

Circular 3/1999: Town and country planning (compensation for restrictions on mineral working and mineral waste depositing) (Scotland) regulations 1998

This Circular supersedes SDD Circular 22/1987.

The Chief Executive, Local Authorities

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Planning series:

National Planning Policy Guidelines (NPPGs) provide statements of Government policy on nationally important land use and other planning matters, supported where appropriate by a locational framework.

Circulars, which also provide statements of Government policy, contain guidance on policy implementation through legislative or procedural change.

Planning Advice Notes (PANs) provide advice on good practice and other relevant information.

Statements of Government policy contained in NPPGs and Circulars may, so far as relevant, be material considerations to be taken into account in development plan preparation and development control.

Introduction

1. This Circular explains the provisions of the Town and Country Planning (Compensation for Restrictions on Mineral Working and Mineral Waste Depositing) (Scotland) Regulations 1998 (SI 1998 No.2914 (s.170)) which come into force on 25 January 1999. The Regulations update the compensation arrangements which apply when a planning authority revokes, modifies, suspends, prohibits or discontinues mineral working.
2. The 1997 Act provides that sites with planning permission(s) for development consisting of the winning and working of minerals or involving the deposit of mineral waste ("minerals development") must be reviewed every 15 years to ensure modern conditions apply. Compensation is payable if new conditions, other than restoration and aftercare conditions, restrict working rights.
3. Under the terms of the 1997 Act, planning authorities retain their powers to make revocation, modification, discontinuance, prohibition and suspension orders to enable them to act in cases of urgency or default. Paragraph 120 of Circular 34/1996 explains the Government's intention to make regulations to bring the compensation entitlement following such orders in to line with that for periodic reviews now provided for under the 1997 Act.

4. Planning Authorities are reminded that orders should not be used as a substitute for, or supplemental to, periodic reviews as provided for by Section 74 of the 1997 Act, except in cases of technical default (ie where a periodic review has been missed as the orders represent the only means for reviewing and updating the permission) or in the exceptional situation where a material change in circumstances between reviews makes it unacceptable for the development to continue on the existing terms and conditions of the planning permission.

Order making powers available

Revocation and modification orders

5. Under Section 65 of the Town and Country Planning (Scotland) Act 1997 (the "1997 Act"), a planning permission for minerals development may be revoked or modified by the planning authority if they consider that it is expedient to do so. The planning authority can include an aftercare condition in a revocation or modification order provided it also includes, or the planning permission already contains, a restoration condition. Section 65 orders may only be made before buildings or operations have been completed or a change of use has occurred. In the case of minerals development, an order can only be made before development commences or in respect of uncompleted parts of the development. For example aftercare conditions can only be imposed before soils have been replaced and restoration conditions satisfied.

6. Planning authorities are required to serve notice of a Section 65 order on the owners and occupiers of the land affected and on any other person who, in their opinion, would be affected by the order. The notice must specify a period (not less than 28 days from the date of service) during which anyone served with a notice may request that their representations be heard by a person appointed by the Secretary of State before the order is confirmed. This may be by means of a local inquiry, a hearing or written representations. However, Section 67 of the 1997 Act provides for an expedited procedure where all those who received notice of the order have informed the planning authority that they do not wish to object to it. In such cases a Section 65 order may take effect without being confirmed by the Secretary of State provided that the planning authority have:

- advertised the making of the order;
- sent a copy of the advertisement to the Secretary of State not more than 3 days after it is published;
- and the Secretary of State has not:
 - directed that the order be submitted to him for confirmation; or
 - received notice that a person affected by the order wishes to object.

The provisions of Section 67 do not apply where an order has been submitted to the Secretary of State for confirmation, where the order revokes or modifies a planning permission granted or deemed to have been granted by the Secretary of State or where an order modifies conditions imposed by virtue of Sections 58 or 59 of the 1997 Act.

7. There will be cases where a site is subject to more than one planning permission and the planning authority will need to decide whether to make an order under Section 65 for each permission or to make a single discontinuance order under paragraph 1 of Schedule 8 to the 1997 Act. In such cases, the planning authority should consider which option will best achieve their planning objectives for the site. However, it is expected that a discontinuance order will usually be more effective than a series of Section 65 orders tackling individual permissions.

