



Department for
Communities and
Local Government

Improving the use of planning conditions

Public consultation



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How to respond

To:	Local authorities, developers, and the general public
Body/bodies responsible for the consultation:	The Department for Communities and Local Government
Duration:	This consultation will last for 8 weeks from Wednesday 7 September 2016. It will close at 12:00PM on Wednesday 2 November 2016.
Enquiries:	For any enquiries about the consultation please contact matthew.prescott@communities.gsi.gov.uk
How to respond:	<p>You may respond by completing an online survey at: https://www.surveymonkey.co.uk/r/TT256NM</p> <p>Alternatively you can email your response to the questions in this consultation to the above address.</p> <p>For written responses, answer boxes are provided alongside the questions on pages 14 and 15. If you need to use additional paper to respond, please ensure that you clearly show which question you are responding to.</p> <p>Written responses should be sent to:</p> <p>Matt Prescott Department for Communities and Local Government Fry Building Marsham Street London SW1P 4DF</p> <p>When you reply it would be very useful if you confirm whether you are replying as an individual or submitting an official response on behalf of an organisation and include:</p> <ul style="list-style-type: none"> - your name, - your position (if applicable), - the name of organisation (if applicable), and - an email address

Scope of the consultation

Topic of this consultation:	<p>This consultation paper seeks views on the Government's proposals to improve the use of planning conditions, specifically:</p> <ol style="list-style-type: none">1. how the process of prohibiting the use of pre-commencement conditions without the agreement of the applicant would operate; and2. the potential for a wider application of primary legislation to prohibit conditions in targeted circumstances.
Scope of this consultation:	<p>As part of the Neighbourhood Planning Bill, the Government has introduced proposals to improve the use of planning conditions. This consultation is designed to help support the development and implementation of policy, and inform debate during the Bill's passage.</p>
Geographical scope:	<p>These proposals relate to England only.</p>
Impact Assessment:	<p>An impact assessment of the measure will be published as part of the Impact Assessment for the Neighbourhood Planning Bill. This will be released before the Bill's Second Reading in the first House.</p>

Policy background

Summary

1. Planning conditions can perform an important function in shaping planning proposals, and helping to achieve sustainable development. However, we remain concerned that too many overly restrictive and unnecessary conditions are routinely attached to planning permissions, with little regard given to the additional costs and delays that they impose. In addition, delays in discharging conditions which require the approval of details can mean that development is not able to be completed as quickly as it should. Unnecessary conditions and delays in discharging conditions can have significant negative impacts on all users of the planning system, not least by holding up the delivery of housing development on sites which have already been granted planning permission.
2. In the last Parliament we introduced significant reforms aimed at improving the use of conditions, including the introduction of a deemed discharge in April 2015 and strengthening Planning Guidance. In the Budget 2016 we announced our intention to legislate to ensure that pre-commencement conditions can only be used with the agreement of the applicant. Building on this announcement, the consultation paper seeks views on how the process of prohibiting the use of pre-commencement conditions without the agreement of the applicant would operate, and the potential for a wider application of primary legislation to prohibit conditions in targeted circumstances.
3. These proposals will not restrict the ability of local planning authorities to seek to impose conditions that are necessary to achieve sustainable development, in line with the National Planning Policy Framework. We expect that this process would become a part of the dialogue between the applicant and the local planning authority, building on current best practice. In the unlikely event that an applicant refuses to accept a necessary pre-commencement condition proposed by a local planning authority, the authority can refuse planning permission. This will maintain appropriate protections for important matters such as heritage, the natural environment, green spaces, and measures to mitigate the risk of flooding.

