



Department for
Communities and
Local Government

Government response to the consultation on improving the use of planning conditions

December 2016



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Introduction

1. The Government published a consultation seeking views on proposals for improving the use of planning conditions on 7 September 2016. The consultation was open for 8 weeks and closed on 2 November 2016. The consultation was designed to help support the development and implementation of policy, and inform debate during the passage of the Neighbourhood Planning Bill (“the Bill”).
2. The consultation paper explained that the Government is of the view that planning conditions perform an important function in shaping planning proposals, and achieving 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 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 sought 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 the proposed powers in the Bill to prohibit conditions in targeted circumstances.
3. As the consultation paper made clear, these proposals will not restrict the ability of local planning authorities to make otherwise unacceptable development acceptable through the use of conditions that are necessary to achieve sustainable development, and 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.

Consultation responses

Who responded?

4. The Government would like to thank everyone who responded to the consultation for taking the time to share their views. We have carefully considered all of the responses received. This document provides a summary of the issues raised, alongside the Government's response.
5. 194 responses were received. A breakdown of the types of respondent is shown below:

Response by type of respondent	% breakdown
Local Planning Authorities	40
Development sector	19
Industry representative bodies	6
Interest groups	6
Public sector organisations	4
Professional bodies	3
Parish / Town councils	2
Other	20
Total	100%

Pre-commencement conditions process

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?

6. 180 respondents to the consultation provided an answer to this question. Although the question asked about the process, rather than the principle, it is clear from the responses that around 44% of respondents were either in complete support or supported the principle with reservations about the process, with 42% non-supportive. The position of the remaining 14% is unclear.

7. In terms of those detailed points about the process, three points emerged in a number of responses.
8. Approximately 25% of the responses, mainly from local authorities, and archaeological and environmental bodies, stressed the **importance of ensuring that certain pre-commencement conditions could still be imposed**, for example, by exempting them from the requirement to seek the developer's agreement altogether.
9. Around 20% of responses to this question mentioned the potential of the process to **delay the determination of planning applications**. Some respondents believed the process would impact on the ability of local planning authorities to meet the statutory deadlines for determining applications, in particular as consideration of conditions is common towards the latter stages of the decision-making process. Questions were also raised around whether the process would place a disproportionate burden on the consideration of minor applications, create an expectation for applicants to provide more information upfront to support an application, and place local authority resources under further pressure in carrying out such consultations.
10. Around 5% of respondents expressed doubt that **local planning authorities and applicants were likely to come to an agreement on the need for pre-commencement conditions**. Some respondents said that the agreement process was more likely to increase tensions between developers and local planning authorities, and lead to more planning applications being refused, with a resulting increase in appeals. Several respondents, including both developers and local authorities, suggested the introduction of a dispute resolution mechanism to ensure that disagreements were resolved quickly.

Government response

11. The Government recognises the importance and value of certain pre-commencement conditions in promoting sustainable development and ensuring that necessary safeguards are put in place for important matters including heritage and the natural environment. We want to reassure those who expressed concern that 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.
12. These measures build on current Planning Practice Guidance, which clarifies that it is best practice for a local planning authority to agree proposed conditions with an applicant before a decision is taken, and as early in the planning application process as possible.

13. By introducing a requirement for the local authority to seek the agreement of the developer to pre-commencement conditions, we are seeking to place best practice on a statutory footing. The Government remains of the view set out in the consultation paper that it should be the responsibility of the local planning authority to choose the most appropriate time to seek agreement of the applicant to any pre-commencement conditions and where dialogue begins early, this requirement should not lengthen the process of determining a planning application.
14. We anticipate that this process will reduce the workloads of authorities once permission has been granted by reducing the number of pre-commencement conditions that have to be discharged.
15. Finally, we acknowledge that some respondents called for the inclusion of a fast-track mechanism for appeals. We believe that the introduction of a dispute resolution procedure would add a further formal step to the process which would be likely to cause delays. We also believe that it could actually discourage effective discussions between applicants and local authorities, who may simply wait to use the mediation route as an alternative to meaningful engagement early in the process.

