### Cumulative Impacts – What is a Reasonably Foreseeable Action?

Spawforths dealt with a case in which an objector to a scheme argued that a number of new business opportunities they were planning should be included in a cumulative impact assessment.

There was no evidence submitted with the objection which suggested that implementation of any development would occur as there was no planning application, nor was there any precise detail given so there was no certainty of success or fixed timescales.

We subsequently assessed the legal context before analysing whether the cumulative impacts of a proposed development should be assessed within an Environmental Statement and if it was reasonably foreseeable.

European Community Directive 85/337/EEC, as amended, requires the assessment of cumulative effects at a project level within an EIA. This legislation has been transposed in the UK through Schedule 4, Part 1 of the EIA Regulations.

It should be noted that inherent within the nature of the Directive itself is a test of reasonableness which is allied to the state of knowledge and availability of information.

The legislation does not stipulate any particular methodology for assessing cumulative impacts, nor is there any specific guidance on the meaning of “reasonably foreseeable”. However EU Guidelines (1999) set out a number of methods which can be used.

The guidance does provide a form of definition illustrated by example:

> “Cumulative Impacts

Impacts that resort from incremental changes caused by other past, present or reasonably foreseeable actions together with the project. For example,

- Incremental noise from a number of separate developments;
- Combined effect of individual impacts, e.g. noise, dust and visual from one development on a particular receptor;
- Several developments within significant impacts individually but which together have a cumulative effect, e.g. development of a golf course may have an insignificant impact but when considered with several nearby golf courses there could be a significant cumulative impact on local ecology and landscape.”

The following guidance is also provided (albeit in relation to scoping)

> “There are limitations in defining the area and time boundary that would be affected by the project. For example it is only reasonable to consider current events and those that will take place in foreseeable future. Furthermore, the assessment can only be based on the data that is readily available. There needs to be a cut-off point at which it can be said that the impacts cannot be reasonably attributed to the project. This should be established. For example this may establish the point beyond which there can no longer be any reasonable mitigation.”

(Paragraph 4.2.1)
Combined Effect of the Directive, the Regulations, Guidance and Case Law

It follows that the requirement to assess the cumulative impact of a development with other developments is subject to the availability of information and to the test of reasonableness.

There is relatively limited judicial guidance on the precise point at issue. However of direct relevance is the decision of the High Court in Louise Bowen-West v Secretary of State for Communities and Local Government, Northamptonshire County Council or Augean Plc (2011). The court accepted in this case that the Inspector and the Secretary of State were entitled to make a finding of fact that a particular proposal need not be assessed as a cumulative effect because it was a future proposal that lacked detail. That was treated as a “rational conclusion germane to the overall judgement made by the Secretary of State”.

Overall the courts approach to the issue of EIA and whether or not the content of an EIA is adequate (which would include its approach to the assessment of cumulative effects) is to ask whether or not the approach adopted by the statement is sufficient on Wednesbury principals. The question therefore is whether or not the authority in accepting the ES has behaved in a way that no reasonable planning authority could; that is to say that if it has behaved in a way which is so unreasonable as to amount to perverse.

Summary

Based on interpretation and application of the Directive, Regulations, Guidance and case law, any assessment of cumulative impacts, should be based on the test of reasonableness allied to the state of knowledge and availability of information.

If a “project” would in their own right not be caught by the Directive or the Regulations or does not have the requisite degree of certainty, clarity and availability of information it should not be a reasonable requirement to include it as part of cumulative impact assessment.

Applying the interpretations and tests that the Courts would apply to any ES that did not assess the cumulative impact of any of the proposals with the characteristics of this case study would be so flawed that no reasonable planning authority could accept that it was sufficient. Based on the facts, a Local Planning Authority would be reaching a reasonable and rational judgement in not asking for these matters to be included in the Environmental Statement.

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