OFFICE OF THE DEPUTY PRIME MINISTER

ODPM Circular 08/2005
Office of the Deputy Prime Minister
Eland House, Bressenden Place, London SWIE 5DU

24 August 2005

GUIDANCE ON CHANGES TO THE DEVELOPMENT CONTROL SYSTEM

1. This Circular provides guidance on the operation of the development control provisions commenced on 24 August 2005. These provisions are contained in Part 4 of the Planning and Compulsory Purchase Act 2004. The Circular covers:

   - the power to decline to determine applications
   - the duration of permission and consents
   - the duty to respond to consultation
   - Regional Planning Bodies as statutory consultees.

2. The guidance contained in this Circular relates to England only. A further Circular will be issued when the measures are commenced in relation to Wales. References in this Circular to the "2004 Act" are to the Planning and Compulsory Purchase Act 2004. References to the "1990 Act" are to the Town and Country Planning Act 1990. References to the "Listed Buildings Act" are to the Planning (Listed Buildings and Conservation Areas) Act 1990. References to the GDPO are to the Town and Country Planning (General Development Procedure) Order 1995.

Power to decline to determine applications

3. Section 43 of the 2004 Act replaces the existing section 70A of the 1990 Act with new sections 70A and 70B. It also inserts new sections 81A and 81B into the Listed Buildings Act.

PURPOSE OF POWERS

4. These new powers are intended to inhibit the use of repeated applications that are submitted with the intention of, over time, reducing opposition to undesirable developments. They are not intended to prevent the submission of a similar application which has been altered in order to address objections to the previous application. Applicants should be encouraged to enter into pre-application discussions to minimise the likelihood of their applications being rejected.

REPEAT APPLICATIONS

5. Powers previously existed for local planning authorities to decline to determine an application for planning permission which was the same or substantially the same as an application that, within the previous two years, the Secretary of State had called in and refused or had dismissed on appeal.

6. This new power extends the ability to decline to determine applications to include applications for listed building consent, conservation area consent and applications for the prior approval of a local planning authority for development which is permitted under the Town and Country Planning (General Permitted Development) Order 1995.

7. In addition, local planning authorities will also be able to decline to determine applications where there has been no appeal to the Secretary of State on at least two previous refusals in the last two years.

8. Local planning authorities should use the power to decline to determine repeat applications only where they believe that the applicant is trying to wear down opposition by submitting repeated applications. If an application has been revised in a genuine attempt to take account of objections to an earlier proposal, the local planning authority should determine it.

9. If an applicant thinks that an authority has acted unreasonably in declining to determine a repeat application, he or she is able to seek judicial review of that authority's decision.

"SIMILAR" APPLICATIONS

10. Section 70A(8) defines applications for planning permission as "similar" if (and only if) the local planning authority thinks that the development and the land to which the applications relate are the same or substantially the same.

11. Section 81A(7) of the Listed Buildings Act defines an application for listed building consent or conservation area consent as "similar" if (and only if) the

local planning authority thinks that the building and works to which the applications relate are the same or substantially the same.

12. Where an authority considers that an application is similar, it is not automatically obliged to decline to determine the application. However, local planning authorities should be mindful of the intention behind this power. It can be a major cause of frustration to members of the public and the local community to have to deal with a repeat application when they have already dealt with the original application and seen the development be refused.

"SIGNIFICANT CHANGE"

13. Local planning authorities should decide what constitutes a "significant change" in each case. An authority may consider that a change in a Development Plan Document or other material consideration will be "significant" for the purpose of this section if it is likely to alter the weight given to any planning consideration in the determination of an application.

DOUBTFUL CASES

14. In considering whether to exercise its power under sections 70A or 81A, an authority will sometimes be faced with a doubtful case. In such a case, the authority should generally give the benefit of the doubt to the applicant and determine the application. No conclusion about the likely success of an application should be drawn from the decision by a local planning authority not to exercise its powers under sections 70A and 81A.

NOTIFYING AN APPLICANT

15. Where a local planning authority declines to determine an application, it should notify the applicant that it has exercised its power under section 70A or 81A to decline to determine the application and should return the application to the applicant. The authority should seek to make this decision as soon as possible so that, for example, further, unnecessary public consultation is avoided.

APPEAL

16. An application which a local planning authority declines to determine under section 70A or 81A should be returned to the applicant and should then be regarded by the authority as withdrawn. Applicants have no right of appeal against a local planning authority's decision not to determine an application except where the authority has failed to give notice of their decision not to determine an application (see section 78(2)(aa) of the 1990 Act). An applicant may, however, apply for judicial review of an authority's decision to exercise its power under these sections.