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?

16. Of the 159 respondents who answered the question, 86% agreed that a default period should be introduced where an applicant had failed to respond. Support for the proposal for a default period was fairly consistent across sectors: local authorities 76%, development industry 65%, and interest groups 82%. Most agreed that this was necessary to reduce the risk of delays, and some developers felt that it was useful to set a timeframe for the process. The vast majority (92%) of the responses suggested a duration which ranged between 1 week and 1 month, with the majority proposing a period of ten working days.
17. The most frequent comment from respondents was the need to ensure that the process for agreeing conditions was **not unnecessarily delayed by the applicant**. For this reason, the use of a default period was favoured.
18. It was highlighted that if a default period was introduced, it is important to recognise how it would **operate within the statutory deadlines** for determining applications. Respondents were sceptical about how a default period would work without making it more difficult to meet the determination deadlines, taking into account the need for changes following feedback or to resolve disagreements.

19. Respondents also questioned at **what point the default period would begin**. Comments not only addressed whether the period would begin at the point at which the request for agreement to the proposed pre-commencement conditions was sent or received, but also whether the period would restart following the response of the applicant. Furthermore, some suggested that there should be a cut-off period before which the local authority should send its request for agreement. This would help facilitate the timely determination of applications.
20. Several responses suggested that a default period should be **proportionate to the type of application** that was being determined, with separate default periods for applications for minor and major development.
21. Respondents sought **more information on the precise details** of how a default period would work in practice, including what constitutes written agreement.

Government response

22. We do not expect that there will be many instances where an applicant does not respond to a request for agreement to impose a pre-commencement condition but we note that the majority of respondents agreed that we should introduce this default measure, to avoid undue delay in the process, where no response came from the applicant. Many respondents stressed the importance of ensuring that a default period was as short as possible to not hold up the determination of applications. We believe this point should be balanced with allowing a meaningful time for applicants to consider the pre-commencement conditions proposed by the local authority. We therefore **propose a default period of 10 working days**, in addition to the ability for local authorities to agree a longer timescale with the applicant.
23. It is essential that any default period should not impede the timely determination of planning applications, and local authorities should therefore give careful consideration to how this period fits within the statutory determination deadlines. As set out in the consultation paper, we feel it is right that the local authority should decide the precise timing of when they seek the applicant's agreement. We believe that early engagement will help greatly reduce the likelihood of disagreement when the conditions are sent to the applicant.
24. In practice, we intend for the default period to commence once the local planning authority has given notice of its intention to impose a pre-commencement condition and sought the agreement of the applicant. The default period would then elapse 10 days later, unless a longer period had been agreed by the local authority and applicant.

Prohibiting specific types of planning conditions

25. This section of the consultation proposed greater clarity for local planning authorities and applicants about a number of types of conditions which Planning Practice Guidance identifies as not meeting the 6 policy tests in paragraph 206 of the National Planning Policy Framework. The Bill includes a power to allow the Secretary of State to provide that certain conditions may or may not be imposed in defined circumstances in secondary legislation. The consultation sought views on the prohibition of the conditions set out in guidance¹, and asked whether there are any other types that should also be prohibited.

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

26. There were 96 responses in total to Question 3, many provided comments in general terms on the principle of a prohibition, with a number also commenting on the detail of the specific types of conditions referred to in the consultation. There were 27 responses that were generally in favour of a prohibition. The development industry represented about half of respondents in support of the measure. They suggested that there was considerable merit in prohibiting these conditions in legislation as it would make clear that conditions that do not meet the national policy tests should not be imposed, and therefore help speed up housing delivery. A number of local authorities and interest groups also supported the measure in principle, arguing that it would help reduce the number of unnecessary conditions. Local authorities made up about half of the 68 respondents generally opposed to a prohibition, on the basis that the current policy tests contained in the National Planning Policy Framework were a sufficient safeguard, together with the ability of applicants to appeal where planning permission is granted subject to conditions that fail to meet the tests.

