

## USING CONDITIONS AND SECTION 106 OBLIGATIONS

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1. This paper examines how conditions and section 106 obligations can be used to solve problems and achieve practical outcomes in the development control process. It also considers the limitations and risks associated with their use. It is not the purpose of this paper to go through the detail of the current guidance on conditions in circular 11/95 or that relating to planning obligation in circular 05/2005, though I have referred to this guidance where necessary. I have also referred to some of the proposals in the DCLG consultation paper, “Improving the use and discharge of planning conditions” (December 2009).
2. The paper focuses on the following uses of conditions and section 106 obligations and some of the issues arising in respect of each one:
  - (1) Conditions preventing development until a scheme has been approved.
  - (2) Overcoming land ownership problems.
  - (3) Introducing flexibility.
  - (4) Using conditions and obligations to void EIA.
  - (5) Increasing the prospect of costs recovery on appeal.

### **(1) Conditions preventing development until a scheme has been approved**

3. The use of conditions which require certain matters to be submitted for later approval is well established and well-known. An obvious example is that of reserved matters conditions. Usually conditions requiring later approval of components of the scheme will be written in a negative form, so that development cannot start, or dwellings cannot be occupied, until the condition has been discharged. But what of conditions that prevent development from starting until a scheme of some kind has been submitted and approved? One issue that continues to

arise is the extent to which such conditions can be imposed, particularly where the scheme would need to be secured by a section 106 obligation.

4. Guidance in circular 11/95 advises at paragraph 13 that “Permission cannot be granted subject to a condition that the applicant enters into a planning obligation under section 106 of the Act or an agreement under other powers.” As a matter of law such an absolute statement is not correct, because the power to impose conditions is in principle wide enough to encompass a condition requiring a section 106 to be entered into. What matters are the circumstances.
5. One important question is whether compliance with the condition would require the payment of money. Circular 11/95, paragraph 80, advises that no payment of money “or other consideration” can be required when granting planning permission, unless there is express statutory authority to that effect. The reason often advanced for this is a legal principle which forbids taxation without express statutory authority. Section 106(2)(c) of the 1990 Act expressly allows planning obligations which require the payment of money. Sections 70 and 72 of the Act which give the power to impose conditions do not have any such express provision. It can be seen at once that this has implications for conditions that may expressly or impliedly require a section 106 obligation to be entered into, at least where that obligation may need to provide for the payment of money.
6. On the other hand, if a condition can be imposed, it would save the delay, expense and uncertainty of having to negotiate and execute a section 106 obligation prior to the grant of planning permission.

#### *PINS standard conditions*

7. Until recently PINS own guidance to its inspectors (available on its website) advised that conditions along the following lines could be imposed where planning permission could be made acceptable by a section 106 obligation:

*“No development shall begin until details of a scheme for the provision of [educational] [recreational] [community services] infrastructure to meet the needs of the development [in accordance with Structure and Local Plan policies] has been*

*submitted to and approved in writing by the LPA. The scheme shall include a timetable for the provision to be made and shall be carried out in accordance with the approved details.”*

8. However, in a decision letter dated 26 October 2007 relating to major residential and mixed use development at Leighton Buzzard, the Secretary of State rejected the use of such a condition because the scheme in question was unlikely to be acceptable without requiring payments to be made, and because the condition was regarded as insufficiently detailed and therefore failed the test of precision under circular 11/95.
9. As a result of that decision PINS advice to inspectors is that such conditions should no longer be used, although the guidance goes on to say “this does not mean that a condition should never be used as an alternative to a missing or unsatisfactory obligation so long as it meets the tests in DoE Circular 11/95.” Reference to the ‘tests’ under the circular is, presumably, meant to be a means by which the guidance at paragraph 13 of the same circular is by-passed.
10. As matters stand, therefore, it appears that negative conditions requiring a scheme to be approved may be acceptable under government policy provided (a) it can be demonstrated that the scheme will not require the payment of money and (b) sufficient details as to the content of an acceptable scheme is before the decision maker. On this last point, since the test of precision is an issue, the condition itself ought to be drafted so as to explain that detail by e.g. setting out the minimum content or parameters of an acceptable scheme.

