# Planning for a better future

Our planning manifesto for the government

POS
Planning Officers Society

# Manifesto Background Paper 6

# From concept to construction: making the system more flexible

The need to change a design, and potentially a planning permission, is a normal feature of the development process and the planning system should be capable of dealing with it in an effective and efficient manner. Our planning system was never explicitly designed to have this flexibility. POS proposes several changes to the planning system to address this.

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Registered office: Park House, 37 Clarence Street, Leicester LE1 3RW
www.planningofficers.org.uk

## Planning Officers Society

POS is the single credible voice for public sector planners, pursuing good quality and effective planning practice. The Society's aim is to ensure that planning makes a major contribution to achieving sustainable development in ways that are fair and equitable and achieve the social, economic and environmental aspirations of the community.

We operate in three main ways:

- As a support network for planners in the public sector
- As promoters of best practise in planning
- As a think tank and lobbying organisation for excellence in planning practice

Where we can, we will work across the sector to craft proposals that have widespread support from the people who operate the planning system at the coalface: landowners, developers, agents, legal, local authorities and politicians. We will be both radical and practical as we look for solutions to tangible problems that will make a real difference to crucial areas. Our objective is to improve the planning system to enable it to deliver its key aim of sustainable development. It is within this context that we have set out this advice to Government so we can plan together for a better future.

## POS Manifesto

This started in early 2014 when we looked ahead to the national parliamentary elections in May 2015. The main parties were drafting their manifestos, so we thought about what we could do to help them. This resulted in Planning for a better future: Our planning manifesto for the next government. The time since then has seen an unprecedented amount of change to the planning system, so our initial planning manifesto for the next government has morphed into an on-going planning manifesto for government.

These are think pieces that tackle a topical area within planning practice and sets out our recommendations for improvement. They comprise a growing series of Manifesto Background Papers that look in detail at specific issues. Those that are still current are summarised in our main Planning Manifesto paper that sets out the current ask from POS to the government.

The views expressed in these documents reflect the initial view of POS. It is a consensus position. It should not be taken as a final position; rather an informed starting point to debate the issues. It is expected that the recommendations will evolve as the debate progresses.

Other titles in the series can be viewed from our website.

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## Contact details

**Mike Kiely** Board Chair chair@planningofficers.org.uk
**Stewart Murray** President 2015/16 president@planningofficers.org.uk
**John Silvester** Communications Manager communicatons@planningofficers.org.uk

# Summary

The need to change a design, and potentially a planning permission, is a normal feature of the development process and the planning system should be capable of dealing with it in an effective and efficient manner. Our planning system was never explicitly designed to have this flexibility. POS proposes six changes to the planning system to address this:

1. Permission in Principle and the role of outline applications: POS considers that the proposals promoted by government could go further and the detailed regulations need careful design:
    - Specific local plan allocations for any type of land use should benefit from PIP
    - Applications for all scales of development should be possible, not just 10 homes or fewer
    - LPAs should have the power to issue a PIP unilaterally as this could be a useful pro-active tool that enables Local Plan allocations to be more dynamic and streamlined and it would be a more efficient version of a Local Development Order
    - PIP proposals should be for high level sign-off of development principles on a specific site
    - The decision should confirm that, or otherwise, and set out clearly the detailed matters that will need to be addressed at the next, detailed approval, stage so that applicants know what matters they need to address to gain planning permission
    - POS also recommends a review of the need for the full/outline application split
2. Flexibility with planning fees when amending applications
    - The scope to amend an application once submitted, but before it is determined, is quite wide
    - A significant constraint in the flexibility that could be achieved here is that there is no statutory provision to seek an extra planning fee during the determination if an amended application requires a higher fee
    - Flexibility in the Fees Regulations should be introduced to enable changes to be made to live applications and any associated uplift in the application fee to be paid to the LPA
3. Determining applications with split decisions
    - LPAs should have a clear power to issue a split decision (as the Secretary of State has under section 79 of the 1990 Act when dealing with appeals) where the two elements are clearly severable or where the refusal relates to a detailed element that the LPA cannot support, but otherwise the rest of the scheme is satisfactory
4. Ability to condition unacceptable details
    - You cannot approve something (e.g. the drawing says the walls of the extension will be in brick) and then take that part of that approval away by condition (e.g. require the elevations to match the main stone building)
    - If that is required, the detail on the drawing would have to be changed or amended via a letter or email and the amendment should be referred to in the decision notice