Government response

27. The Government notes that many respondents stated that the guidance was already sufficient without provision being made in legislation. However, we believe it is necessary to help ensure that conditions applied by local planning authorities meet the six policy tests in the National Planning Policy Framework. We intend to do this through secondary legislation, expressly prohibiting each of the six conditions below. However, in light of responses we recognise the need to provide greater clarity on the detail of the conditions we propose to prohibit, and this will be set out in draft

¹ <http://planningguidance.communities.gov.uk/blog/guidance/use-of-planning-conditions/what-approach-should-be-taken-to-imposing-conditions/>

regulations. We will therefore carry out a further consultation on the draft regulations, as well as preparing updated guidance to support this measure, should the Bill provisions come into force.

1: Conditions which unreasonably impact on the deliverability of a development - e.g. disproportionate financial burden

28. More than a quarter of respondents that commented on this type of condition – mostly from the development industry - agreed we should prohibit this type of condition. However, there was considerable opposition from local authorities, largely because they felt it would be difficult to determine ‘unreasonable impact’, which would need to be considered on a case-by-case basis. There was also cross-sector concern that such a prohibition might be used to avoid or challenge conditions which can be justified in planning terms and meet the national policy tests for conditions.

Government response

29. The Government intends to prohibit such conditions in legislation, specifically in order to ensure that a condition which imposes costs on the applicant may only be imposed if the costs do not make the development in question economically unviable. This is a matter of judgement for the local authority to determine in the circumstances of each case. However, where the impact of a proposed scheme is not capable of being mitigated by reasonable conditions, the local authority may need to consider whether they should refuse planning permission for the proposal.

2: Conditions which reserve outline application details

30. The majority of responses on this type of condition showed that there was some misunderstanding of what a prohibition would relate to, and what effect this would have. For instance, there were concerns that this prohibition would restrict the ability of local authorities to impose conditions on outline applications that are necessary to achieve sustainable development, or that it would remove the flexibility afforded by the outline planning application process to submit detailed reserve matters at a later date.

Government response

31. The Government recognises that there was some confusion over the interpretation of Condition 2. Our proposed prohibition would not restrict the ability of local authorities to impose conditions on outline applications that are necessary to achieve sustainable development, or remove the flexibility afforded by the outline planning application process with the ability to submit detailed ‘reserve matters’ at a later date. Rather it would prohibit conditions which reserve for later consideration matters which

are determinable (i.e. which have been particularised in the application in sufficient detail), unless the application makes clear that these matters are included for illustrative purposes only. Having considered the responses received, the Government intends to add this prohibition to regulations which will clarify the position, alongside new guidance.

3: Conditions which require the development to be carried out in its entirety

32. About half of respondents on this specific point (mostly from the development sector but also some local authorities) agreed we should prohibit these type of conditions, as they would fail the national policy tests, and in some cases could stop development going ahead, as more time was often needed to secure funding.
33. Most local authorities who commented disagreed, stating that without conditions which require development to be carried out in its entirety there was a risk that measures to tackle issues such as drainage and land contamination could be avoided if the development was not completed. A small number of interest groups claimed that such conditions may sometimes be justified if the development site is in a location where visual amenity may be particularly important, such as a conservation area.

Government response

34. The conditions we are referring to relate specifically to the full completion of the scheme, and would not prevent separate conditions on other important matters such as flooding and land contamination. At present it is equally possible that such conditions could fail the test of reasonableness both in areas where visual amenity was a significant issue, as in other areas. This prohibition would not impact on the ability of developers to seek planning permission for phased schemes, and local authorities already have the ability to serve completion notices, to encourage the completion of partially-built development. The Government intends to prohibit such conditions and to issue new guidance to support the measure.

