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Intelligent Transport Planning Solutions

Creative Minds, Intelligent Thinking

Environmental Damage Regime

What will the new environmental damage regime mean for you?
The Environmental Liability Directive (the "ELD") introduces a number of significant changes to the UK's current environmental protection legislation framework. It will be transposed into English and Welsh law via the Environmental Damage (Prevention and Remediation) Regulations 2009 (the "Regulations") which come into force on 1 March 2009. The Regulations extend the scope of the "polluter pays" principle and introduce a positive reporting obligation in respect of actual or threatened environmental damage.

What is "environmental damage"?
The Regulations do not cover all types of damage to the environment. They are based upon the concept of "environmental damage" which is damage to one or more of the following:-

- Protected species, natural habitats or sites of specific scientific interest;
- Surface water, or ground water; or
- Land.

Strict liability is introduced for environmental damage caused by a specified range of "occupational activities" (i.e. which are already environmentally permitted activities). Fault-based liability exists in respect of environmental damage to protected species and natural habitats from all other commercial activities.

The Regulations are not retrospective and do not cover environmental damage caused before February 2009. For historically contaminated land, the contaminated land regime will continue to apply.

Responsible Operators
The Regulations impose new and important obligations on operators in the event of actual or threatened environmental damage. Where an activity has caused environmental damage or where there is an imminent threat of environmental damage, the responsible operator must:-

- immediately take all practical steps to prevent the damage/further damage; and
- notify all relevant details to the enforcing authority, e.g. environment agency.

Other than as a requirement of certain environmental permits, this positive reporting obligation is a new concept.

Remedial Measures – what is required?
Other than for damage to land, remediation can consist of one or all of the following:-

- Primary remediation – returns damaged natural resources, or impaired services to, or towards the state they would have been in if the damage had not occurred;
- complementary remediation – compensates for when primary remediation is not possible.

Measures can either be taken at the damaged site or an alternative site but where possible, the alternative site should be geographically linked;

- Compensatory remediation – compensates for interim losses of natural resources or services arising from when the damage took place until primary and complementary remediation achieves their full effect.

It is not yet clear what the impact of the Regulations will be but the scope of the remediation obligations is very extensive. Some commentators believe the Regulations will only apply to large scale incidents, however, much will depend on the approach of the enforcing authorities

Care Homes and Tax

The Background

As you may know there has been a long standing debate between the care homes industry and HMRC as to how goodwill should be valued for tax purposes on the purchase of a care home. In the past HMRC have argued that in a business which is carried out from a trade related property, which includes a care home, there was likely to be little or no "free goodwill" which could be separately identified from the property. Instead, most goodwill should properly be treated for tax purposes as part of the value attributed to the property.

This was significant for a number of tax purposes. Stamp duty land tax is payable at 4% on the purchase of property whereas goodwill is not subject to stamp duty or stamp duty land tax. In addition since the introduction of the new regime for the taxation of intangibles in 2002, a business can claim tax relief on the amortisation of goodwill but not property.

What's New

On January 29, HMRC issued a note setting out a revised policy in relation to the treatment of goodwill on business purchases. Attached to the note was a detailed technical note setting out their more detailed thinking.

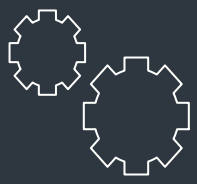
This new practice introduces a welcome shift in HMRC thinking especially as it applies to care homes. HMRC now recognise that there is likely to be an element of goodwill which is separate from the property. Any element of the purchase price attributable to this goodwill will not be subject to SDLT and will fall within the intangibles regime.

HMRC's view is that in valuing the goodwill the starting point is that goodwill is equal to the value of the business as a going concern less the value of the tangible assets. The main area of debate will therefore be around the valuation of those tangible assets and in particular any property. We are still likely to see disputes in this area. HMRC argue that the property should be valued on the basis of a continuing business but they recognise that there will still be an element of goodwill above this in relation to many businesses. The detailed guidance recognises that this may be quite significant in a care home which carries out specialist care, and where a significant amount of the value may be attributed to the value of contracts with customers and staff.

What does this all mean in practice?

In respect of future acquisitions it will be important to give consideration to being able to support the value of any goodwill which is independent of the property value. In particular it will be important to consider whether it is appropriate to obtain valuations of the property in line with the principles set out in the HMRC guidance and also to have evidence to support the value of existing client and staff contracts. The agreement should usually include an apportionment based on these principles.

In respect of past acquisitions it may be worth revisiting the split of consideration between the goodwill and property especially where this is the subject to dispute with HMRC



UNIQUE APPROACH

As one of the UKs leading consultants in the transport sector, iTransport Planning provides *integrated*, *individual, sustainable and innovative* Transport Planning solutions.

We are leading the way in supporting developers, landowners, property owners, town planners, property agents and project managers with a comprehensive service that delivers far-sighted transport planning solutions.

PLAN & DESIGN

We plan and develop *sustainable* transport solutions to ensure that our advice *improves* and *sustains* the quality of people's lives in the *built*, *natural*, *economic* and *social* environment. We resolve transport problems through the design and applications of *innovative* technical and engineering solutions.

ENABLE

We work with our clients to ensure that our indepth experience & expertise in Development & Regeneration directly benefits the project so that risks & costs are *minimised*, savings & innovation are *optimised*, and progress is *expedited*. What we learned in 25 years of *global* experience will directly *benefit* our clients and their projects.

Proposed changes to the planning appeal system

On 21 May 2007 the Government published a consultation paper entitled *Improving the Appeal Process in the Planning System – Making it proportionate, customer focused, efficient and well resourced*. The consultation paper proposed some fundamental changes to how the appeal system operates. Following consideration of the consultation responses (and having modified some of the proposals) the Government has now introduced some changes through the Planning Act 2008 and clarified the amendments which will be made to secondary legislation.