#### *Proposals for change*

11. This issue is one of the key matters raised in the December 2009 consultation. Paragraphs CO18.1 to CO18.7 suggest two alternative forms of guidance. The first is to repeat the existing guidance that is against a condition to enter into a section 106 obligation. The second is to repeat the same guidance but then qualify it by allowing such a condition “in very exceptional circumstances”, and subject to a list of considerations to which “LPAs should have regard” when “judging whether such a condition may be appropriate”.

12. The considerations are:

- a. there is an acknowledged need for comprehensive development (for example it may be a development plan site allocation, or the subject of a site wide master plan), and the site is in multiple ownership
- b. delivery is at serious risk of delay because genuine attempts to complete the agreement before determination of the application have failed through no fault of the applicant, for example due to multiplicity of ownership. There must however be at least reasonable prospects that this can be rectified prior to the commencement of development
- c. the applicant has a legal interest in a least part of the application site (for example an option or agreement for sale)
- d. there is agreement on the requirement for a planning obligation
- e. a draft planning obligation (or agreed heads of terms as an absolute minimum) has been agreed and annexed to the decision notice and
- f. the proposed condition meets all of the six tests. The test of precision means that criterion e. must be satisfied

13. Although the above are strictly speaking only factors to which the planning authority should have regard, it is unlikely that any such condition would be accepted were there to be substantial non-compliance with any relevant factor. The advice that such conditions should only be imposed “in very exceptional circumstances” bears this out. The proposals do not anticipate the use of such conditions being the norm.

14. Two points are worthy of note. First, paragraph CO18.5 advises that this type of condition must not be used “if it is necessary to bind the whole of the application site, or a critical part of it which the applicant does not have a legal interest in, at the time of the decision.” The wording is ambiguous and the advice questionable. The extent of the applicant’s interest should not be a decisive factor in all cases. The use of negative conditions which require actions over land in third party ownership at the time of the grant of planning permission is already well established.

15. Secondly, this part of the guidance is silent on obligations which would require the payment of money, although elsewhere in the consultation draft the prohibition on conditions requiring

payment is repeated (paragraph CO16.1). It is therefore not clear whether the draft guidance intends there to be a shift in this aspect of government advice.

## **(2) Overcoming land ownership problems.**

16. Section 106 obligations can only be entered into by a party having an interest in the land (section 106(1)). They can only be enforced under section 106 against those who are parties to the original agreement and those who derive title from such parties (section 106(3)). Against that background, and since compliance with a planning obligation requires the requisite degree of interest and control over the land, it is common for planning authorities to insist that they have as a party to the agreement every person with an interest in the land, or at least that every person with an interest in the land whose co-operation may be needed to ensure compliance. Failure to comply with a section 106 obligation is not a breach of planning control under the TCPA 1990 (see section 171A).
17. By contrast, conditions attached to a planning permission run with the land as the planning permission does. If conditions are not complied with, there is a breach of planning control. A breach of condition notice can be served on any person who has carried out development in breach of condition or who has control over the land (section 187A(2) TCPA 1990). An enforcement notice may also be served against breaches of condition. Such notices may be served on the owner and occupier of the land, and on any other person likely to be affected by the notice (section 172(2)).
18. Problems can arise where a planning authority is seeking a section 106 obligation but the applicant for planning permission is unable to secure the agreement of relevant parties who have an interest in the land.

### *Using conditions to by pass a requirement for a section 106 obligation*

19. In such cases conditions can often be use to by-pass this impasse. Government guidance advises that where there is a choice between conditions and planning obligation conditions should be imposed (circular 11/95, paragraph 12). Conditions can often deal with matters commonly dealt with under section 106 obligations, including, for example, the quantum, mix

and tenure of affordable housing. In this way ownership issues that are preventing a section 106 from being entered into can often be overcome.

### *Proposals for reform*

20. I have already referred to draft proposals to allow, exceptionally, negative conditions which require a section 106 obligation to be entered into. The main impetus behind the proposal is the desire to avoid important development projects being put at risk just because at the time of the grant of planning permission it is not possible to complete a section 106 obligation binding on all of the relevant parts of the application site (see part 1 of the December 2009 consultation, paragraph 1.16 to 1.17). The list of considerations for imposing such conditions reflects the underlying issue of land ownership and site assembly.

21. If the proposals for such conditions are adopted, it seems likely that they will provide further flexibility for overcoming obstacles to the grant of planning permission caused by land ownership, even where a section 106 obligation will be required before development can proceed.