4: Conditions which duplicate a requirement for compliance with other regulatory requirements - e.g. building regulations

35. From those who commented on this type of condition, there was considerable support among the development industry and a number of local authorities in favour of a prohibition, as it would help avoid duplication of information requests and additional administrative burdens for both developers and authorities.
36. About a third of respondents who commented, mostly local authorities, raised concerns about a blanket prohibition on this type of condition, stating that reference

to other regulatory requirements can help address issues which might require emphasis or local interpretation of other regulatory frameworks. Prohibiting this type of condition could also potentially risk inadequate assessment and control of certain critical matters, for example the disposal of surface water.

Government response

37. The Government intends to prohibit such conditions, with exceptions. For example, additional technical requirements exceeding the minimum standards under the Building Regulations 2010. These additional measures apply only where a planning authority makes compliance with them a condition of a grant of planning permission. Otherwise, such a prohibition would not remove the ability of a local authority to impose conditions on important matters, but would act as a reminder not to impose conditions where other legislation has already provided for the issue. Current Planning Practice Guidance clarifies that ‘informative notes’ can be used by the local planning authority to draw an applicant’s attention to other relevant matters – for example, the requirement to seek additional consents under other regimes.

5: Conditions requiring land to be given up

38. More than half of respondents who commented on this type of condition, including both the development industry and local authorities, agreed we should prohibit such conditions, as they could be dealt with through, for instance, section 106 agreements. Also, preventing the use of conditions positively requiring the transfer of land is in accordance with policy and case-law.
39. Around a third of respondents who commented, mostly local authorities, were opposed to the measure, stating that requiring land to be given up might be necessary, for example in the context of surface water drainage.

Government response

40. The Government intends to prohibit such conditions, except certain conditions which prevent or restrict the carrying out of development until a specified action has taken place. Planning Practice Guidance currently makes clear that conditions requiring works on land that is not controlled by the applicant, or that requires the consent or authorisation of another person or body often fail the tests of reasonableness and enforceability. It also provides that it may be possible to achieve a similar result using a condition worded in a negative form (a Grampian condition) – i.e. prohibiting development authorised by the planning permission or other aspects linked to the planning permission (e.g. occupation of premises) until a specified action has been taken (such as the provision of supporting infrastructure).

6: Positively worded conditions requiring payment of money or other consideration

41. More than a quarter of those who responded on this type of condition, made up of local authorities, interest groups and the development industry agreed we should prohibit their use, as the requirement to pay money could be contained within a section 106 agreement.
42. However, a considerable number of respondents who commented on this issue disagreed. Local authorities represented the main group opposed, stating that conditions are considered necessary in the absence of other mechanisms to ensure maintenance of, for instance, sustainable drainage systems over the lifetime of the development. They also felt such conditions should be allowed as an alternative to expensive and time consuming section 106 agreements. Preventing the use of conditions to secure small monetary transactions would not help speed up the planning process, because the alternative is a section 106 obligation, which would take much longer to complete.

Government response

43. The Government intends to prohibit conditions which require money or other consideration, unless it follows current guidance, which clarifies that it may be possible to use a negatively worded condition to prohibit development authorised by the planning permission until a specified action has been taken (for example, the entering into a planning obligation requiring the payment of a financial contribution towards the provision of supporting infrastructure). If parties are in agreement, this should mean that the s106 agreement process is not as burdensome as described in some cases.

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

44. 137 respondents gave views on this question. Local authorities who responded mostly confirmed that they had no further suggestions to make, or to oppose in principle the idea of prohibiting other types of conditions. Those in the development industry made a number of recommendations for other types of conditions which should be prohibited, including:
 - Conditions which duplicate or split conditions across different regulatory regimes;
 - Conditions which restrict hours/methods of working on a building site;
 - Conditions which require a completion date. This was based on the fact that permissions already have a default time limit within which they must be

commenced or they expire. It was argued that imposing such a condition could lead to a greater number of appeals or an increase in enforcement procedures against non-compliance with the condition.

