

Rogers Report identifies five key areas for regulation

The remit of the Rogers Report, released by the Chancellor of the Exchequer with the budget in March, was to identify priority areas of regulation and enforcement for council regulatory services.

The review leading to the report was chaired by Peter Rogers, the chief executive of Westminster City Council.

It scanned about 60 areas of council regulation and enforcement and came up with five key areas for councils to focus on, the main factor being impact on health.

The five key areas are:

- n air quality/pollution control
- n alcohol, entertainment and late night refreshment licensing
- n food hygiene
- n health and safety at work
- n trading standards.

There is no doubt the above are important areas of council enforcement: environmental health, trading standards and licensing departments will all have clear guidance on how to formulate a risk matrix as well as target resources.

However, it should be borne in mind that, given the climate councils have been working in, they have probably been targeting their resources in these areas for some time.

On the other hand, some health-related areas have not been listed, such as private sector rented housing under the Housing Act 2004 and Building Regulations enforcement. These regulations are after all, primarily there to deal with health and safety issues.

Some council areas may have "hot topics" of enforcement which are not on the list; for example, a



Pollution control was one of the five key areas identified by the Rogers Report.

council whose area is characteristically rural and attractive might not have pressing pollution control issues but may have, for example, town planning control issues which suggest resources might, as far as they are concerned, be more usefully channelled in that direction.

A further thought on this issue; all areas listed might prompt increased requests for information under the Environment Information Regulations (see page two).

For more information contact David Elliott on 01926 880756 or via email.

david.elliott@wrighthassall.co.uk

INSIDE THIS ISSUE
Know your Environmental Information Regulations

See page 2

Planning permission and how to avoid undue delay

David Quayle reports,
Back Page

Broad scope of environmental regulations can prove a burden

The Freedom of Information Act 2000 (FOIA) which came into force in January 2005, gave the public access to information "held" by public authorities. The Act in the UK was seen as being more onerous on public bodies than similar legislation in other countries, for example, the response period of 20 working days was shorter; a request could come from anywhere in the world; it did not have to be labelled a Freedom of Information Act request; and no reason had to be given for wanting the information.

However, that dark horse of onerous legislation, the Environmental Information Regulations (EIR), has proved even more burdensome than the FOIA, despite being secondary legislation. Why is this?

1. Requests for information under the FOIA must be made in writing unlike those under the EIR.

2. Under FOIA information is exempt if its disclosure is prohibited by other legislation - not so with EIR.

3. The response period can be extended indefinitely (within reason) under FOIA for the public interest test to be determined by the Public Authority.



The Environmental Information Regulations can be more time-consuming for local authorities than the Freedom of Information Act. DAVID ELLIOTT explains why.

Under EIR there is an absolute time limit of 40 working days to respond to requests.

4. There is no cost limit under EIR so a request for Environmental information must be dealt with regardless of the cost involved.

5. There are no "absolute exemptions" under EIR. All exemptions are qualified and subject to the public interest test.

6. There is no provision in EIR for refusing to respond to "vexatious or repeated requests" unlike FOIA.

7. The obligations of publishing information under the EIR are much greater in scope than the publication scheme under FOIA.

8. Whilst in practice there is a requirement under FOIA for the public authority to reconsider their decision by way of internal complaint as the Information Commissioner (IC) will not assume jurisdiction unless this has been done, there is an express requirement for the authority to reconsider contained in the EIR.

Aside from this, the definition of "Environmental Information" is wide. It relates to information in "visual, aural, electronic, or any other material form" and covers information on:

- the state of the elements of the environment



Planning, pollution, footpaths and tree protection are just some of the areas that come under the remit of the Environmental Information Regulations.

- factors released into the environment likely to affect the elements referred to above

- policies, legislation, plans, programmes, agreements and activities affecting elements and factors referred to above

- reports on implementation of environmental legislation

- relevant economic analysis

- the state of human Health and Safety, including the contamination of the food chain, conditions of human life, cultural sites and built structures as affected by the matters listed above.

As well as being more onerous than the FOIA, the EIR cover a startlingly wide range of subject matters relevant to local authorities: planning and development control, minerals and waste, food safety, noise and pollution control, footpaths, building control, health and safety at work, hedgerow and tree protection and property services can all fall within the scope of the regulations rather than the Act.

By way of a recent example, while working for a district council, I advised the authority on whether it could rely on exemptions of information provided in confidence under Section 41 of the Freedom of Information Act 2000 and legal professional privilege under Section 42. Information was withheld and the requester appealed to the IC.