### **(3) Introducing flexibility.**

16 Both planning conditions and section 106 obligations can be used to introduce flexibility into the planning permission or into the development control process. The deferral of parts of the scheme (topic (1) above) is an example of this. This section considers some other examples.

### *Differences of opinion about the need or level of contributions*

17 The need for, or level of, planning contributions is often a sticking point in negotiations. If agreement is not reached, and this forms the basis of a refusal of planning permission, thought needs to be given to the drafting of section 106 obligations to cover the possible outcomes of an appeal on the issue of contributions. If the appellant's s106 simply proposes the level of contribution which the appellant considers to be correct, then the appeal will fail if the Inspector considers that a higher level of contribution is necessary. That is so even if the Inspector rejects the level of contribution sought by the local planning authority.

- 18 The flexibility given by section 106 obligations can protect the appellant's position in such cases. The use clauses which define the level of contribution to be provided as a series of alternatives is now generally accepted by planning authorities and Inspectors. The alternatives may include a nil contribution, the level the appellant contends is correct and the level the local planning authority contends is correct. The drafting of the obligation can then provide that the level to be provided under the s106 is the option chosen by the inspector in his decision letter.
- 19 So a clause might read something like "The highways contribution shall be (a) £nil, or (b) £1000, or (c) £5000, as determined by the Inspector in his decision letter." This flexibility ensures that all likely outcomes are covered. Importantly, such drafting will avoid the cost of having multiple planning obligations, having to pay a contribution when none were necessary, or worse still, a refusal of planning permission because the Inspector had not been provided with a 106 that secured a sufficient level of contributions.
- 20 Such an obligation will also tend to confine the parameters for the debate at the appeal. It will leave open the possibility of applying for costs in the event that no contribution was justified (see topic (5), below).
- 21 The above is a simple example, but the same can be applied to more complex cases, such as those involving the level of affordable housing or the tenure and mix of such housing.

#### *Changing economic circumstances*

- 22 The current economic climate has brought to the fore questions of viability and its impact on the level of affordable housing provision in particular. It is now becoming common practice to include overage provisions in section 106 obligations to accommodate the prospect that over the life time of the permission the economy will improve so as to allow a greater proportion of affordable housing to be provided than is viable at the time the permission is granted.
- 23 The detail of these obligations varies but the basic structure provides for a financial appraisal to be carried out if the permission has not been implemented by a certain time (say, 12 months

from the date of grant). The treatment of assumptions and inputs into the appraisal – including the level of developer profit - can be specified in the 106. If the residual value indicated in the new appraisal is higher than that in the appraisal that supported the grant of planning permission, then the new appraisal can be used as basis for the number of affordable housing units to be provided under the planning permission.

- 24 An interesting question is whether the current vogue for overage clauses survives the current economic downturn. If the on-going regulation of the level of affordable housing according to market conditions becomes established, logically the same approach could be applied after the economic recovery but to accommodate a rising market, or indeed to safeguard the developer against a falling market if the provisions of the 106 are drafted so as to enable their operation in reverse. Provided such clauses comply with policy – so that, for example, the rising market cannot result in the developer being required to provide more than policy demands even if a residual valuation would support such provision – their use could be supportable on permissions granted when the current economic situation has returned to an accepted normality.

*Conditions specifying something “unless otherwise agreed”*

- 25 Caution needs to be exercised when relying upon conditions with the words “unless otherwise agreed by the local planning authority” as a means of introducing flexibility into a planning permission. Such tailpieces to conditions are commonly found, but are limited in their effect and may in many cases be unlawful.
- 26 *R (Midcounties Co-operative Ltd) v Wyre Forest DC* [2009] EWHC 964 (Admin) Ouseley J considered a challenge to a planning permission on a number of grounds, including that a planning condition was unlawful because of the wording of its tailpiece. The development in question was a Tesco foodstore. Condition (6) provided that the foodstore permission should not exceed a certain floorspace “unless otherwise agreed in writing with the Local Planning Authority.” The floorspace specified in the condition related to that which had been applied for and whose retail impact had been assessed in the application. The issue was whether the apparent flexibility given by the tailpiece of the condition rendered the condition unlawful.

