Mitigation in EIA screening: caution prevails

The 2017 EIA Regulations formally allow mitigation measures to be taken into account by the local planning authority during screening to determine the likelihood of significant environmental effects and states that where relevant in accordance with Regulation 5(5) these must be recorded as part of the authority’s screening opinion.

Therefore, it is possible to screen out EIA where mitigation exists and provided a local authority accepts it and records it properly as part of their Screening Opinion.

In practice however, this is not new and follows the accepted principles in accordance with the Court of Appeal in R. (on the application of Loader) v Secretary of State for Communities and Local Government [2012] that mitigation measures that are modest in scope and/or plainly and easily achievable can be relied upon in determining likely significant effects. It should not therefore be taken as a new radical approach to EIA screening in which extensive or elaborate mitigation can be used to negate EIA obligations.

The emphasis here needs to be on mitigation measures that are ‘modest in scope and/or plainly and easily achievable.’ Such examples could arguably include a Construction Environmental Management Plan (CEMP), restrictions on operating hours, a SuDS strategy or dust mitigation plan.

Even prior to implementation of the 2017 EIA Regulations this approach was set out by Lord Carnwath in the Supreme Court in R (Champion) v North Norfolk District Council [2015] which states:

‘ Whilst each case will no doubt turn on its own particular facts, and whilst it may well be perfectly reasonable to envisage the operation of standard conditions and a reasonably managed development, the underlying purpose of the Regulations in implementing the Directive is that the potentially significant impacts of a development are described together with a description of the measures envisaged to prevent, reduce and, where possible, offset any significant adverse effects on the environment. Thus, the public is engaged in the process of assessing the efficacy of any mitigation measures.’

In that case, the Court stated that the proposal would need a number of “non-standard planning conditions and enforceable obligations under section 106” and that these were precisely the sort of controls which should have been "identified in a publicly accessible way in an environmental statement prepared under the Regulations”.

These matters were again considered in Cairns, R v Hertfordshire County Council 2018 in which the Court concluded:
“on the one hand, that there is nothing to rule out consideration of mitigating measures at the screening stage; but, on the other, that the EIA Directive and the Regulations expressly envisage that mitigation measures will where appropriate be included in the environmental statement. Application of the precautionary principle, which underlies the EIA Directive, implies that cases of material doubt should generally be resolved in favour of EIA.”

From DHA’s experience there is an increasing trend amongst practitioners to provide extensive detailed reports, evidence and reliance on mitigation measures that go well beyond reliance on mitigation that is modest in scope and/or plainly and easily achievable.

Some screening requests appear to be collating evidence consummate to the detail usually presented in an ES to justify that EIA is not required. Whilst it is understandable to see why such an approach is being taken being, given the pressures from developers to avoid EIA, caution should be taken in light of possible Judicial Review implications.

It should be noted that whilst in Cairns, R v Hertfordshire County Council 2018 ultimately the error in EIA application was not fatal to the permission and the judge took the discretion not to quash, the scheme had to proceed all the way to the High Court in order to achieve this outcome.

Whilst the number of EIA challenges has reduced in recent years EIA screening remains a fruitful target particularly by way of consequence of its procedural nature. The application of mitigation measures in EIA screening will no doubt depend on the nature of the development in question, its complexity, and the sensitivity of the surrounding environment, but caution will need to prevail.

*DHA Planning, December 2019.*