

## Insights

# SWIRE V SECRETARY OF STATE [2020]: A CAUTIONARY TALE FOR APPLICANTS SEEKING SCREENING DIRECTIONS

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## SUMMARY

A recent High Court ruling in the case of *R (Swire) v Secretary of State* [2020] has highlighted the subtleties in the approach to screening decisions and particularly in the assessment of measures to mitigate the adverse effects of a proposed development, in cases where negative screening opinions are given.

Environmental Impact Assessments (“EIAs”) have long been a fertile area for legal challenge to planning permissions due to the complexities and subtleties of the EIA regime. The recent case of *Swire* brings the EIA screening process into focus.

In this case it was held that a negative screening decision, that an EIA was not required, was unlawful because insufficient information and limited evidence on the potential contaminants at a development site had been provided by the applicant.

## Screening decisions

By way of background, the Town and Country Planning (Environmental Impact Assessment) Regulations 2017 (“the EIA Regulations”) require the mandatory submission of an EIA planning applications for certain types of development in every case<sup>[1]</sup>. EIAs must also be submitted for developments that fall outside this mandatory list but that are likely to have a significant effect on the environment<sup>[2]</sup>. In these cases, the development proposal must be screened by the screening authority<sup>[3]</sup> to determine whether significant effects on the environment are likely and whether an EIA is required.

When carrying out the screening, the screening authority must take account the relevant criteria specified in the EIA Regulations<sup>[4]</sup> and each case should be considered on its own merits in a balanced way before a decision on whether or not the proposal is an EIA development and requires the submission of an EIA can be taken.

The Planning Practice Guidance encourages applicants to identify features of their development proposal and any measures that could be put in place to avoid or prevent what might otherwise have been significant adverse effects on the environment, and to provide this information to the authority to inform the screening decision<sup>[5]</sup>.

The extent to which mitigation or other measures may be taken into account in reaching a screening opinion depends on the facts of each case and the screening authority must have regard to the amount of information available and the degree of uncertainty in relation to the environmental impact.

### **The *Swire* case**

The *Swire* case was a judicial review of a screening decision made by the Secretary of State that a proposed scheme for 20 homes on a site that had previously been used to process cattle slaughtered with BSE in the 1990s, was not an EIA development, and as such did not require an EIA to be submitted with the planning application.

A desktop and phase 1 surveys of the site had been carried out and identified a range of contaminants. The applicant had agreed with the local planning authority that the land was contaminated and had proposed a comprehensive remediation plan based on further investigations that could be secured by way of planning condition.

The screening authority determined that the development was in a sensitive area but that the environmental impact was likely to be eliminated by the proposed mitigation measures that would be secured by planning conditions. This meant that it was unlikely to have significant effects on the environment and consequently that an EIA was not required.

However, following a judicial challenge, the Court held that the screening decision was unlawful because limited evidence of the contamination and hazards from BSE-infected carcasses at the site had been provided or on the methods of detecting, managing and remediating it. As such, the Secretary of State was not in a position to conclude that the proposed mitigation would safeguard and address potential problems of contamination or would be successful, as there was not enough information to support that assumption. The screening decision was therefore unlawful.

### **Comment**

Where screening opinions are sought, this case highlights the importance for applicants to give careful consideration to the information and evidence submitted to a screening authority at the outset, to ensure that the authority's resulting screening decision is lawful. What will be sufficient will depend on the facts in each case, and in trying to submit the right of balance of information, it can be easy for applicant's to trip up.

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- [1] Schedule 1 EIA Regulations
  - [2] Schedule 2 EIA Regulations
  - [3] The local planning authority and Secretary of State
  - [4] Schedule 3 EIA Regulations
  - [5] Regulation 6 EIA Regulations

## RELATED PRACTICE AREAS

- Real Estate
- Planning & Zoning

## MEET THE TEAM



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