- Government should consider addressing this as it could enable quicker positive decisions, with unresolved issues being dealt with through conditions, without prior agreement

5. Making legal agreements easier to resolve

- Typically, section 106 agreements run into difficulties after the LPA resolves to approve planning permission subject to the completion of the agreement
- A right of appeal against the failure to complete the legal agreement should be introduced
- At such an appeal the Inspector would only look at the terms of the agreement insofar as they are appropriate to mitigate the impact of unacceptable development to make it acceptable in planning terms
- A simpler alternative would be to divorce the completion of section 106 agreements from the planning application determination process and allow it to be routinely dealt with through a Grampian style condition

6. A better system for amending planning permissions

- S96A is a specific system for non-material changes to planning permission
- The use of s73 to deal with minor material amendments is a sticking-plaster solution to a problem that should have been dealt with clearly through legislation
- POS recommends a new combined procedure to deal with amendments.
- The LPA would issue one of three types of decision:

  a) Decide that the amendment is not material and confirm this without the need to carry out any publicity or consultation. This is effectively the current section 96A procedure, except that a new consent should be issued so that the cumulative impact of such amendments, if any, are explicitly dealt with.
  b) Decide that the amendment is material, but can be dealt with as an amendment because it does not go to the heart of the consent. The process would involve publicity or consultation where necessary (usually just the neighbours affected) and, if approved, results in a new planning consent, again so that the cumulative impact of such amendments, if any, are dealt with. The LPA should be able to add conditions (in addition to those on the original consent) to deal with any new matters raised by the amendment(s).
  c) Decide that the change goes beyond what can be considered as an amendment and refuse the application. There would be no need for any publicity or consultation.

- There should be a right of appeal against the second (where refused or new conditions are imposed) and third outcomes

# 1 Introduction

1.1 The need to change a design, and potentially a planning permission, is a normal feature of the development process and the planning system should be capable of dealing with it in an effective and efficient manner. There are many good reasons why a planning permission needs to be flexible, but the common ones are:

- The scheme may be at an early stage in the design process and there is a high degree of uncertainty around aspects of its physical design or its land use components;
- The market is uncertain and the scheme needs to be able to respond to market changes;
- There may be supply problems with materials, or better products or techniques may become available; and/or
- The client changes their mind.

1.2 Our planning system was never explicitly designed to have this flexibility. Custom and practice grew up to deal with minor amendments, but until section 96A was introduced into the Town and Country Planning Act 1990 by the Planning Act 2008, there was never a statutory basis for dealing with amending planning permissions. The current provisions still fall short of being an adequate and comprehensive basis to deal with amendments and changes. This paper deals with the need for planning permissions to be flexible enough to enable changes and amendments to be accommodated. The main paper sets out our recommendations for legislative and policy changes to facilitate this in the following areas:

- Permission in Principle and the role of outline applications
- Flexibility with planning fees when amending applications
- Determining applications with split decisions
- Ability to condition unacceptable details
- Making legal agreements easier to resolve
- A better system for amending planning permissions

1.3 An appendix sets out advice to Local Planning Authorities (LPAs) about ways to optimise flexibility in the planning and development process within the current system. Applicants may also find this advice helpful.