- 27 Ouseley J held that the condition was unlawful (at [70]), but that the court could strike out the offending words without affecting the rest of the condition or the integrity of the planning permission as a whole, and the illegality did not justify quashing the planning permission (at [71]-[75]).
- 28 In reaching his decision, the judge accepted the correctness of previous case-law that had held that there was a very limited power to make immaterial variations to planning permissions informally (quite apart from the express power introduced by the 2009 GDPO). The problem with the tailpiece in the present case was that it contained no express wording limiting its scope. As a result, on its face it enabled development to be approved which would depart materially from that which had been applied for and assessed, and such an approval could take place outside of the statutory process. In response to the argument that the tailpiece should be read as confined to immaterial amendments, he held that it was not reasonable to expect members of the public to know that the law only permitted immaterial amendments to be made, or to know that giving effect to the apparent scope of the tailpiece would be unlawful (at [69]-[70]). He therefore struck out the offending words.
- 29 The case is a clear warning that attempts to achieve flexibility in a planning permission by means of such words on a condition are risky. In the present case the permission survived because on the evidence the offending words had not been material to the grant of planning permission. Had they been – that is to say, had there been evidence to show that the tailpiece had been considered an important factor in the decision to grant the permission – then the permission itself could well have been quashed. Note that a condition with a tailpiece that expressly referred to “minor variations” to approved plans was held to be lawful.

#### **(4) Using conditions and obligations to void EIA.**

- 30 After much litigation, it is now well established that a planning authority when screening a development can take into account mitigation measures that are proposed to mitigate the development’s environmental effects: see in particular *Gillespie v First Secretary of State* [2003] Env LR 30, and *R (Catt) v Brighton and Hove City Council* [2007] Env LR 32. This is

so even though mitigation measures must themselves be part of the EIA process in cases where an EIA is carried out.

- 31 The ability to rely upon proposed mitigation measures in practice will depend upon the facts of the case. The key issue is whether the measures proposed can properly be relied upon as effective in confining the environmental effects of the proposed development. As Pill LJ explained in *Catt* at [34]

*“ . . . there will be cases where the likely effectiveness of conditions or proposed remedial or ameliorative measures can be predicted with confidence. There may also be cases where the nature, size and location of the development are such that the likely effectiveness of such measures is not crucial to forming the opinion. It is not sufficient for a party to point to an uncertainty arising from the implementation of the development, or the need for a planning condition, and conclude that an EIA is necessarily required. An assessment, which almost inevitably involves a degree of prediction, is required as to the effect of the particular proposal on the environment, and a planning judgment made . . . ”*

- 32 Since the EIA process involves considerable cost and often delay to projects, the practical value of conditions and planning obligations as a tool for either avoiding or narrowing the scope of an EIA is obvious. Moreover, since it is not unusual for one or more chapters of an environmental statement to conclude with a finding that no significant environmental effects are likely once mitigation measures are in place, there would appear to be considerable scope for using this technique. Below I consider some of the practical implications of it.

#### *Reasons and evidence*

- 33 There is an important qualification on *Gillespie* and *Catt* which arises from the decision of the ECJ in case C-75/08 *Mellor*. In *Mellor* the ECJ held that a planning authority needs to be able to provide its reasons for a negative screening decision, that is, a decision not to require EIA. The reasons do not need to be provided with the decision itself, but they must be furnished when requested by an interested party. They can comprise a statement of reasons and/ or other material which explains the decision (see [57] to [61]). The adequacy of reasons is to be

gauged by the requirement that interested parties must be able to secure the right to a lawful screening decision, which in turn means ensuring that they have the right to bring effective legal action against unlawful decisions. The ECJ thus held that interested parties must be able to exercise their rights

*“ . . . under the best possible conditions and have the possibility of deciding, with a full knowledge of the relevant facts, whether there is any point in applying to the courts.”*  
(at [59]).

34 This may seem far removed from anything to do with conditions and planning obligations. However, its effect is to increase the importance of the planning authority being able to point to reasons and evidence upon which to justify its reliance upon a condition or a section 106 obligation when deciding that EIA is not required. This in turn places a burden upon applicants for planning permission to make sure that the effective operation of such conditions and obligations is explained and supported by evidence upon which the screening decision can be based.