The complainant had requested, in writing, relevant correspondence allowed under the FOIA relating to the purchase by a development company of land and property owned by the council and an adjacent site owned by the complainant.

In decision notice FS50071319 the IC agreed the council was entitled to withhold the information, provided by the developers to the council in

confidence, and legal advice to the property services department. Although the council had accidentally failed to notify the requester of his appeal rights, no action was required as an appeal had already been lodged.

However, the IC pointed out that this request could have been made under the EIR and not the FOIA; however, as neither side had raised the point and as it would have made no difference to his findings, he would take the point no further.

As this dispute centred on private property rights, it had probably not occurred to either party that this was potentially an EIR request - presumably because buildings were involved.

Only the well-advised seeker of information will know whether to apply for information under the EIR or the FOIA whereas the IC will expect the council to know when the information requested falls within the definition of "Environmental Information"- and apply the appropriate regime.

The Freedom of Information Act, as primary legislation, may have been better publicised but do not underestimate the impact of the Environmental Information Regulations!

For advice on Freedom of Information, Environmental Information or Data Protection contact David Elliott or David Quayle.

david.quayle@wrighthassall.co.uk

david.elliott@wrighthassall.co.uk

White Paper plans for a better future

The government published a White Paper in May which set out proposals for further reforming of the planning system whilst recognising the broader environmental issues. Since the overhaul of planning legislation back in 1990, there has been growing concern about the increasing delays and complexity of the planning process and the impact on businesses and commercial enterprises.

The White Paper sets out a wide ranging package of reforms to strengthen the support for sustainable economic development, streamline the planning process, improve the ability for local authorities to engage with communities, simplify procedures for major infrastructure projects and play a key role in combating climate change.

The key proposals cover two distinct areas; national infrastructure projects and the town and country planning system.

Key national infrastructure projects

■ The government will produce policy statements that will provide a clear framework to improve the application process. These policy statements will have a shelf life of between 10-25 years (with a five-year review) and will attempt to integrate national economic, environmental and social goals, including climate change objectives. They will also identify any special considerations that the independent Infrastructure Planning Commission should take into account. The national policy statements will be open to legal challenge and will go through a process of scrutiny and public consultation.

■ The number of consent regimes will be reduced and enquiry procedures improved.

■ An Infrastructure Planning Commission will be set up to take decisions on significant infrastructure proposals, such as power stations, road networks, railways, freight terminals, airports etc.

■ Better opportunities for public consultation and engagement will be provided at each stage of the planning approval process.

There are obvious advantages in providing a clear strategy. The time taken to consider a major infrastructure project should be reduced. Some comfort must also be had from the independence of the commission with little or no political interference.

As national policy statements on infrastructure will have important implications for local and regional planning, it is expected they will set out the contribution expected from the town and country planning system to make the delivery of infrastructure possible. It is also expected that



Proposals set out in the White Paper should be in place by 2009.

Regional Spatial Strategies, the Spatial Development Strategy in London and local development plan documents will make reference to, reflect and amplify national policy statements on infrastructure.

Proposals for the town and country planning system

■ A more focused national policy framework to provide context for plan-making and decision-taking.

■ A new Planning Policy Statement for Economic Development to reinforce the government's commitment to the existing PPS1, Delivering Sustainable Development. This new planning policy statement will cover plan-making and decision-taking. It will set out a new approach to determining planning applications that do not derive any specific support from plan policies.

■ Replace the "need and impact" tests in PPS6 with a new test, which will focus on town centres and promote competition and improve customer choice.

■ Finalise the Planning Policy Statement on climate change and introduce legislation to set out the role of local planning authorities in tackling energy efficiency.

■ Put in place a timetable and action plan to deliver substantial reductions in carbon emissions from new commercial buildings within the next 10 years.

■ Review and, where possible, extend permitted development rights on micro-generation to non-residential types of land use, including commercial and agricultural development and

review the provision for Article 4 directions.

■ Bring into line the Sustainable Community Strategy and local development framework core strategy to "place planning at the heart of local government". The government will also "continue building capacity", will promote "culture change in planning" and will "issue 'place shaping' guidance".

■ Make changes to local development frameworks with higher levels of community engagement.

■ Introduce Planning Performance Agreements to help streamline the processing of major applications. There will also be some changes to planning fees.

■ Introduce a new "impact" approach to householder development, with the aim of reducing the number of minor applications.

■ Reduce the number of applications that are called in by ministers and improve the appeal process.

■ A system of neighbour agreements whereby, if a proposed development was agreed between the developer and neighbours, full planning permission would not be required. .