1.4 Notwithstanding our recognition of the need for flexibility, a balance needs to be struck between the flexibility that is necessary for developments, particularly large multi-phased developments that will be built out over many years, and the need to have something tangible and clear to assess and determine. This is of course important for the LPA, but it is arguably even more so for the community. It is at the point that the planning application is publicised that the community can comment on the application and potentially influence the decision. Once planning permission has been granted, it is usually the case that the subsequent approvals (clearing the details through conditions or dealing with minor changes) will not be subject to further advertisement or publicity. The local community, and their political representatives, will often balk at schemes that have low levels of detail. This can be a cause of tension in the process which may have an impact on the decision. It is important that this is recognised and ways to mitigate it are considered. This is touched on in the appendix.

# 2 Permission in Principle and the role of outline applications

2.1 Government is introducing Permission in Principle (PIP) as a means of establishing the principle of a development in as simple a way as possible. POS supports the principles behind this initiative, and in fact produced a paper (originally in 2014 in response to the Lyons Housing Review) called *Red line submissions: a proportionate approach*[1] that may well have influenced government thinking. However, POS considers that the proposals promoted by government could go further and the detailed regulations need careful design.

2.2 A process that formally decides that the principle of a development is acceptable on a specific site could have a much wider application than just for housing allocations in local plans or brownfield registers and applications for 10 homes or fewer. We recommend that:

- Specific local plan allocations for any type of land use should benefit from PIP
- Applications for all scales of development should be possible, not just 10 homes or fewer
- LPAs should have the power to issue a PIP unilaterally as this could be a useful pro-active tool that enables Local Plan allocations to be more dynamic and streamlined and it would be a more efficient version of a Local Development Order

2.3 It is understood that government's concern related to the second bullet point is that it should be limited to small developments because of worries about Environmental Impact Assessment (EIA) development. POS believe that there may be an argument that PIPs are not implementable planning permissions and so could fall outside the EIA regulatory regime. If this cannot be successfully argued, then it is the case that only a very small number of such developments would be caught by the EIA Regulations and these can be carved out as exceptions that are not available for the PIP process or alternatively EIA could be incorporated into the PIP process.

2.4 It is important to remember that PIPs are designed to simplify the planning process. This means that they will not contain a great level of detail about the development. Generally, the more detail that is included in an application, the more information that is needed to ensure that the application can be supported and the more complex the process becomes. In many cases, it will be difficult to include precise housing numbers in a PIP application without investigating constraints, such as trees, flooding risks etc, to see if the number of units proposed can be accommodated on site in an acceptable way. Therefore, in some cases there may be no housing numbers and in most cases it will be expressed as "up to" a number of units. It is important that this is recognised and built into the detailed regulations. The danger is that what should be a useful addition to the planning system could become a burden that slows the system down, especially the Local Plan process.

[1] www.planningofficers.org.uk/downloads/pdf/POS%20Manifesto%20-%20Red%20Line%20Apps_Aug15.pdf

2.5 PIP proposals should be for high level sign-off of development principles on a specific site. The decision should confirm that, or otherwise, and set out clearly the detailed matters that will need to be addressed at the next, detailed approval, stage so that applicants know what matters they need to address to gain planning permission. This would be a better system than the current blunt local lists for these developments.

2.6 If this new measure is put in place, which looks likely, the role of outline applications needs to be considered, particularly whether the binary distinction between outline and full still make sense. POS questions whether there is a need to still have the two application options. With an outline application, the reserved matters are defined in article 2 of the Development Management Procedure Order (DMPO) and explained in more detail in Planning Practice Guidance[2] (PPG). The reserved matters are: access, appearance, landscaping, layout and scale. These do not cover all the "matters" that might be "reserved" and there is always the question of what level of detail constitutes the submission of a "matter"?

2.7 A simpler system would be to just make an application for planning permission with as much detail as is considered necessary. LPAs have the power, under article 5(2) of DMPO 2015, to require the submission of some or all the reserved matters if they are, "of the opinion that, in the circumstances of the case, the application ought not to be considered separately from all or any of the reserved matters". This provision could easily be adapted to deal with a non-outline world where applicants submit the level of detail that they have at that point in time.