DATE OF IMPLEMENTATION

17. The existing provisions which enable an authority to decline to determine an application which has been refused or dismissed by the Secretary of State within the last two years are re-enacted by the new section 70A. An authority may

decline to determine an application which it has previously turned down within the last two years which is received on or after the date on which the new section 70A takes effect, even if the previous proposal was turned down by the authority before that date. The powers as extended do not apply to applications that were submitted prior to that day and which are determined after that date.

18. **This guidance revokes that in paragraphs 4 to 9 of Annex 2 to the Department of the Environment Circular 14/91.**

Duration of permission and consent

19. Section 51 of the 2004 Act amends section 91 of the 1990 Act and section 18 of the Listed Buildings Act so that detailed planning permission, listed building consent and conservation area consent will normally be granted with the condition that the development or works must be begun within three years from the date on which the permission or consent was granted. Local planning authorities may agree longer or shorter durations of permission or consent where they consider it would be appropriate, but the timescale should be appropriate to the size and nature of the development or works.

20. Section 51 also amends section 92 of the 1990 Act to require development which has been granted outline planning permission to be begun within two years from the date of final approval of reserved matters rather than 5 years from the granting of outline planning permission, since this might have allowed a longer duration of consent than would be provided under a full planning permission.

21. Section 51 also amends section 73 of the 1990 Act and section 19 of the Listed Buildings Act so that a planning permission or consent can no longer be extended by an application to vary a condition.

PURPOSE OF POWERS

22. These powers reduce the period of validity of a detailed planning permission, a listed building consent and a conservation area consent from five to three years. Local planning authorities may still direct longer or shorter periods where this would be appropriate, and it is recommended that they be flexible in their dealings with applicants, designating periods appropriate to the size and nature of the proposal. Furthermore, the powers remove the scope to begin development within five years of the grant of outline consent, since this might have allowed a longer duration of consent than would be provided under an application for full planning permission. These provisions also prevent an extension to the agreed period of validity without the submission of a new application.

DURATION OF CONSENT

23. When granting planning permission, listed building consent or conservation area consent, a local planning authority must grant that permission or consent subject to a condition imposing a time-limit within which the development must be started. When the local planning authority fails to impose such a condition, the permission or consent would be deemed to be granted subject to the condition

that the development or works to which it relates must be begun not later than the expiration of three years beginning with the grant of permission or consent.

OUTLINE PLANNING PERMISSION

24. Where a local planning authority is considering an application for outline planning permission under section 92 of the 1990 Act, it must grant outline planning permission subject to conditions imposing two types of time-limit. The first sets the time-limit within which applications must be made for the approval of reserved matters. This will normally be three years from the grant of outline permission, but an authority could chose to direct a longer or shorter period as appropriate. The second sets the time-limit within which the development itself must be started. This will usually be two years from the final approval of the last of the reserved matters, but may be longer or shorter as directed by the local planning authority. Whilst this route to permission may operate to the same timetable as currently, it provides local planning authorities with additional flexibility on timing, such as for relatively straightforward projects with few reserved matters.

VARIATION FROM STANDARD TIME-LIMITS FOR DETAILED APPLICATIONS

25. The three year default period has been introduced to encourage development to take place at an early stage and it is considered that for the majority of planning permissions and consents three years gives the developer long enough to begin implementation.

26. However, there will be developments where three years is unlikely to be long enough to enable the developer to complete all the preparation needed before starting work. Section 91(1)(b) enables local planning authorities to substitute a longer or shorter period once they have considered any material considerations. For each application, authorities should consider whether a three year period is appropriate to the size and nature of the development proposed and consider whether a longer or shorter period would be more reasonable. Local planning authorities should bear in mind that applicants will no longer be able to apply to extend the time-limit set in the consent.

27. Local planning authorities may wish to adopt a flexible approach to the fixing of time-limits where development is to be carried out in distinct parts or phases; section 92(5) of the 1990 Act provides that outline permissions may be granted subject to a series of time-limits, each relating to a separate part of the development. Such a condition must be imposed at the time outline planning permission is granted.

SEPARATE SUBMISSION OF DIFFERENT RESERVED MATTERS

28. Applications for approval under an outline permission may be made either for all reserved matters at once, or for one at one time and others at another. Even after details relating to a particular reserved matter have been approved, one or more fresh applications may be made for approval of alternative details in relation to the same reserved matter. Once the time-limit for applications for approval of

reserved matters has expired, however, no applications for such an approval can be made.

29. A condition requiring the developer to obtain approval of reserved matters within a stated period should not be used, since the timing of an approval is not within the developer's control. A condition, therefore, should set time-limits only on the submission of reserved matters.

EFFECT OF TIME-LIMIT

30. After the expiry of the time-limit for commencement of development it is not possible for development to be begun under that permission; a further application for planning permission must be made.