Background

4. Planning conditions can be a useful tool for both applicants and local planning authorities in bringing forward sustainable development. They can ensure that development can go ahead which might otherwise have been refused. Conditions also offer flexibility that allows applicants to carry out further work on matters of detail after planning permission has been granted.
5. Conditions generally fall into two broad types:
 - controls over how the development is carried out or its onward operation (i.e. controlling hours of operation in the interests of preserving local amenity)
 - conditions requiring the submission and approval (discharge) of something by the local planning authority before a prescribed part of the development goes ahead. This includes pre-commencement conditions which prevent any development taking place before approval is given
6. The main powers in primary legislation relating to local planning authority use of conditions are in Sections 70, 72, 73, 73A, 74A and Schedule 5 of the Town and Country Planning Act 1990. Section 70(1)(a) of the 1990 Act enables the local planning authority in granting planning permission to impose 'such conditions as they think fit'. This power is broad but must be interpreted in light of material factors such as the National Planning Policy Framework, its supporting guidance on the use of conditions, and relevant case law¹. The National Planning Policy Framework asks that planning conditions should only be imposed where they are necessary, relevant to planning and to the development to be permitted, enforceable, precise and reasonable in all other respects.

Issues under consideration

7. There are two issues linked to the use of conditions that are under consideration in this consultation, which are explained below.

Issue 1: Too many unnecessary conditions are imposed

There are continuing concerns about the number of unnecessary or otherwise unacceptable conditions attached to permissions. The cumulative impact of a local planning authority imposing a number of conditions when they grant planning

¹ <http://planningguidance.planningportal.gov.uk>

permission can present considerable burdens for applicants as well as the local planning authority itself. It is therefore vital to ensure that conditions are only imposed where they meet the tests that are currently set out in the National Planning Policy Framework. It is also important to have effective dialogue between the local planning authority and the applicant about how conditions will impact on the planned delivery of the development.

Issue 2: Use of pre-commencement conditions

Particular care is needed when a local planning authority is considering using a pre-commencement condition that will prevent any development authorised by the planning permission from taking place until detailed aspects of the development have been approved and the condition has been formally discharged by the local planning authority. As pre-commencement conditions can restrict the start of any work on a site, it is very important to ensure this is approach is genuinely needed. Imposing such a constraint on development, when it is not justified, unnecessarily delays the delivery of development and drives up costs.

Action taken so far

8. The Government has already taken action aimed at addressing the use and discharge of conditions:
 - **Planning guidance** on use of planning conditions first published in March 2014 contains a number of clear guidance messages that should be considered by local planning authorities each time they take a decision to grant planning permission subject to conditions.
 - A new **deemed discharge** for certain planning conditions was introduced in April 2015. This means that where a local planning authority has delayed in making a decision on an application for approval (discharge) under a condition, an applicant can treat the approval as given.
 - A new requirement that local planning authorities must provide **specific written justification in the decision notice** for imposing a pre-commencement condition.

Further action

9. To build on the action already taken, the Government announced in the Budget this year its intention to legislate to ensure that pre-commencement conditions can only

be used with the agreement of the applicant. The Government also announced an intention to review the deemed discharge process. This does not require primary legislation and will be taken forward separately. This consultation paper outlines two measures that the Government is seeking views on:

- the proposed process to prohibit pre-commencement conditions from being imposed unless the local authority has the written agreement of the applicant; and
- the potential wider application of primary legislation to prohibit conditions in targeted circumstances

These measures are outlined in turn in the following section.

Government's proposals

The process of prohibiting pre-commencement conditions from being imposed without the prior written agreement of the applicant

10. The Government announced in the Budget this year its intention to legislate to prohibit pre-commencement conditions from being imposed unless the applicant has first agreed them. This measure will help ensure that pre-commencement conditions are only used when necessary so that development with planning permission can get underway without delay - while retaining the ability of the local authority to impose conditions that are necessary to achieve sustainable development, in line with the National Planning Policy Framework. It also recognises that using pre-commencement as a point for submission of information can cause applicants particular difficulties as it can limit their ability to carry out any preliminary work and gain access to finance.
11. This measure will not restrict the ability of local planning authority to propose pre-commencement conditions that may be necessary – for example, conditions in relation to archaeological investigations or wildlife surveys. However, it will provide the applicant with an earlier opportunity to challenge any pre-commencement conditions that may be unnecessary, for example, where they are capable in planning terms of being discharged later in the development process. Reaching agreement on pre-commencement conditions in advance can help reduce the likelihood of related planning appeals, which can be costly and time consuming for both parties.
12. We propose that it would be the responsibility of the local planning authority to seek the written agreement of the applicant to any pre-commencement conditions. The authority would be able to choose the most appropriate time to seek agreement, but would not be able to grant planning permission subject to pre-commencement conditions unless agreement had been given. We expect that this process would become a part of the dialogue between the applicant and the local planning authority, building on current best practice.
13. In most cases, the applicant and local planning authority are likely to reach agreement on what pre-commencement conditions should be imposed. In the unlikely event that the applicant does not agree to the imposition of a pre-commencement condition, the local planning authority would have the option to either change the condition in question, allow the developer to comply with it after the