2.8 In this new world, what we now call reserved matters would simply become matters safeguarded for future approval under condition. This is a much more precise and targeted way of dealing with what needs to be submitted for approval and when. Reserved matters are effectively pre-commencement conditions, and you may not need to approve, say, landscaping before the development commences. However, under the current system you have no choice.

2.9 The 1990 Act does not refer to outline or full planning applications or permissions; they are a creature of the DMPO, so making such a change should not require primary legislation.

2.10 This change should also make it easier to accommodate the specialist application types that have grown up to deal with some of the challenges with major strategic developments, especially discharging EIA responsibilities, where schemes are still in an outline form. Approaches such as parameter based outlines, masterplan-backed outlines and hybrid applications will all work equally well, if not better, under this approach.

[2] Reference ID: 14-006-20140306

# 3 Flexibility with planning fees when amending applications

3.1 The scope to amend an application once submitted, but before it is determined, is quite wide. It is up to the LPA whether it accepts any such amendments (the applicant cannot unilaterally amend a planning application; there is no statutory right to do so) and most LPAs will accept amendments, particularly where they are in response to statutory consultee responses. However, a significant constraint in the flexibility that could be achieved here is that there is no statutory provision to seek an extra planning fee during the determination if an amended application requires a higher fee – the fee is payable on submission of the application based on what it contained at that time (regulation 3 of the Fees Regulations). This is an area where flexibility in the Fees Regulations should be introduced to enable these changes to be made and any associated uplift in the application fee to be paid to the LPA. This should include extending the site area.

# 4 Determining applications with split decisions

4.1 The ability to issue a split decision is a very useful one. This is only possible where a scheme has two elements that are severable. For example, if there was an application for a single storey side extension and two-storey rear extension to a house and the side extension was acceptable and the rear one was not, you could approve the former and refuse the latter. Whilst it is possible for local authorities to issue split decisions, there is no express power to do so. Case law indicates that an authority can grant permission for less than what has been applied for[3] in addition the PPG[4] indicates that in exceptional circumstances LPAs may use conditions to grant permission for part of the development applied for, but usually with the applicant's agreement. This is less than ideal.

4.2 LPAs should have a clear power to issue a split decision (as the Secretary of State has under section 79 of the 1990 Act when dealing with appeals) where the two elements are clearly severable or where the refusal relates to a detailed element that the LPA cannot support, but otherwise the rest of the scheme is satisfactory. This would be a very useful addition to LPA powers and enable positive decisions to be issued wherever possible.

[3] Kent CC v Secretary of State and Burmah Total Refineries [1976]
[4] Reference ID: 21a-013-20140306

# 5 Ability to condition unacceptable details

5.1 LPAs have wide ranging powers to impose conditions. They are governed by the six tests in the National Planning Policy Framework (NPPF) (expanded upon in PPG[5]) and the primacy of the application description and drawings. You cannot approve something (e.g. the drawing says the walls of the extension will be in brick) and then take that part of that approval away by condition (e.g. require the elevations to match the main stone building). If that is required, the detail on the drawing would have to be changed or amended via a letter or email and the amendment should be referred to in the decision notice. Government should consider addressing this as it could enable quicker positive decisions, with unresolved issues being dealt with through conditions, without prior agreement. Like split decisions, it would also enable positive decisions to be issued wherever possible.

# 6 Making legal agreements easier to resolve

6.1 Government is currently looking at how section 106 can be speeded up and deadlocks in negotiations resolved. POS is concerned that the approach being considered, a separate and binding dispute resolution process, may not work as the decision on the section 106 agreement is an intrinsic part of the determination of the application. A planning obligation is used to mitigate the impact of unacceptable development to make it acceptable in planning terms (PPG[6]). It's not a standalone contract. We think that there is a better approach that uses current systems and processes, but adjusts them to deal with the real situations that arise.