45. Others, including interest groups provided suggestions for prohibition, including:

- Conditions which require material samples to be agreed up front before development can commence;
- Conditions which require pre-approved drawings to be duplicated and re-submitted for approval;
- Conditions attached to temporary permissions, when the development has a short lifespan.

Government response

46. Many of the recommendations for other types of condition to be prohibited are already dealt with by planning practice guidance or fall within the conditions which we intend to prohibit in regulations, including reserved matters conditions (covered under Condition 2); conditions that duplicate other regimes (covered under Condition 4); and conditions requiring a completion date (covered under Condition 3). The Government does not believe that it is necessary to prohibit any of the other types suggested, as it is possible that they may be imposed in a way that meets the six tests in the National Planning Policy Framework. However, we will keep this matter under review.

Public Sector Equality Duty

- 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?**

47. 16 respondents answered this question. The majority of respondents told us that the changes would not have any greater impact on people with protected characteristics.

Positive impact

48. One respondent felt there would be a positive impact on faith communities through the improved use of conditions.

Negative impact

49. However, three respondents were concerned that there may be an impact if authorities were constrained in their ability to impose conditions in a way which may benefit people with protected characteristics.

Government response

50. In the consultation document, and during the passage of the Bill, the Government has clarified that the measures will not remove the ability of local authorities to make otherwise unacceptable development acceptable through the use of planning conditions which are necessary in order to achieve sustainable development, and which meet the policy tests in the National Planning Policy Framework.
51. If we were to prohibit the 6 types of conditions that we have consulted on, this would not prevent local authorities from seeking to impose conditions that meet the national policy tests. The proposed measures will apply to all those seeking planning permission, and therefore we do not consider that such prohibitions would impact those with protected characteristics differently to those without.

Impact on local authorities and business

- 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?**

52. We received comments from 108 of the respondents to the consultation on the impact of the measures on businesses and local planning authorities. Of those who clearly expressed an opinion, 22 respondents (predominantly developers) believed there would be a positive impact on the planning decision-making process, and 52 (predominantly local authorities) thought the impact on the process would be negative.

Positive impact

53. Common reasons for support were that the measures would speed-up the process of negotiating conditions, help ensure that only necessary conditions were imposed, and thereby reduce delays to the delivery of new homes. Respondents also suggested that the changes would reduce costs and workloads for both businesses and local planning authorities with the potential for fewer pre-commencement conditions that would need to be discharged.

Negative impact

54. In terms of the negative impacts of the measures, the responses stated that there were concerns around the resourcing implications for both parties, increased delays associated with disagreements and subsequent appeals, and that the process would lead to greater tensions between applicants and local planning authorities. Respondents also highlighted the potential impacts on developers, for whom they expect the process to prove more costly due to the need to provide more detail upfront and expenditure on consultants during the agreement process, if the ability for local authorities to impose conditions was limited.
55. Respondents typically cited their prior experience in general terms when asked for evidence under question 6(ii).
56. In response to question 6 (iii) there were a number of proposals put forward to help mitigate any negative impact of the measures. These included exempting certain types of pre-commencement conditions from the need for local authorities to obtain the developer's written consent, promoting pre-application engagement, increasing local authority resources, providing a dispute resolution mechanism where there are disagreements, and ensuring that developers are required to justify any challenges to proposed conditions.

Government response

57. The new approach to pre-commencement conditions will embed the good practice of proactive and early engagement between parties, which will ensure that pre-commencement conditions meet the policy tests and ensure unnecessary or inappropriate pre commencement conditions are avoided – with commensurate time savings post permission. Furthermore, with on-going engagement there is no reason why the application process should be lengthened and we propose to introduce a default measure where the applicant does not respond after a defined period. We consider that expressly exempting certain conditions from this prohibition would add unnecessary complexity to the process.
58. In relation to the prohibition of specific conditions and in the light of the consultation responses, we will issue a consultation on draft regulations, and will also **publish updated guidance** to support the changes, if they are brought forward. This will set out for both applicants and local planning authorities how the measures will work successfully within the existing process.