Discontinuance orders

8. Where the planning authority consider it "expedient in the interests of the proper planning of their area (including the interests of amenity), regard being had to the development plan and to any other material considerations" they may, under paragraph 1 of Schedule 8 to the 1997 Act, make an order requiring any use of land to be discontinued, or they may impose conditions as to its continuing use or require buildings or works to be altered or removed. For the purposes of this section the winning and working of minerals is treated as a use of land. The planning authority can include in a discontinuance order requirements for the alteration or removal of plant or machinery and conditions relating to the restoration of the land. If the order imposes restoration conditions, or the site is already subject to such conditions, aftercare conditions may also be imposed. Whereas revocation and modification orders can only be used where there is an express planning permission, discontinuance orders relate to the use of land. Planning authorities may therefore wish to consider making a discontinuance order where:

- (a) minerals development was begun before the Town and Country Planning (Scotland) Act 1947 came into effect and no express planning permission exists;
- (b) minerals development begun in breach of planning control but enforcement action is not appropriate; or
- (c) the making of a discontinuance order represents the most efficient method of modifying the use (eg ensuring the restoration) of a large site which is subject to more than one planning permission. (In a case of this kind, the operator may be prepared to make an application for a consolidated permission and such an application would be exempt from the normal fee).

9. Discontinuance orders take effect only if confirmed by the Secretary of State and he may modify an order as he considers necessary. When a planning authority submits an order for confirmation, they must serve notice on the owners and occupiers of the land affected and on any other person who, in their opinion, will be affected by the order. Anyone served with such a notice has the right to be heard by a person appointed by the Secretary of State. This may be by means of a local inquiry or by written representations. There is no expedited procedure for unopposed orders under this section.

Prohibition orders

10. Paragraph 3 of Schedule 8 to the 1997 Act enables planning authorities to make orders prohibiting the resumption of minerals development in, on or under land where no such development has been carried out to any substantial extent for a

period of at least 2 years and where, on the evidence available to the planning authority, it appears that development is unlikely to resume to any substantial extent. The intention of prohibition orders is to establish without doubt that minerals development has ceased, to ensure that development cannot resume without a fresh grant of planning permission and to secure the restoration of the land.

11. Parliament has expressly provided for planning authorities to make orders prohibiting the resumption of minerals development where such development had permanently ceased. Prohibition Orders therefore provide the due process for extinguishing planning permissions in such circumstances and the Government believes that wider use should be made of these powers in respect of dormant mineral sites where resumption of development is unlikely.

12. In addition to prohibiting the resumption of development, prohibition orders may impose requirements for:

- (a) the removal or alteration of plant and machinery;
- (b) the removal or alleviation of any injury to amenity caused by the minerals development (except where caused by subsidence from underground workings);
- (c) compliance with any planning conditions to which the minerals development is subject; and,
- (d) the restoration of the land.

Where a restoration condition is imposed by the order, or the site is already subject to one, an aftercare condition may also be imposed.

13. Whether or not it can be held that no working has been carried out "to any substantial extent" will depend on the circumstances of the individual case, including the scale of the operation and past levels of production. In deciding whether or not the resumption of working is unlikely, planning authorities should weigh evidence supplied by the operators/owners on the pattern and programme of their operations including forecasts of trends in production and markets for their products. Operators and owners will need to show a real and genuine intention to work the site. In the event of an inquiry, planning authorities will need to be able to demonstrate that their decision to make an order is a reasonable one in the light of such issues and other relevant information.

14. Prohibition orders can only take effect if confirmed by the Secretary of State, and he may confirm them without modification or subject to such modifications as he considers expedient. When a prohibition order takes effect, any planning permission to which the order relates will cease. This provision does not prevent the planning authority making a further grant of planning permission for minerals development on the site if they decide to revoke the prohibition order. Such revocation must be by order, but does not require confirmation by the Secretary of State.

15. A planning permission which is terminated by a prohibition order would not be reinstated automatically if the order was revoked. A new planning permission would be required to enable minerals development to be resumed.

Suspension orders

16. Where a planning authority has reason to believe that an operator intends to resume minerals development in the foreseeable future, it would be inappropriate for them to make a prohibition order. Paragraphs 5 and 6 of Schedule 8 to the 1997 Act therefore enables planning authorities to make suspension orders in respect of a site where mineral development has taken place but has been temporarily suspended. A planning authority may assume that minerals development has been temporarily suspended when it has not been carried out to any substantial extent for at least 12 months but it appears to them that a resumption of operations is likely.

17. The aim of suspension orders is to deal with environmental problems arising at sites where minerals development has been temporarily suspended. They may be regarded as a holding measure pending the resumption of development or the making of a prohibition order. The orders may not include restoration or aftercare conditions but may require that steps be taken for the protection of the environment including measures to preserve the amenities of the area in which the land is situated, to protect it from damage or to prevent deterioration in the condition of the land while development is suspended. Requirements which may be appropriate include the removal where practicable of plant or equipment, the disposal of stockpiles and waste heaps and the tidying up and maintenance of the site. Fencing and other safety measures may also be appropriate, if it is found that existing powers under the Public Health Acts and Mines and Quarries Act are inadequate to deal with a particular situation. The order should include a time limit for compliance with any steps required, but since some can be carried out relatively quickly and others may take longer to arrange, provision is made for a planning authority to specify different time limits for different steps.