6.2 Typically, section 106 agreements run into difficulties after the LPA resolves to approve planning permission subject to the completion of the agreement. When this occurs, developers have a right of appeal against non-determination, but they rarely take this up. There are several reasons for this, but a key one is the risk involved. The appeal puts the decision on the whole application at risk; the inspector may refuse planning permission despite the LPA being willing to approve it. Furthermore, the developer has to put forward their own section 106 (usually a unilateral undertaking) and they only really have one shot at this. POS considers that there are two ways to tackle this.

6.3 One way is to introduce a right of appeal against the failure to complete the legal agreement. At such an appeal the Inspector would only look at the terms of the agreement insofar as they are appropriate to mitigate the impact of unacceptable development to make it acceptable in planning terms. Both parties (LPA and appellant) would put forward their draft obligation(s) and it is up to the inspector to resolve what is the right planning approach (which could be a combination of the two drafts) given the resolution to permit from the LPA. There could be a round-table, hearing-type discussion (or an exchange of written representations for simple cases) to iron out any areas. The Planning Inspectorate (PINS) and its independent inspectors are best placed to deal with these issues.

[5] Reference ID: 21a-005-20140306
[6] Reference ID: 23b-001-20150326

6.4 Alternatively, government could decide that the completion of section 106 agreements can be divorced from the planning application determination process and dealt with through a Grampian style condition. The PPG does concede that "in exceptional circumstances a negatively worded condition requiring a planning obligation or other agreement to be entered into before certain development can commence may be appropriate in the case of more complex and strategically important development where there is clear evidence that the delivery of the development would otherwise be at serious risk"[7]. This is an odd piece of advice. Something like this is either lawful or not. It is hard to see how such exceptional circumstances render something that is usually unacceptable to be acceptable. We urge Government to change this so it becomes normal practice. This would also enable our first suggestion, a right of appeal to PINS against non-completion of a section 106 agreement, to operate within the current powers to appeal against a condition.

6.5 We feel that a similar position exists for what are generally described as Arsenal clauses. This is where the developer does not yet own all the land (eg in a potential Compulsory Purchase Order scenario) and planning obligations need to be drafted that ensure the section 106 obligations are effectively bound into any part of the site that they relate to before the development (or a relevant phase) commences, including the land that the developer does not yet have an interest in. Once again, for the reasons set out above, government's advice in PPG[8] on Grampian conditions is less than ideal and there is no specific advice around planning obligations in this context. They need to be accepted as normal practice.

6.6 The final area of section 106 practice that needs reviewing is the ability of LPAs to put what are often called "claw-back clauses" or "review mechanisms" into section 106 agreements for housing developments where the level of affordable housing has been reduced due to viability arguments. These can be protracted arguments, often between the developer's and the LPA's viability consultants, which in POS's experience can be truncated by the inclusion of these clauses. They are supported (particularly by PINS) in multi-phased schemes, but not always in single phased developments. Given that planning permissions normally have a three-year life and even small housing developments will generally take at least a couple of years to build out, there can be a significant change in the financial landscape over such a period. Such clauses will not impact on the developer's profits and should have no negative impact on delivery. They are targeted at what are called "super profits", that is the profit over and above the predicted developer's profit. It is hard to see why diverting a proportion of this to the supply of affordable housing isn't supported in all suitable cases.

[7] Reference ID: 21a-010-20140306
[8] Reference ID: 21a-009-20140306

# 7 A better system for amending planning permissions

7.1 Prior to the introduction of section 96A (power to make non-material changes to planning permission) LPAs operated an informal, pragmatic approach to dealing with minor amendments. The test was along the lines of "no reasonable person could possibly have a different view on the amendment, to that which they had on the original application." LPAs had to consider the cumulative impact of several minor changes. It worked reasonably well and there were hardly any formal disputes (Local Government Ombudsman or judicial reviews). It could be argued that, because there is now a power to deal with these amendments (section 96A), an informal approach is no longer available to LPAs. The concept of "de-minimus" clearly still exists and can be a way of dealing with very minor changes through a simple exchange of letters or emails.