31. Previously, a developer who wished to extend the period of validity of a consent before the period had expired could do so by applying to vary a condition. Section 73(5) of the 1990 Act and section 19(5) of the Listed Buildings Act now prevent such an extension. Any person who has not started development within the time-limit allowed by the permission or consent will need to submit a fresh application if he or she wishes to undertake that development or works. Local planning authorities should judge such applications against current planning considerations.

DATE OF IMPLEMENTATION

32. An authority should determine an application which is received on or after 24 August 2005 in accordance with the new provisions. The new provisions do not apply to applications that were determined prior to that date or submitted prior to that day and which are determined after that date. However, where permission or consent was granted prior to 24 August 2005, developers will retain until 23 August 2006 the ability to seek to extend the time-limit on that permission or consent.

33. **This guidance revokes that in paragraphs 54 to 60 of the Department for the Environment Circular 11/95.**

Duty to respond to consultation

34. This guidance explains the new duty set out in section 54 of the 2004 Act requiring statutory consultees to respond to consultation within a set time period. New articles 11A and 11B of the GDPO specify to which consultation requirements the duty to respond will apply, the prescribed period for response, and the requirement on statutory consultees to provide a report to the Secretary of State on their performance.

35. Statutory consultees will be required to respond to consultation within 21 days under the provisions in section 54 and article 11A of the GDPO. The Secretary of State is also empowered to require statutory consultees to submit a report to him on their performance against the statutory deadline. Article 11B of the GDPO introduces the requirement to report annually.

PURPOSE OF POWERS

36. These powers are intended to assist with the speedier submission of the information necessary to enable a planning application to be determined.

TO WHOM DOES THE DUTY APPLY?

37. The duty to respond applies to anyone who is a statutory consultee by virtue of the following provisions:

- Articles 10 and 12 (including directions under article 10(3)) of the GDPO.
- Paragraph 5(a) of condition A.3 in Part 24 of the Town and Country Planning (General Permitted Development) Order 1995 (consultation in respect of prior approval applications for telecoms development).
- Section 71(3) of the 1990 Act.
- Paragraph 4(2) of Schedule 1 to the 1990 Act.
- Paragraphs 7 of Schedule 1 to the 1990 Act.
- Paragraph 3(b) of Schedule 4 to the Listed Buildings Act.

38. Where a duty to respond applies, it applies only to consultation under the above provisions, not to any other consultation with that statutory consultee, even if consultation is required by other statutory measures.

39. The reason for the different approach is that different consultation procedures apply. As a general rule, the duty to respond applies where local planning authorities were previously able to determine an application for permission or consent 14 days or more after the date on which they consult the statutory consultee.

PRE-APPLICATION CONSULTATION

40. The duty to respond also applies to anyone who is a statutory consultee by virtue of the above provisions where a request for advice relating to a potential development is made in advance of submitting a planning application. In such cases it can be equally important for developers and others to receive advice quickly. Local planning authorities will still be required to consult statutory consultees even if an applicant has already consulted them at pre-application stage.

DUTY TO RESPOND

41. Potential developers (at pre-application stage) and local planning authorities (at application stage) must provide sufficient information to the statutory consultee to enable it give a substantive reply. In considering what is "sufficient", potential developers, local planning authorities and statutory consultees should have

regard to the words of Webster J in *R v Secretary of State for Social Services ex parte Association of Metropolitan Authorities* (1986):

> "... in any context the essence of consultation is the communication of a genuine invitation to give advice and a genuine consideration of that advice. In my view it must go without saying that to achieve consultation sufficient information must be supplied by the consulting party to the consulted party to enable it to tender helpful advice..... By helpful advice, in this context, I mean sufficiently informed and considered information or advice about aspects of the form or substance of the proposals, or their implications for the consulted party, being aspects material to the implementation of the proposal as to which the Secretary of State might not be fully informed or advised and as to which the party consulted might have relevant information or advice to offer."

42. Local planning authorities should send statutory consultees a copy of all relevant papers that they have received from an applicant to help the statutory consultee to provide a substantive response. Prospective developers are also advised to send to statutory consultees all the information they think that the statutory consultee might need to provide advice. The 21 day deadline will not start until the statutory consultee has received all the information it needs to provide an informed response. Where a statutory consultee needs to request further information, it should do so without delay.

43. A substantive response should:

- say the statutory consultee has no comment to make; or
- say that, on the basis of the information available to it, the statutory consultee is content with the proposed development; or
- refer the local planning authority to current standing advice provided by that statutory consultee; or
- provide advice.

44. The substantive response should include reasons for the consultee's views so that where these views have informed a subsequent decision made by a local planning authority the decision is transparent. A holding reply would not be a substantive response.