18. A suspension order is a temporary measure and there is provision for a planning authority to take account of changing circumstances after an order has come into force by making a supplementary suspension order. For example, if the resumption of minerals development is postponed for a further period, perhaps because of changing market conditions, then a supplementary suspension order securing the site for a further period may be appropriate. Such an order may direct the operator to take additional or alternative steps to protect the environment from those specified in the original suspension order. Where minerals development has resumed sooner than had been anticipated, a supplementary suspension order can be used to direct that the suspension order should cease to have effect.

19. Before they can take effect, suspension orders and supplementary suspension orders must be confirmed, with or without modification, by the Secretary of State. Such confirmation requirements do not apply to supplementary suspension orders which simply revoke a suspension order or previous supplementary suspension order. The procedural arrangements are similar to those for discontinuance orders.

20. Planning authorities have a duty to review suspension orders and supplementary suspension orders at intervals of not more than 5 years and to determine whether a prohibition order or a (further) supplementary suspension order should be made. This is to ensure that a suspension order does not remain in force indefinitely without

the planning authority considering what other action to take. It is important to remember that suspension orders do not and cannot prevent the re-commencement of minerals development. If, however, an operator wishes to recommence working land which is the subject of an order, he must notify the planning authority of the intended date of re-commencement and the planning authority must revoke the order within 2 months of that date if working has resumed to a substantial extent. If they do not revoke the order, the operator may apply to the Secretary of State for its revocation and either the operator or the planning authority may request a hearing prior to the decision being made.

Choice of order

21. Planning authorities should bear in mind that certain principles apply to the making of orders under the 1997 Act. In making an order they should have regard to the development plan and any other material considerations. The selection of the appropriate order will depend on the circumstances of the individual cases and the working status of the site. A Section 65 order revokes or modifies a planning permission and may only be made before the development commences or in respect of any part of a permission which is not completed. A discontinuance order, however, relates to the use of land and may be used to discontinue a use of land, to regularise or impose conditions on the continuance of an authorised use or to grant permission for an alternative development of the land. In considering whether to confirm an order, the Secretary of State will be concerned with its effectiveness in promoting its planning objectives in relation to the site. Each case will need to be considered on its planning merits. The basis for an order must therefore be defensible and planning authorities should be able to justify the application of the order to the area of the site which is affected.

22. Orders may be used to deal with any mineral sites in the area of a planning authority separately from any duty to review them under Part II of Schedule 8 or Schedules 9 and 10 to the 1997 Act.

23. Under Section 239 of the 1997 Act, any person who is aggrieved by an order under Section 65 or paragraphs 1, 3, 5 or 6 of Schedule 8 on the grounds that it is not within the powers of the Act or that a procedural requirement has not been complied with may make an application to the Court of Session.

Compensation following orders

24. All the orders making powers discussed above, that is:

- revocation and modification orders (Section 65 of the 1997 Act);
 - discontinuance orders (paragraph 1 of Schedule 8, to the 1997 Act);
 - prohibition orders (paragraph 3 of Schedule 8, to the 1997 Act); and
 - suspension orders and supplementary suspension orders (paragraphs 5 and 6 of Schedule 8 to the 1997 Act).
- may attract compensation from the planning authority if they are confirmed by the Secretary of State and a valid claim is made under the appropriate provisions of the 1997 Act. The provisions are Sections 76 (or 232 as

appropriate) in the case of revocation and modification orders, or Sections 83 (or 233 as appropriate) in the case of other orders. However, The Town and Country Planning (Compensation for Restrictions on Mineral Working and Mineral Waste Depositing) (Scotland) Regulations 1998 ("the 1998 Regulations") define the circumstances in which compensation is not payable following the making of a modification or discontinuance order, and modify Section 83 of the 1997 Act in its application to claims for compensation following the making of a prohibition, suspension or supplementary order.

Revocation and modification orders (Section 65 of the 1997 Act)

25. Regulation 3 provides that no compensation is payable where the following conditions are satisfied:

- the order does not impose any restriction on working rights; or modify or replace any such restriction, other than a restoration or aftercare condition, subject to which the planning permission was granted or which was imposed by an earlier order;
- that either the permission was granted not less than 5 years before the date of the order, or the planning permission which the order modifies was granted before 22 February 1982 (the date when the power to impose aftercare conditions came into force);
- the order was made more than 5 years after any previous order or orders in respect of the same land and more than 5 years after an application for determination of conditions under Part II of Schedule 8 or Schedules 9 and 10 to the 1997 Act.