development is underway or, remove the condition altogether. The authority would also retain the right to refuse the planning application if it considers that the pre-commencement condition is necessary to make the development acceptable. In these cases, the applicant would have the option to appeal the condition as is currently the case and the local planning authority would be expected to justify the condition and why it is needed at the pre-commencement stage.

14. We are interested to hear views on the proposed process to prohibit pre-commencement conditions from being imposed where the local authority does not have the written agreement of the applicant.
15. We are also interested to hear whether it would be necessary to make provision for a default period, after which an applicant's written agreement would be deemed to have been given, if no response has been received. This would allow the local planning authority to proceed to impose the pre-commencement condition if no response had been received from the applicant within a given period.

Question 1 – Do you have any comments about the proposed process for prohibiting pre-commencement conditions from being imposed where the local authority do not have the written agreement of the applicant?

Question 2 – Do you think it would be necessary to set out a default period, after which an applicant's agreement would be deemed to be given? If so, what do you think the default period should be?

The wider application of primary legislation to prohibit specific types of condition

16. Planning law enables local planning authorities to impose conditions on grants of planning permission 'as they see fit' provided they meet the 6 tests prescribed in the National Planning Policy Framework². This gives local planning authorities the flexibility to ensure that impacts are adequately mitigated and developments are acceptable. We want to retain most of this flexibility, but provide local planning authorities and applicants with greater clarity about conditions that do not meet the policy tests, and which should not be used in any circumstances.
17. In order to prohibit pre-commencement conditions from being imposed where they do not have the written agreement of the applicant, we will need new primary legislation

² See paragraph 206 of the Framework; <http://planningguidance.communities.gov.uk/blog/policy/achieving-sustainable-development/decision-taking/>

to be introduced through the Neighbourhood Planning Bill. The new power will allow the Secretary of State to prohibit certain conditions in defined circumstances. In this context, we know that there are a number of types of condition that may be proposed, but which do not meet the national policy tests. National Planning Guidance already identifies a number of examples of conditions that are unacceptable and should not be used, but this is not a comprehensive list³ (see Table 1 for summary).

Table 1: Summary of the current list of planning conditions that should not be used (as per planning practice guidance)

	Conditions	NPPF test this condition would fail
1	Conditions which unreasonably impact on the deliverability of a development – e.g. disproportionate financial burden	<ul style="list-style-type: none"> ▪ Test of reasonableness
2	Conditions which reserve outline application details	<ul style="list-style-type: none"> ▪ Test of reasonableness ▪ Test of relevance to the development to be permitted
3	Conditions which require the development to be carried out in its entirety	<ul style="list-style-type: none"> ▪ Test of necessity ▪ Test of enforcement
4	Conditions which duplicate a requirement for compliance with other regulatory requirements – e.g. Building Regulations	<ul style="list-style-type: none"> ▪ Test of necessity ▪ Test of relevance to planning
5	Conditions requiring land to be given up	<ul style="list-style-type: none"> ▪ Test of reasonableness ▪ Test of enforcement
6	Positively worded conditions requiring payment of money or other consideration	<ul style="list-style-type: none"> ▪ Test of necessity ▪ Test of reasonableness

18. We are interested in views on whether any of the types of condition listed in Table 1 should be expressly prohibited through legislation. In addition, we are interested to seek views on whether there are other conditions, beyond those listed above, which are unnecessary or otherwise fail the 6 tests set out in the National Policy Framework and which should be prohibited in legislation.

³ <http://planningguidance.communities.gov.uk/blog/guidance/use-of-planning-conditions/what-approach-should-be-taken-to-imposing-conditions/>

19. It is important to note that we do not expect that there will be many examples of such conditions. Clearly it would not be appropriate to prohibit conditions which met the 6 policy tests and were designed to help deliver policies in the NPPF, such as in relation to the protection of the natural or historic environment.