TIME-LIMITS

45. The period prescribed for the purpose of the duty to respond is 21 days starting with the date on which the statutory consultee receives the information necessary to allow it to provide a substantive response, or any other period agreed in writing between both parties. Where separate legislation sets a different time-limit for response, for instance consultation with English Nature under the Wildlife and Countryside Act 1981 or the Countryside and Rights of Way Act 2000, then that time-limit is not superseded by the 21 day deadline.

46. The statutory deadline will have been met if the statutory consultee gives its response within 21 days starting on the day on which the statutory consultee receives the consultation document. Statutory consultees are strongly advised to ensure that the advice is given by the fastest possible means. Good communication will be necessary between the local planning authority and the consultee where there is the possibility of confusion as to the deadline for a response; for example, if information was late in reaching the consultee.

47. Potential developers and local planning authorities should bear in mind that there may well be a need to extend the deadline in some cases. In such cases, potential developers and local planning authorities should consider favourably any request for an extension.

48. The amount of time needed for a statutory consultee to respond on a planning application is likely to be less if a potential developer has already sought the advice of the statutory consultee before submitting an application. Potential developers are therefore strongly advised to carry out such pre-application consultation - particularly where the development is likely to need detailed expert advice.

DETERMINATION OF APPLICATIONS BEFORE THE 21 DAY DEADLINE

49. The duty for statutory consultees to respond within 21 days and the general restriction that such applications should not be determined before a period of 21 days do not prevent the local planning authority from making an earlier determination where it has received a substantive response. Previously, decisions on applications could be made after 14 days. By changing this to 21 days, the two periods will be more closely aligned, providing greater consistency between the two requirements. In some circumstances the two periods may not align perfectly; therefore parties should seek to minimise this possible impact by having regard to the advice in paragraph 46 of this Circular. Additionally, the flexibility to make an earlier decision where all the relevant information is at hand is consistent with the objective of speeding up the planning process.

REPORTING REQUIREMENTS

50. Statutory consultees are required to report annually to the Secretary of State on their performance in meeting the statutory deadline. The report should consist of the following information:

- the number of consultation requests received from prospective developers (that is, at pre-application stage);
- the number of such consultation requests which were responded to within the statutory deadline;
- the number of consultation requests received from local planning authorities;
- the number of such consultation requests which were responded to within the statutory deadline; and

- (if appropriate) a brief summary of reasons why the statutory deadline has not been met in all cases.

51. Where the 21 day deadline has been extended by the agreement of both parties, it is the extended date against which performance should be recorded. The report does not need to identify where such longer periods have been agreed.

52. The summary of reasons should not include details of every case, but should provide a general picture of why the target was not met. For example, one reason might be that insufficient information had been supplied to the statutory consultee, and therefore the statutory consultee had to go back for more information. In such cases, statutory consultees should give an indication of whether this is a widespread problem or whether the problem relates to individual prospective developers or local planning authorities.

SUBMISSION OF ANNUAL REPORTS

53. Reports should cover the year from April to March, and must be sent to the Secretary of State within three months of the end of the report year. For example, a report on performance from April 2005 to March 2006 would need to be submitted by the end of June 2006.

54. Where a consultation period falls over the end of year period, performance should be included in the report covering the period in which the response is provided. For example, a request received on 25 March 2006, and responded to on 10 April 2006, should be included in the report for April 2006 to March 2007.

55. Statutory consultees should send their reports, by the end of June each year, to the following address: Planning Development Control Division, Zone 4/H3, Eland House, Bressenden Place, London, SW1E 5DU, or by e-mail to consulteereports@odpm.gsi.gov.uk.

56. A summary of these reports may be published and, depending on trends identified in such reports, Ministers may request action be taken to address poor performance by statutory consultees.

Consultation with Regional Planning Bodies

57. This guidance explains the new consultation requirements set out in paragraph 16(4) of Schedule 6 to the 2004 Act which inserts a new paragraph 7 into Schedule 1 to the 1990 Act.

PURPOSE OF POWERS

58. To update the consultation arrangements on planning applications between local planning authorities and county councils to reflect the changes introduced by the 2004 Act. It also introduces provisions for regional planning bodies to be statutory consultees on certain planning applications. In both cases the period prescribed for responding to requests for advice is 21 days.

59. The regional planning body will be consulted on any development which would be of major importance for the implementation of the Regional Spatial Strategy or a relevant regional policy, because of its scale or nature or the location of the land. Further, each regional planning body may notify local planning authorities in writing of other descriptions of development in relation to which it wishes to be consulted. It is expected that these descriptive criteria will be linked to development likely to impinge on the implementation of the Regional Spatial Strategy or a relevant regional policy, but they may also cover other types of development. It is not expected that there will be significant numbers of planning applications on which the regional planning bodies will wish to be consulted.

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Printed by The Stationery Office Ltd under the authority and superintendence of the Controller of Her Majesty's Stationery Office and Queen's Printer of Acts of Parliament.

ISBN 0 11 753953 8

£6

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