

DERBYSHIRE COUNTY COUNCIL

CABINET MEETING

24 July 2012

Report of the Strategic Director – Environmental Services

EUROPEAN UNION FINANCIAL SANCTIONS (REGENERATION)

Introductory Summary Part 2 of the Localism Act 2011 provides a discretionary power for the Government to pass on financial sanctions imposed by the European Union to public authorities. The report sets out the current situation in terms of the uncertainties over this process and the risks to Derbyshire County Council including, the circumstances in which this new power may be exercised, the procedures in the Government policy statement consultation for implementation of the power, and the implications for Derbyshire County Council associated with the preparation of a sound Derby and Derbyshire Joint Waste Plan. Members are asked to note the current position and receive a report at the next meeting of Cabinet setting out a new timetable for the preparation of the Waste Plan.

(1) **Purpose of the Report** To inform Cabinet of the position regarding the legislation in Part 2 of the Localism Act 2011 which brings into being the power to pass European Union (EU) infraction fines on to public authorities.

(2) **Information and Analysis**

Localism Act

The Localism Act 2011 received royal assent in November 2011. Part 2 of the Act provides a new discretionary power (clauses 48 - 57) for the Government to pass on and apportion financial sanctions imposed by the European Court of Justice for non-compliance with any European obligation to public authorities. This applies where such a sanction has been imposed and the public authorities had a responsibility to comply with that financial sanction.

The intention of this new discretionary power is to incentivise public authorities to comply with EU law where it is clearly within their remit of responsibility. This provision potentially covers a wide range of matters, including quality of bathing waters, air quality standards, procurement procedures and the content of Waste Plans.

It is a requirement of the Localism Act 2011 (clause 49) that the Secretary of State publishes and consults upon a policy statement regarding the payment of EU fines by public authorities. The policy statement consultation was published in January 2012. This document was developed with the Local Government Association (LGA) and the Head of Planning Services was involved in advising the LGA in matters related to Planning at an earlier stage. The draft sets out the context around which EU fines legislation will be used and is based on four key components:

- **Working in partnership** – when negotiating EU legislation, the Government will work with all bodies which might be affected.
- **“No surprises”** – the Government will allow bodies, affected in a particular case, time to put matters right before passing on any penalty.
- **Fair, reasonable and proportionate process** – an independent panel of experts will be appointed to ensure that the Government’s decision in any case is fair, reasonable and proportionate, and only applies to bodies that can be said to have contributed to the national or Government’s default.
- **Ability to pay** – bodies required to pay the fine will be able to make representations on the amount to be paid.

Government has indicated that the UK has never received a fine from the European Court of Justice but that the Court has the ability to impose lump sums and/or ongoing penalty payments until such point as compliance is achieved. The amount/s could be significant with a minimum lump sum of €8.992 million (Euros), based on the UK’s Gross Domestic Product (GDP). The results of the consultation and any consequent amendments/clarifications are awaited. There are two areas of key uncertainty:

- There is no indicative overall timescale given for the process set out. It is therefore difficult to gauge what this will mean in practice for progress to any fine.
- The wording of the document is ambiguous and open to interpretation in several key areas. For example, it is difficult to determine whether all infraction proceedings are to be applied in the same manner.

EU infraction proceedings and Waste Plan coverage

The Government has indicated (letter from Chief Planner, Department of Communities and Local Government (CLG) January 2011) that there is a possibility that the EU will resume infraction proceedings against the UK for failure to meet the requirements of Article 7 of the EU Waste Framework Directive (WFD) (2006/12/EC). The WFD requires all Member States to have

in place comprehensive “waste management plans” for their territory and for those plans to address specified issues. The revised WFD (2008/98/EC) confirms and revises this requirement in Article 28 which indicates what the national coverage of waste management plans should contain.

In this context, “national coverage” will be achieved via the adoption of a range of national and local policy vehicles. This will need to include:

- The new National Waste Management Strategy (anticipated due autumn/winter 2013) for which the Department for Environment, Food and Rural Affairs (DEFRA) is responsible.
- A revised annex to the National Waste Management Strategy setting national waste planning guidance to replace Planning Policy Statement 10 (anticipated due autumn/winter 2013) for which CLG is responsible.
- Complete coverage of Waste Plans at the local level. This will require the updating of The Derby and Derbyshire Waste Plan (2005) which is currently under way.

This is not a new requirement, although several elements of it have been amended. In January 2002, the European Court of Justice delivered a judgement (case C-35/00) concluding that the UK had not fully complied with all the provisions of the WFD by not drawing up coverage of “waste management plans” covering the whole of its’ territory. There are five stages to European infraction proceedings, and this action followed two earlier stages of proceedings in July 1995 and April 1999. Until the UK has coverage (which includes all the matters specified above) of Directive-compliant waste plans, there is a risk of the UK incurring further infraction proceedings and, potentially, the ultimate risk of fines.

Over the recent years, there has been debate between local authorities, Government departments and the LGA on several areas of broad uncertainty in relation to this matter. The key question for local authorities is “What is a Directive-compliant Local Plan?” Uncertainty has been heightened by the scope/content of the waste management planning provisions of the WFD’s changing since initial infraction proceedings commenced in 1995. This is coupled with several significant legislative and policy changes in the scope and content of waste plans because of amendments to the English planning guidance and legislation. This has recently included the removal of the one part of the development plan for a given area in the form of Regional Spatial Strategies (RRS).

Uncertainty in local authorities, the Planning Inspectorate and CLG has led to a view on what constitutes a “compliant waste plan” which has changed over the time. In addition, the (now abolished) Government Offices, gave advice which appears (with hindsight) to contradict both CLG and Planning Inspectorate interpretations of WFD requirements.