Question 3 – Do you consider that any of the conditions referred to in Table 1 should be expressly prohibited in legislation? Please specify which type of conditions you are referring to and give reasons for your views.

Question 4 – Are there other types of conditions, beyond those listed in Table 1, that should be prohibited? Please provide reasons for your views.

Equalities considerations

20. We do not consider that the measures covered in this consultation will have a negative impact on discrimination, good relations or equality of opportunity. The overall aim of these measures is to improve the use of planning conditions to support the delivery of housing development. However, we would welcome your comments as part of this consultation.

- Question 5 – (i) Do you have any views about the impact of our proposed changes on people with protected characteristics as defined in section 149 of the Equality Act 2010?**
- (ii) What evidence do you have on this matter?**
 - (iii) If any such impact is negative, is there anything that could be done to mitigate it?**

Impact assessment

21. Overall, we expect this proposal will have beneficial impacts for developers by reducing the number of pre-commencement conditions overall, and removing the ability for local authorities to impose conditions which clearly do not meet the tests in the National Planning Policy Framework. Where the local authority insists on retaining the substance of a pre-commencement condition, but decides to require discharge at a later stage of the development process e.g. before the development is occupied, this proposal will ensure that the condition doesn't delay the start of the development. Where a condition is removed altogether it can reduce costs and delays in implementing the permission.

- Question 6 – (i) Do you have any views about the impact of our proposed changes on businesses or local planning authorities?**
- (ii) What evidence do you have on this matter?**
 - (iii) If any such impact is negative, is there anything that could be done to mitigate it?**

Questions

Question 1 – Do you have any comments about the proposed process for prohibiting pre-commencement conditions from being imposed where the local authority do not have the written agreement of the applicant?

Question 2 – Do you think it would be necessary to set out a default period, after which an applicant's agreement would be deemed to be given? If so, what do you think the default period should be?

Question 3 – Do you consider that any of the conditions referred to in Table 1 (p.11) should be expressly prohibited in legislation? Please specify which type of conditions you are referring to and give reasons for your views.

Question 4 – Are there other types of conditions, beyond those listed in Table 1, that should be prohibited? Please provide reasons for your views.

- Question 5 – (i) Do you have any views about the impact of our proposed changes on people with protected characteristics as defined in section 149 of the Equalities Act 2010?**
- (ii) What evidence do you have on this matter?**
 - (iii) If any such impact is negative, is there anything that could be done to mitigate it?**

- Question 6 – (i) Do you have any views about the impact of our proposed changes on businesses or local planning authorities?**
- (ii) What evidence do you have on this matter?**
 - (iii) If any such impact is negative, is there anything that could be done to mitigate it?**

Answers do not have to be limited to the spaces provided

About this consultation

This consultation document and consultation process have been planned to adhere to the Consultation Principles issued by the Cabinet Office.

Representative groups are asked to give a summary of the people and organisations they represent, and where relevant who else they have consulted in reaching their conclusions when they respond.

Information provided in response to this consultation, including personal information, may be published or disclosed in accordance with the access to information regimes (these are primarily the Freedom of Information Act 2000 (FOIA), the Data Protection Act 1998 (DPA) and the Environmental Information Regulations 2004.

If you want the information that you provide to be treated as confidential, please be aware that, under the FOIA, there is a statutory Code of Practice with which public authorities must comply and which deals, amongst other things, with obligations of confidence. In view of this it would be helpful if you could explain to us why you regard the information you have provided as confidential. If we receive a request for disclosure of the information we will take full account of your explanation, but we cannot give an assurance that confidentiality can be maintained in all circumstances. An automatic confidentiality disclaimer generated by your IT system will not, of itself, be regarded as binding on the Department.

The Department for Communities and Local Government will process your personal data in accordance with DPA and in the majority of circumstances this will mean that your personal data will not be disclosed to third parties.
Individual responses will not be acknowledged unless specifically requested.

Your opinions are valuable to us. Thank you for taking the time to read this document and respond.