#### *Early consideration of conditions and planning obligations*

35 Since screening is usually carried out at an early stage in the development control process it is prudent for applicants and local planning authorities to give consideration to the detail of possible conditions and planning obligations from the outset. The DCLG's proposed measures to improve the discharging of conditions (Part 3 of the December 2009 consultation) would facilitate this. Measure (1) of these proposals would integrate consideration of conditions into the pre-application discussion process, making it a “key component” of that stage of development control. This would focus attention not only on the detail of mechanisms to control the effects of a proposal but also on the evidence needed to support the use and effectiveness of any proposed controls. At the determination stage, measures (2) and (3) propose the drafting by the local planning authority of a structured decision notice prior to determination of the application, including a list of proposed conditions, and this being shared with the applicant and interested parties. The purpose of this is to allow comment on the appropriateness of particular conditions. In practical terms the effect of this latter proposal

may be that applicants are encouraged to draw up draft conditions at an early stage in the process.

- 36 In the present context, these proposals would assist in establishing a sound basis for relying upon conditions as a means by which mitigation measures could be secured. They would bring into play detailed consideration of conditions and obligations at an early stage in the development consent process – the very stage when screening decisions tend to be made.

#### *Conditions or s106?*

- 37 Finally, a word of caution about reliance upon planning obligations in this context. Under the UK planning regime the variation of a planning obligation is not treated in the same way as a ‘variation’ of a planning permission by means of a section 73 application. In particular, the formal EIA procedures do not apply to variations to planning obligations. There is, therefore, some scope for argument that mitigation measures secured by a section 106 obligation should not be taken into account when screening a planning application. This is because the mitigation measures could be changed at a later date by varying the section 106, without re-engaging any requirement to consider the need for EIA. By contrast, any variation of a condition by means of a section 73 application would trigger the need to consider whether EIA was required.

- 38 The argument may not a good one because the planning authority could lawfully refuse to vary the planning obligation if doing so would result in the EIA regime being circumvented. However, it may be given added vigour by analogy with the approach which Ouseley J took in the *Midcounties* case. Given the history of litigation over EIA matters, it is worth having this point in mind.

#### **(5) Increasing the prospect of costs recovery on appeal.**

- 39 Conditions and planning obligations are an important tool in strategies to increase the prospects of costs recovery at planning appeals. There are three main reasons for this. First, they can overcome planning objections to a scheme and therefore render unreasonable the pursuit of those objections by a party to the appeal. Secondly, Government guidance contains clearly defined tests for the imposition of conditions and for requiring planning obligations,

making it potentially easier to establish non-compliance with policy and therefore to found a costs application based on such non-compliance. Thirdly, the costs circular 03/09 specifies a number of circumstances in which unreasonableness can arise from issues concerning conditions and planning obligations.

- 40 Since the threat of costs can often provide a useful negotiating tool, the use of arguments arising from conditions and section 106 obligations, even if they are peripheral to more important issues in the case, should not be overlooked.

*Costs awards relating to the use of conditions*

- 41 The costs circular advises of the risk of costs to local planning authorities where they have not considered the use of conditions to overcome objections to the proposal where it would have been appropriate to do so, where they impose conditions that do not comply with circular 11/95 and where they are unable to produce substantial evidence to support the imposition of a planning condition. Authorities are advised to keep conditions under review as part of their appeal case management (see paragraphs 25, 29, 56, and 60 of the circular).
- 42 Appellants can be at risk of costs if they fail to provide information to the planning authority which would have enabled the authority to grant planning permission subject to conditions rather than refuse it (paragraph B6).

*Section 106 obligations and costs*

- 43 A planning authority which seeks a planning obligation that does not comply with guidance in circular 05/2005 is at risk of costs, as is an appellant who refuses to enter into a reasonable requirement sought by way of a section 106 obligation (see paragraphs B13 and B27 of the costs circular). Where an appeal raises the question of whether a planning obligation is justifiable or not, it is usually approached on the basis that the local planning authority bears an initial burden of explaining how the obligation it is seeking is justified by relevant policy and evidence, in accordance with circular 05/2005.



44 Interestingly, circular 05/2005 itself advises that the Secretary of State will consider “sympathetically” applications for costs made by either party to an appeal on the basis that a reasonable obligation has not been provided, or an unreasonable one has been sought (circular 05/2005, paragraph B57).

### **Conclusions**

45 Conditions and section 106 obligations are useful tools which can be used to practical effect in overcoming certain problems that may arise in the development control process. However, care needs to be taken to ensure that their use stays within appropriate bounds of law and policy. The government’s proposals for a new policy on conditions may open up greater possibilities for using conditions in cases where a section 106 obligation will be needed before development starts but is not available when the planning application is being determined.

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