These changes, together with the publication of a revised Costs Circular (providing further guidance on the award of costs) will be effective from 6 April 2009. Clients who anticipate using the public inquiry system in the future will need to pay particular attention to the following key points:

Appeal fee
The Government intends to introduce an appeal fee and a power to make regulations to set fees for appeals is contained in Section 200 of the Planning Act 2008. There will be further consultation prior to introducing the appeal fee but it is anticipated that the fee could be set at 20% of the planning application fee.

Determining the appeal method
The current appeal system allows the principal parties to select the appeal method – written representations, hearing or inquiry. The Planning Act however now empowers the Planning Inspectorate, acting on behalf of the Secretary of State, to determine the most appropriate appeal method in accordance with Ministerially approved and published criteria. The criteria will provide that where the complexity of a case or exceptional circumstances demand it a hearing or inquiry will still be held but parties will nonetheless want to make a robust case to the Planning Inspectorate if they want to ensure a right to be heard and to cross examine opponents through the inquiry process. Further guidance on how this will work will be published in due course.

Inquiry date – planning ahead
At the moment a high proportion of inquiry and hearing dates slip and about 50% of appeals where an inquiry has been requested are withdrawn. To encourage real commitment to pursuing an appeal the Planning Inspectorate will offer two inquiry or hearing dates with one to be mutually agreed within ten working days of the start date of the appeal otherwise a date will be imposed by the Planning Inspectorate on the parties. The Planning Inspectorate's policy will be to resist adjournments, withdrawals and postponements and to decline to link appeals unless they are made at the same time.

Preparing your evidence – keeping it brief
The Government intends to require all parties to prepare more focused and concise evidence. Further guidance and recommended templates will be issued which will prescribe the material content and the level of detail required. Parties will also be encouraged to meet specific word limits and if voluntary measures to reduce the length of submissions do not work secondary legislation may be imposed. For hearings, parties will be required to submit short summaries of their statements before the hearing.

Statement of common ground
Current rules require the Statement of Common Ground to be submitted to the Planning Inspectorate four weeks before the date of the inquiry, at the same time as proofs of evidence. In due course secondary legislation will require the Statement of Common Ground to be prepared jointly by the local authority and the appellant and submitted to the Planning Inspectorate six weeks from the start of the appeal process. The intention is to prompt parties to begin planning the involvement of expert witnesses and to identify areas of disagreement as well as agreement at an earlier stage in the process.

Comments at the nine week stage
At present parties to appeals decided by hearing or inquiry are offered a final opportunity to comment in writing at the nine week stage despite having a further opportunity to make additional comments at the hearing or inquiry. This rule will be removed.

Introducing new material at appeal

The Government wants to stamp out the practice of 'case-creep' (where a scheme is revised during the course of the appeal enabling amendments or alternatives to a scheme to be progressed that should have been submitted as a new planning application). The Secretary of State (and her inspectors) will therefore be given powers to refuse to consider changes to a scheme or the submission of any new material beyond that which was before the local authority when it made its decision. There will be discretion to allow new material in exceptional circumstances but appellants will not want to rely on this and will need to consider carefully at an early stage whether scheme changes will be needed to address objectors' or planners' concerns.

Award of Costs

The draft Circular makes clear that parties will be liable for an award of costs at all stages of the process, even where they withdraw an appeal due to be dealt with by hearing or inquiry before the date for the hearing or inquiry has been set.

Costs will normally be awarded where a party has made a timely application for an award of costs, the party against whom the award is sought has acted unreasonably and the unreasonable behaviour has caused the party applying for costs to incur unnecessary or wasted expense in the appeal process. The draft Circular also provides clear examples of what might be considered unreasonable behaviour. For example, non-compliance with any rule or regulation, for example, the late submission of statements, will be regarded as unreasonable unless there is evidence of "extraordinary circumstances". Failure to understand current Regulations will not provide an excuse!

Good case management will be essential to ensure that the Government's best practice guidelines are met because behavior will be judged against these guidelines:

- there should be constructive co-operation and dialogue between the parties at all stages
- parties should respond promptly to changing circumstances and provide a clear explanation of a revised stance or position, with nothing coming as a complete surprise and
- parties should be willing to accept the possibility that a view taken in the past can no longer be supported and act accordingly at the earliest opportunity.

The provisions in the Town and Country Planning Act 1990 enabling costs to be awarded in appeals which have been dealt with by way of written representations will also be brought into force. This is intended to give some solace to those upon whom the written representations procedure has been imposed by the Planning Inspectorate!

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Our Philosophy....Our Approach

iPRT's approach to Transport Planning & Regeneration is like live theatre, dynamic, spontaneous and full of ideas and emotion. It's about discovering the essential qualities of a place so that we can help people describe their vision for the future

Understanding – Choose what we do!!

We begin with conversation. Our role is to help people identify the important elements that resonate as essential to the character of a place. We do this through a series of exercises to uncover strengths and weaknesses, opportunities and connections, history and nuance.

Discovery – Trying out ideas

common language, evolving ideas and 3 dimensions. We often create transport models so that everyone can have a clear understanding of the scale and the relationships of the buildings, streets and public spaces. It is through this process that the vision is refined and the quality is better understood by everyone involved.

Deciding – Choosing what we do

iPRT's drawings and models are more than pictures. We work tirelessly to foster a sense of local identity, to produce visions that are realistic and plans that can be implemented. Our designs are embedded with the principles of social equality, environmental responsibility and humane design to create beloved places that are truly timeless