26. Where these conditions are not satisfied Section 76 applies unmodified, and unabated compensation is payable.

Discontinuance orders (paragraph 1 of Schedule 8 to the 1997 Act)

27. Regulation 4 provides that no compensation is payable where the following conditions are satisfied:

- (a) the order does not impose any restriction on working rights; or modify or replace any such restriction, other than a restoration or aftercare condition, subject to which the planning permission was granted or which was imposed by an earlier order;
- (b) the order imposes a condition on the continuance of the use of the land; or requires the alteration or removal of any buildings, works, plant or machinery used in connection with the development;
- (c) the development began not less than 5 years before the date of the order;
- (d) the order was made more than 5 years after any previous order or orders in respect of the same land and more than 5 years after an application for determination of conditions under Part II of Schedule 8 or Schedules 9 and 10 to the 1997 Act was finally determined.

28. Where these conditions are not satisfied Section 83 applies unmodified and unabated compensation is payable. However, it should be remembered that where

an order is made to discontinue a use of land that was not lawful (eg see paragraph 8(b)) any increase in the value of the land by virtue of that use will not be taken into account in assessing compensation in accordance with Section 13 of the Land Compensation (Scotland) Act 1963.

Prohibition orders (paragraph 3 of Schedule 8 to the 1997 Act)

29. Regulation 5 modifies Section 83 of Town and Country Planning (Scotland) Act 1997 where certain conditions are satisfied. The conditions are:

- (a) that minerals development began not less than 5 years before the date of the order; and
- (b) the order was made more than 5 years after any previous order or orders in respect of the same land.

30. Where these conditions are satisfied, the effect of the modifications is to exclude from the compensation calculation:

- the value of any mineral in, on or under the site which cannot be won or worked;
- the value of any mineral waste which cannot be deposited;
- the value of any void space which cannot be filled; or
- the cost of complying with any restoration or aftercare condition;
- in consequence of the order. The amount of compensation assessed is then reduced by £8,100.

Suspension orders and supplementary suspension orders (paragraphs 5 and 6 of Schedule 8 to the 1997 Act)

31. Regulation 6 modifies Section 83 of Town and Country Planning (Scotland) Act 1997 The effect of the modifications is to exclude from the compensation calculation:

- the value of any mineral in, on or under the site which cannot be won or worked;
- the value of any mineral waste which cannot be deposited; or
- the value of any void space which cannot be filled.
- in consequence of the order. The amount of compensation assessed is then reduced by £8,100.

Apportionment of compensation for prohibition and suspension orders

32. Regulation 7 provides for the apportionment of abatement of compensation following prohibition or suspension orders where there is more than one person with an interest in the land or minerals to which the order relates. That is, where at the time of assessing the amount of compensation to be paid, the planning authority are aware that there are other persons as well as the claimant who are interested in the site the planning authority must apportion the amount of abatement according to the proportion that the value of the claimant's interest in the site and minerals bears to the total value of the site and minerals to which the order relates.

Restriction on working rights

33. Regulation 2 defines "restriction on working rights" for the purpose of modification and discontinuance orders as meaning that, in relation to any land, there is imposed a restriction as to:

- (a) the size of the area which may be used for the winning and working of minerals or the depositing of mineral waste;
- (b) the depth to which operations for the winning and working of minerals may extend;
- (c) the height of any deposit of mineral waste;
- (d) the rate at which any particular mineral may be extracted;
- (e) the rate at which any particular mineral waste may be deposited;
- (f) the period at the expiry of which any winning and working of minerals or depositing of mineral waste is to cease; or
- (g) the total quantity of minerals which may be extracted from, or of mineral waste which may be deposited on, the site.

Further copies and enquiries

34. Enquiries about this Circular should be addressed to Mr Ian Mitchell, Scottish Office Development Department, Planning Division, 2-H32, Victoria Quay, Edinburgh, EH6 6QQ (Telephone 0131-244-7062). Further copies and a list of planning Circulars may be obtained from Miss Lisa Mullen (0131-244 7066) at the same address.

35. Copies of the Town and Country Planning (Compensation for Restrictions on Mineral Working and Mineral Waste Depositing) (Scotland) Regulations 1998 (SI 1998 No.2914 (s.170)) may be purchased from The Stationery Office Ltd, 71 Lothian Road, Edinburgh, EH3 9AZ (Telephone 0131-622-7050).