



Overcoming Environmental Constraints to Projects and Maximising Success

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Environmental constraints to planning consents

- Planning consents must be legally robust
- Objector groups are well advised / funded
- Court challenges = cost / delay
- Three environmental regimes are crucial to get right
 - *1. Environmental Impact Assessment*
 - *2. Protected Species Assessment*
 - *3. Habitats Regulations Assessment*
- What to look for and how to maximise success!

ENVIRONMENTAL IMPACT ASSESSMENT

Environmental Impact Assessment (EIA) regime

- To ensure planning decisions take account of the environmental impacts of a development
- Applies to projects “likely to have a significant effect on the environment”
 - List 1 projects that always need EIA
 - List 2 projects that need EIA *only* if:
 - meet a prescribed threshold *or* are in a sensitive area; and
 - are “likely to have significant effects”

EIA: overview

- If a List 2 project, developer:
 - can decide his project is subject to EIA; or
 - request a “screening opinion” from LPA
- Developer must provide an Environmental Statement (ES) with his planning application
- LPA arranges consultation with the public / statutory consultees
- LPA must take account the environmental information when making its determination

Maximising success: EIA screening for List 2 projects

- Is your List 2 project “likely to have significant environmental effects”?
 - Is a LPA’s negative screening decision defensible / well reasoned?
 - If you adjust the project – has it been re-screened?

Maximising success: what the ES should cover

- Request a LPA “scoping opinion”
- But don’t cut corners
- Cover cumulative impacts
- If concerns are raised, volunteer to submit an ES Addendum

New EIA Directive: changes due in May 2017

- New EIA screening for List 2 projects:
 - Developers who meet defined thresholds: must provide a detailed “screening report”
 - Can include mitigation measures
 - Wait up to 90 days for a screening opinion
 - Encourages “front loading”

PROTECTED SPECIES ASSESSMENT

Protected species assessment

- All planning determinations (even non-EIA projects) must take into account protected species impacts
- LPA must request survey data where species “likely to be present and affected”
- Natural England “standing advice” to LPAs

European Protected Species (EPS)

- List of species with special protection:
 - bats, great crested newts, otter, dormice
- Criminal offences exist to protect them
- Natural England licences (NE) available if 3 strict tests are met
- For developer = costs (eg new habitat) and delay

LPA's legal duty as regards EPS

- Supreme Court *Morge* 2011: LPA must consider:
- 1. Will a proposed development trigger any criminal offence against an EPS?
- 2. If so, is a Natural England licence likely to be granted? Will the 3 licensing tests be met?
 - Project is needed for imperative reasons of overriding public interest
 - No satisfactory alternative
 - Population will be maintained through provision of new habitat?
- If NE licence unlikely, planning permission must be refused

EPS: Maximising success

- Survey EPS in good time
 - eg 2014 court case: insufficient assessment of impacts on bats
- Persuade LPA where possible that no EPS offence will be triggered
 - eg 2013 court case: killing of bats by wind turbines
- If offences will be triggered, provide details to LPA on the 3 licensing tests
 - eg 2012 case: Covanta energy from waste facility

HABITAT REGULATIONS ASSESSMENT

Habitat Regulations Assessment (HRA)

- Applies where development is within or near to a “European site” – 337 sites in England
- Developer must provide a “shadow Habitat Regulations Assessment” with planning application
- LPA must be convinced that no adverse impact from the project on the European site
- If not, permission must be refused (except in very limited circumstances)

HRA: Maximising success

- Know whereabouts of European sites before purchase
- Avoid projects *within* a European site
- Take ecological advice on impact pathways
- Eg Wind farms – bat collision / bird collision
- Eg Housing – recreational pressures / water pollution
- Identify robust mitigation measures and argue “no adverse effect” on the site

SUMMARY

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- Understand the constraints of your site / the legal regimes
- Engage with the local community / anticipate objections
- Engage with Natural England / other statutory consultees
- Continuously check legality of LPA's decisions
- Wait six weeks from grant of planning permission before commencing development

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