would be premature when there is still some uncertainty about precisely how the judgments are to be interpreted. We are working with colleagues across the UK administrations in trying to resolve this.

The background to the Cases

Barker concerned an OPP to develop a leisure complex in Crystal Palace Park granted by the London Borough of Bromley (“Bromley”). At the time of the grant of OPP Bromley determined that an EIA was not required. Subsequently an application was made to Bromley for approval of reserved matters. At the meeting where a decision was to be taken on approval of the reserved matters, some Bromley councillors expressed the wish that an EIA should be carried out. After legal advice had been sought, however, they were informed that as a matter of domestic law an EIA could be required only at the initial OPP stage, and so approval of reserved matters was granted.

Ms Barker brought judicial review proceedings challenging that approval and the legal advice on which it was based. These proceedings were dismissed at first instance ([2001] Env. L.R. 1) and by the Court of Appeal ([2001] EWCA Civ 1766; [2002] Env. L.R. 25). In **Barker**, the House of Lords sought a preliminary ruling from the ECJ on a number of questions relating to EIA and OPP. Pending the preliminary ruling from the ECJ, the House of Lords stayed its decision in **Barker**.

Commission v UK involved infraction proceedings brought by the EC Commission against the UK arising out of two EIA-related matters: (i) the Crystal Palace case the subject of the **Barker** reference and (ii) the grant of OPP and subsequently reserved matters approval by the London Borough of Hammersmith & Fulham in 1996 for the development of retail and leisure facilities at White City.

The two cases were considered together by the ECJ as they both related to EIA and OPPs.

The decision of the ECJ

The ECJ ruled that in such cases the UK has failed to correctly transpose Council Directive 85/337/EEC, as amended, because it allows for EIA only before the grant of outline planning permission and precludes such action at the later stage when reserved matters are approved.

The ECJ observed that a developer cannot begin to implement a project granted OPP until reserved matters have been approved by the LPA. It has therefore ruled that the two decisions to grant OPP and approve reserved matters constitute multi-stage development consent within the meaning of Article 1(2) of the Directive.

Although the ECJ notes that the effects which a project may have on the environment should be identified and assessed before the grant of OPP, it also notes that if those effects are not identifiable until the approval of reserved matters, the assessment should be carried out during the course of that procedure. In effect, it must be possible to allow for EIA at approval of reserved matters.

The reason why our guidance is given on an interim basis

There are two important points to make in this regard:

- (1) It is clear from the judgments that it is very far from every case that will require consideration of EIA at the reserved matters stage. Nonetheless the EIA

Regulations will have to be amended as at present they do not provide for EIA at the reserved matters stage in any circumstances. Guidance contained in Circular 15/99 will also need to be amended.

- (2) The **Barker** proceedings have not yet been finally determined by the House of Lords. The Department for Communities and Local Government has requested a further hearing before the House of Lords in order that the ECJ's judgments can be considered and applied to the facts of the case in **Barker**. Accordingly, any final guidance must await the outcome of the appeal before the House of Lords.

Interim guidance in the light of the ECJ's decisions

As noted above, final guidance on the full implications of these judgments must await the outcome of a hearing in the House of Lords. In the interim the Scottish Executive considers that when considering applications for approval of reserved matters planning authorities should take the following matters into account, but it also strongly advises that planning authorities should seek guidance from their own legal advisers:

- (1) The ECJ's decisions confirm that it is lawful to grant OPPs. The effect of the judgments is not to require the removal of the concept of OPP, but to ensure EIA is carried out at the implementing stage (reserved matters approval) in the circumstances identified by the ECJ.
- (2) The ECJ emphasised strongly that effects which a project may have on the environment must be identified and assessed at the time of the procedure relating to the grant of OPP. It is only if those effects are not identifiable until the time of the procedure relating to the approval of reserved matters that EIA needs to be considered at that later stage. Accordingly, the ECJ's decisions do not affect the guidance we have given in Circular 15/99 that EIA needs to be carried out at the earliest stage possible i.e. before OPP is granted. We have also provided guidance about how EIA should be carried out following the **Tew** and **Milne** judgments in the English Courts and a summary is provided at the end of this note. Although matters of law are ultimately for the Courts, the Scottish Executive considers that **Tew** and **Milne** continue to represent the proper approach to be taken to EIA at the OPP stage.
- (3) The ECJ has made it clear that "in some circumstances" consideration may need to be given to EIA at the subsequent reserved matters stage. As the EIA Directive has direct effect¹, the Scottish Executive considers that planning authorities must satisfy themselves that they have met the requirements of the EIA Directive and ECJ judgments when considering outline planning applications and the subsequent approval of reserved matters even though this is not at present required by current UK legislation.
- (4) What the ECJ requires is that such consideration may be required where likely significant effects are identified at the reserved matters stage which either
 - a. were not identifiable or identified at the OPP stage, or
 - b. were identifiable but which now require "a fresh assessment", probably because of a significant change of circumstances.