7.2 Whilst section 96A is a helpful, clear, legislative solution, it was not the problem that needed to be solved. That was amendments that went beyond minor/non-material; we needed a mechanism for dealing with those. The section 73 minor material amendments procedure that was promoted by government is not a properly set up statutory provision, but a sticking-plaster solution to a problem that should have been dealt with clearly through legislation. What we have through section 73, is the use of a legal provision, designed for amending conditions, to vary a planning permission through a condition that specifies the plans and thereby allows the approved plans to be substituted with new ones.

7.3 The theory behind this approach is that one set of approved plans can be substituted for another set by amending the wording of the condition using section 73. Nobody is saying that consent for a single-storey dwelling house can be changed to a ten-storey office block through this method, so there is clearly a limitation to the power, but where does that limitation lie? It is a source of confusion and hard to see how this approach is suitable in law for the purpose that government is promoting.

7.4 The current position is far from ideal. The section 96A and section 73 approaches are not as well designed as they could be and POS recommends that a single application process for amendments should be introduced. In such a process, applicants would apply to the LPA for an amendment to be approved. They must indicate whether any previous agreed amendment(s) remain in the design of the scheme and need to be considered cumulatively. The LPA would issue one of three types of decision:

- Decide that the amendment is not material and confirm this without the need to carry out any publicity or consultation. This is effectively the current section 96A procedure, except that a new consent should be issued so that the cumulative impact of such amendments, if any, are explicitly dealt with.
- Decide that the amendment is material, but can be dealt with as an amendment because it does not go to the heart of the consent. The process would involve publicity or consultation where necessary (usually just the neighbours affected) and, if approved, results in a new planning consent, again so that the cumulative impact of such amendments, if any, are dealt with. The LPA should be able to add conditions (in addition to those on the original consent) to deal with any new matters raised by the amendment(s).

- Decide that the change goes beyond what can be considered as an amendment and refuse the application. There would be no need for any publicity or consultation.

7.5 There should be a right of appeal against the second (where refused or new conditions are imposed) and third outcomes.

7.6 It is hoped that changes along these lines can find their way onto the statute book as the current arrangements, especially the use of section 73, are an unsatisfactory way of dealing with what should be an intrinsic part of the development management process.

# 8 Conclusions

8.1 As this paper has hopefully demonstrated, there is scope in the planning system to refine the legislative and policy framework to introduce greater flexibility into the process where that is necessary. Desirable as flexibility may be, schemes cannot be so vague that LPAs and the community have nothing tangible to consider. There will be a need to strike the right balance and these proposals should enable that to be delivered in a way that speeds up the development delivery process.

# APPENDIX
# Advice to LPAs to optimise flexibility

1. There is a lot that we can do within the current system to optimise flexibility in the planning and development process. This appendix sets out a range of approaches and best practice that can deliver this.

## Development plans

2. The way the development plan for an area is drafted should also consider the need for flexibility. LPAs should understand market conditions in their area through empirical research and plan clearly for those needs. However, that is not the same as being overly specific and prescriptive where it is clear that conditions and knowledge do not support that approach. The LPA should provide a clear vision and planning policy framework to lead and steer the development of their places, but this must be realistic and deliverable, as well as sufficiently flexible to allow for uncertainty or innovation. This is the strength of the UK Spatial Planning system and we should make sure that we operate in a way that allows it to perform properly.