Government guidance on directive-compliant Plans is currently awaited. However, it is clear that both authorities with currently “up-to-date” or historic waste plans may not actually comply with the revised requirements.

Case law from the European Court of Justice (judgement on joined cases C-53/02 and C-217/02) has provided some clarity guidance regarding the site location and identification requirement of the WFD. Essentially, the **totality** of waste management plans/strategies (both national and local) should include site specific allocations or location criteria which are sufficiently precise to enable the competent licensing or permitting authority (the Environment Agency) to determine whether the site in question falls within the framework provided for by the Waste Plan.

One of the vagaries of this process is related to a wider question of how European Directives (such as the WFD), are transposed into domestic regulation. In the case of England, the planning system also achieves the above goal by the requirement for individual, site-based planning applications to be in place before competent licensing or permitting authorities can decide whether or not to issue permits or licences.

Notwithstanding the above issue, it is clear that the 2005 Derby and Derbyshire Joint Waste Local Plan does not achieve current WFD compliance. However, there is no indication of when/or if infraction proceedings will be resumed, nor of how long the process may take in the European Courts to reach the point where financial penalties are imposed. In addition, as outlined above, any delay to the introduction of national policy will contribute to non-compliance in a manner that is outside the control of any single local authority.

Planning Reforms and Localism

There is another factor to consider. As well as producing a Waste Plan that is WFD compliant, the Waste Plan will also have to be prepared in accordance with the legal and procedural requirements and the “tests of soundness” set out in domestic legislation and Government policy. This is adjudicated by the Planning Inspectorate. Planning reforms have moved apace over the past year and will continue to do so for at least the next 18 months. This sets out the agenda that the Planning Inspectorate will look to see reflected in local Waste Plans.

Some of these factors are significant. Plans will need to address the National Planning Policy Framework (March 2012) and set out locally defined tests of sustainable development. The Localism Act 2011 itself triggered a wholesale removal of most extant national planning guidance; the Local Waste Plan will need to expand in scope to address any guidance vacuum. This will require a turnaround from the old maxim that local plans should not look to address national policy issues.

As mentioned above, the Localism Act 2011 also confirmed the end of RSS. On the basis that RSS currently forms part of the development plan, local plans will consequentially need to expand their scale/scope of issues addressed to fill further policy vacuums.

Critically, the Localism Act 2011 sets out a new a duty to cooperate. This requires planning authorities to cooperate with each other and with other bodies in relation to sustainable development and the use of land for strategic infrastructure in the preparation of their Plans. Cooperation should be constructive, meaningful and continuous. Recent decisions have been made by the Planning Inspectorate to suspend the progress of some waste plans, such as for North London in June 2012, because of failures to comply with this requirement.

Work on replacement minerals and waste core strategies began in 2009. Localism and the planning reform changes since May 2010 means that the Waste Plan documents to be produced will be different in form and scope from those originally intended in 2009. The engagement during all phases of their preparation will be also be different.

Conclusions

A Directive-compliant Plan would require the Derby and Derbyshire Waste Plan to contain all the elements the WFD indicates and have reached publication stage (not submission or adoption). However, it is also imperative that the Waste Plan follows the correct legal and procedural processes and complies with all the tests of soundness in order that it does not have to be withdrawn at or after publication stage.

If infraction proceedings are resumed, the City and County Councils may be found to have a Waste Plan that is non-compliant with the WFD, and thus be at risk of incurring financial penalties as a result. It is therefore important that the replacement Waste Plan is progressed as quickly as possible to minimise the risks.

It is extremely difficult to estimate when or if the UK is likely to be fined, or even if this may actually be passed onto local authorities. However, it is known that the Government timescale for the production of the new waste strategy is towards the end of next year. This national document will form part of the required coverage.

The Derby and Derbyshire Development Plans Joint Advisory Committee (JAC) meeting on 12 April 2012, discussed a report on the changing legislative and policy position and the implications for the Joint Minerals and Waste Plans.

The JAC discussed the issue of EU fines and timely Waste Plan preparation. It expressed the view that it was important to progress the waste plan as quickly as possible to reduce the risk to the County and City Councils of EU

finances being passed on but that there should be no short cuts. It was recognised that publishing a Waste Plan that covered the matters in the WFD, and was sound and legally and procedurally correct, was the most appropriate way forward.

A revised timetable on the production of the Derby and Derbyshire Waste Plan, taking account of all recent legislative changes to planning is currently being prepared in collaboration with Derby City Council and will be the subject of a future report to Cabinet in due course.

(3) **Financial Considerations** The potential impact is significant but it is not possible to estimate the likelihood of any fines being passed on with any degree of certainty.

(4) **Legal Considerations** These are referred to in the main body of the report.

The payment of all, or some, of a European Court of Justice financial sanction may relate to other Departments of the Council responsible for compliance with European legal obligations.

(5) **Property Considerations** There are no property considerations associated with this report.

In preparing this report the relevance of the following factors has been considered: prevention of crime and disorder, equality and diversity, human resources, environmental, health and transport considerations.

(6) **Key Decision** No.

(7) **Call-In** Is it required that call-in be waived in respect of the decisions proposed in the report? No.

(8) **Background Papers** Held by Head of Planning Services . Officer contact details – Rob Murfin, extension 39777 or Michelle Spence, extension 39813.

(9) **OFFICER'S RECOMMENDATIONS** That Cabinet:

9.1 Notes the current situation regarding European Union Fines and Part 2 of the Localism Act 2011.

9.2 Resolves to receive a report on a revised timetable on the production on the Derby and Derbyshire Waste Plan at its next meeting.

Ian Stephenson

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