

## **RESTRICTING THE USE OF WOODHEATERS**

### **ADVICE TO COUNCILS**

26 March 2009

The Department of Environment and Climate Change (DECC), Department of Planning (DoP) and Department of Local Government (DLG) considered the mechanisms available to councils under the Environmental Planning and Assessment Act 1979 (EP&A Act) and Local Government Act 1993 (LGA) to restrict the use of woodheaters. The aim of such restrictions is to protect human health and the environment.

#### **Most Appropriate Mechanism**

Of the options considered, the most appropriate mechanism for the restriction of woodheaters is for a council to develop a local approvals policy (LAP) in relation to woodheaters under s158 of the LGA and to amend its development control plan (DCP) to make reference to this policy, so that where a development application (DA) is made for the installation of a woodheater (either alone or in conjunction with other matters), or where a woodheater may be identified as meeting complying development criteria, the LAP must be taken into account in assessing the application. While there is a small risk of challenge to such a provision in a DCP, the risk is lower than that posed by a DCP provision directly prohibiting woodheaters. However, a Council should obtain its own legal advice about the available options.

#### **Other Planning Options**

1. Councils have considerable scope through s68 LGA approvals to restrict woodheaters. Council approval is required for the installation of a woodheater (s68 LGA, Part F para 4) except in limited circumstances (cl 70 Local Government (General) Regulation 2005). There are three ways this mechanism might restrict the use of woodheaters:
  - i In considering an application for approval under s68 a council must take into account the protection of the environment and of public health, safety and convenience (s89(3) LGA). There is scope here for a council to refuse an approval on the basis of a risk to public health. It must also take into account the principles of ecologically sustainable development. If an approval is to be granted, it can be made subject to conditions provided those conditions are not inconsistent with the Local Government Act, Local Government (General) Regulation 2005 (clause 67) and any LAP.
  - ii A council, in deciding whether to give an approval, must also take into account any relevant LAP. An LAP can specify “the criteria (if any) which (if the policy were to be adopted) the council must take into consideration in determining whether to give or refuse an approval of a particular kind” (s158 LGA). There is plenty of discretion here for councils so they could, for example, include considerations about topography and impact on neighbours with a view to maintaining air quality, as well as the issues identified in point 1i above. To amend an LAP to this effect, a new LAP would have to be made and exhibited.
  - iii While the Government could also prescribe standards in the Local Government (General) Regulation 2005 that must be met before approval is granted (see the current cl 67), this is not proposed.
2. Councils also have other powers under the LGA to make orders that an activity cease where it constitutes a threat to public health (s124 Order 15) and to abate a public nuisance, or order the person responsible for the nuisance to abate it (s125).

**Non-Planning Means of Woodsmoke Reduction**

As well as using the above planning instruments, the Protection of the Environment Operations Act 1997 has the following provisions for the control of smoke from woodheaters:

- i S96(2) Prevention Notices where an activity is carried out in an environmentally unsatisfactory manner.
- ii S135B Smoke Abatement Notices to control the emission of excessive smoke.