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.

- (5) In this regard the Scottish Executive considers that there are broadly three situations in which planning authorities will have to give consideration to the need for EIA at the approval of reserved matters stage:
- a. Where an EIA was undertaken at the OPP stage. Provided that the approach recommended in **Tew** and **Milne** has been rigorously followed the likelihood of the need for further EIA at the reserved matters stage is unlikely.
 - b. Where EIA was considered, but determined not to be required at the OPP stage. Again, provided the screening process at the OPP stage was undertaken properly and in accordance with the guidance in Circular 15/99 it will only be in relatively rare cases that EIA should be required at the reserved matters stage when it was not required at the OPP stage.
 - c. Where there was a failure to consider the need for EIA at the OPP stage. It is in these circumstances that the ECJ's decisions are likely to have most impact and where the need to revisit EIA at the approval of reserved matters stage is most likely to be required. This serves to again emphasise the importance of properly undertaking the screening process at the OPP stage.
- (6) The Scottish Executive considers that when a Planning Authority 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. Where the detail at reserved matters has revealed new or additional likely significant effects on the environment not identified and/or assessed at the OPP stage, the approval of reserved matters without obtaining the necessary environmental information is likely to be in breach of the Directive and thus unlawful. In determining whether EIA is required at the approval of reserved matters stage planning authorities should have regard to the guidance on screening in Circular 15/99 as applying to the approval of reserve matters until such time as the Circular and the EIA Regulations are amended.
- (7) If it is determined by a Planning Authority that EIA is required at the approval of reserved matters it should request the developer to provide such an EIA which, depending on the circumstances, could take the form of a supplemental EIA or addendum to an existing EIA. Whichever approach is considered most appropriate, the EIA must be "comprehensive". Until the EIA Regulations are amended the basis for such a request will have to be the EIA Directive itself which has been held to be directly effective.
- (8) If a developer disagrees with a request for an EIA to be carried out at the approval of reserved matters stage then having regard to the obligations on Planning Authorities to give effect to the EIA Directive and the ECJ's decisions it must either:
- a. refuse the approval of reserved matters outright; or
 - b. defer determination of approval until such time as an EIA is provided.
- On appeal where an EIA is requested but not provided the Scottish Ministers or reporter are likely to take a similar approach.
- (9) Where an EIA is provided the Planning Authority must have regard to it in determining whether to grant the approval of reserved matters.

What are the implications for developers and planning authorities?

If screening at the OPP stage is properly carried out and, where EIA is required at the OPP stage, and the approach *outlined in the Tew and Milne* cases is followed (see below), in practice there should rarely be a problem. EIA should be carried out at the earliest opportunity, so there is no change to the position that it should be carried out at the OPP stage.

The effect of the judgment is that there will be implications where EIA has not been properly carried out or screened for at the OPP stage. This underlines the need for proper scrutiny and care at the OPP stage.

Summary of the position prior to Judgment

Before these most recent judgments, guidance on how an OPP could satisfy the requirements of EIA regulations was based on the judgment in the *Tew* and *Milne* cases which set out the requirements an outline application had to follow. Guidance was provided in John Gunstone's letter to Heads of Planning of June 2002. A summary is set out below:

- (1) An application for a "bare" OPP with all matters reserved for later approval is unlikely to comply with the requirement of the EIA Regulations;
- (2) When granting OPP, the permission must be conditioned by reference to the development parameters considered in the environmental information provided in the ES which has been considered and assessed by the authority prior to approval. This can be usually done by conditions although it would also be possible to achieve this by a planning agreement (under section 75 of the Town and Country Planning (Scotland) Act 1997);
- (3) Developers are not precluded from having a degree of flexibility in how a scheme may be developed. But each option will need to have been properly assessed and be within the remit of the OPP if it is to be permitted as an option for reserved matters; and
- (4) Development carried out pursuant to a reserved matters consent granted for a matter that does not fall within the remit of the outline consent will be unlawful. If a developer wishes to develop outside the parameters of the OPP conditions, then a new planning permission must be sought or an application made under section 42 of the 1997 Act. In either case, fresh consideration should be given to the need for EIA of the revised development. Applications to amend projects which have already required EIA may fall within paragraph 13 of Schedule 2 to the EIA Regulations.

The full note can be seen at www.scotland.gov.uk/Resource/Doc/927/0016735.pdf

Should you have any questions relating to this guidance please contact Cara Davidson of the Executive's Planning Division by email at cara.davidson@scotland.gsi.gov.uk or by telephone on 0131 244 1476.

Yours faithfully,

MICHAEL LOWNDES