There is a welcome package of proposals in the White Paper. The National Policy Statements, and the proposal to create an independent infrastructure, would make large scale projects easier to deliver.

Conversely there are some major concerns with the White Paper's attempt to restrict the time limits for legal challenges. This may almost certainly fly in the face of the Human Rights Act.

The government has indicated that the proposals set out in the White Paper should be in place by 2009.

The White Paper is a consultative document and can be found at:

http://www.communities.gov.uk/embedded_object.asp?id=1510672

The deadline for responses to the White Paper is 17 August 2007 and they should be sent to: Planning Reform Team, Department for Communities and Local Government, 3/J2 Eland House, Bressenden Place, London SW1E 5DU

Alternatively by e-mail to planningreformconsultation@communities.gsi.gov.uk.

A clear way to speed up the planning process

When a Local Planning Authority grants permission for a particular development it is exercising a public function which not only benefits the applicant, but also the wider community, as the terms and conditions of the permission should provide certainty on how and when property can be developed.

Planning permission relates to the property, (unless it is a personal permission) and can be inspected by looking at the planning register. It is an important and valuable document, the scope of which should be clear and unambiguous to the Council, the original applicant, any subsequent owners and the community at large.

Unfortunately the exact scope of authorised development is not always clear due to a number of factors, including inadequate drafting and changes in legislation. The courts have established a number of principles when doubts arise about the precise



Planning documentation should be clear and unambiguous.

is a good example where uncertainty has arisen due to the tightening up of the 1987 Order.

It is well known that, for the purposes of the Town and Country Planning Act 1990, a material change of use of a property constitutes development but that changes of use within the same use class are excluded. The Town and Country Planning (Use Classes) Order 1987 is the current Order which regulates this area of planning law, but it has been amended over the years. For example, an amendment Order which came into force in April 2005 separated the previously broad "food and drink" class (Class A3) into three new separate classes.

Class A3 - use for the sale of food or drink for consumption on the premises.

Class A4 - use a public house, wine bar or other drinking establishment.

Class A5 - use for the sale of hot food for consumption off the premises.

With the above in mind consider the following scenario which is based on a recent case where advice was sought by a client.

A planning permission was granted by a LPA in 1990 for the change of use to a Class A3 use, with a condition not to use the property for the sale of hot food for consumption off the premises. The question arose as to whether, in the absence of any other evidence, this permission should be interpreted by reference to the original 1987 definition of a Class A3 use or the more limited current A3 purpose referred to above. Clearly at the time the 1990 planning permission was granted,

an A3 use would have covered not only a restaurant and similar establishment but also a public house and wine bar as well.

So what was the purchaser of the property to make of this planning permission? Is he entitled to use the property as a public house or wine bar as the original A3 use class allowed when the permission was granted or is the lawful use restricted to that of a restaurant or similar establishment?

The question depends on the proper construction of the document.

It is clear from the Town and Country Planning (Use Classes) (Amendment) (England) Order 2005, which made the changes, that the legislation is not retrospective and it can be argued that at the time the application was submitted and subsequently determined by the Council the original definition must have been in the minds of both the Council and the Applicant. Thus it can be strongly argued that the planning permission granted in 1990 permits both current A3 and A4 uses in 2007 but not the hot food takeaway use, due to the condition attached to the permission. The Local Planning Authority took a different view and the purchaser was then left with a dilemma and uncertainty.

Of course such uncertainty could be resolved in two ways. First an application could be made to the Council to obtain a Certificate of Lawfulness to confirm whether or not the proposed pub or wine bar use falls within the four corners of the permission. Alternatively the purchaser could submit a planning application to try and obtain a new planning permission which would be determined on its merits. In both cases these are likely to take at least eight weeks. In the commercial world these solutions may not always be acceptable and for the council there is extra work which may have been avoided if there had been more clarity in the first place.

Certainly it is in everyone's interests to ensure that applications and the permissions granted are clear and unambiguous in describing what is wanted and what is permitted, particularly if reference is made to legislation such as the Use Classes Orders.

david.quayle@wrightshassall.co.uk
01926 884648



It is all a matter of interpretation. DAVID QUAYLE looks why it is essential that planning documents are constructed in the right manner.

construction of a grant of planning permission. Generally speaking the terms of the permission should be clear from the document but the opportunity exists to go outside the permission and look at the application and the plans when they have been incorporated, which is now standard practice adopted by most Local Planning Authorities.

However, doubts can still arise over interpretation and this can tie up developers and Councils in unnecessary dialogue and delay. Sometimes it is changing legislation which causes the problem. The Town and Country Planning (Use Classes) Order 1987

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