## Uses in an application

3. When applying for planning permission you can seek consent for a mixture of uses (e.g. A1-A5). An application does not need to specify a particular use. Applying for alternative uses can be a wise precaution if what the market will need when planning permission is implemented may be difficult to predict. You will need to ensure that the design of units can cater for multiple end uses. Consideration of different policy tests for different uses can add to complexity, as the LPA needs to consider all possible uses. A condition may be required to set out that only one use can be commenced. Part 3 of the Town and Country Planning (General Permitted Development) (England) Order 2015 (GPDO), changes of use, class V (changes of use permitted under a permission granted on an application) does allow some flexibility for ten years.

## The extent of the site area

4. When drawing the red line for the application site you need to make sure that you have included all land that is necessary to contain the development. Where the red line is drawn is a crucial decision that can anticipate future issues: e.g. do you include the highway within the red line on a scheme where development within the highway (that needs planning permission) may be required? Other matters to think about are construction elements, such as foundations, that may need to go outside of the above-ground application site. The owner of any land that the developer does not own will need to be served with the statutory notice. Such a situation may also present challenges in completing a section 106 agreement because it is necessary to ensure the section 106 obligations are effectively bound into any part of the site that they relate to before the development commences. This will include the parts the applicant does not yet have an interest in. The solution to this are often called Arsenal clauses, and the main paper makes recommendations to government on them. Whilst conditions can require off-site works to be carried out, this either needs to be on land within the applicant's control or comply with

Grampian principles set out in PPG[9], i.e. there is at least some prospect of the applicant being able to deliver the pre-required works.

## The description of the development

5. This would seem to be a straightforward matter, but the operation of section 96A or section 73 means that the more generic the description, potentially, the more scope there would be to use those powers. A description cannot be so vague that it does not describe the development; however, it also does not have to describe the development in a high level of detail. So, the point here is that a planning application for the "erection of an office building" is likely to give you greater scope to amend its height and floorspace than one that is described as the "erection of a five-storey building containing 10,000m2 of office floorspace". LPAs should recognise the benefits of this in terms of "downstream" flexibility, when dealing with the description of a development.

6. For the reasons touched on in paragraph 1.4 of the main paper, applications that have a low level of detail can be a cause of tension in the process which can often have an impact on the decision-making process. A good pre-application process, that meaningfully involves the community and councillors, can convey the reality that the design of a development is an iterative process that adds layers of detail as it is progressed. This understanding by a developer, coupled with a sensitivity to the need to involve the community in later stages of detail development where this is necessary, can prove to be an effective counter to the problems that usually arise.

## Amending applications

7. It is often the case that LPAs will seek amendments themselves to enable a scheme to be supported. Increasingly LPAs are seeking these debates to take place in the pre-application stage so that problems can be ironed out before an application is submitted. This is by far the most efficient way to deal with these matters, as it avoids the LPA and the public having to formally engage with proposals that are unacceptable. Some LPAs say that they will not seek or allow substantive changes to a proposal where the applicant has either not engaged in pre-application discussions or has ignored the advice so received.

8. The Local Government Ombudsman/courts have established that re-advertising the scheme will be necessary where there is a material change to the proposals. There is, of course, a conflict here between the desire to provide speedy decisions and to allow flexibility. LPAs will be keen to issue decisions within statutory determination targets; however, planning performance agreements are the tool to manage this as they allow for a negotiated determination date. Where this occurs, LPAs are judged on that date rather than the arbitrary 8 or 13-week date set by DCLG.

9. There can sometimes be a delay between the point at which the LPA determines the application (either at committee or via an officer delegated decision) and when that decision is issued. Typically, that will be to finalise the negotiations on a section 106 agreement, but in London it will also include applications that must be referred to the Mayor under the stage 2 procedure in the Mayor of London Order 2008. Theoretically the scope to amend the scheme is the same as before it was

[9] Reference ID: 21a-009-20140306

considered by committee, but there is likely to be resistance from a LPA as they have taken a view on the scheme and are proceeding to issue the decision. Where amendments are accepted, it will be vital to ensure that the proper procedures are followed and the material planning considerations appropriately documented in a report. If officers decide to accept an amendment without going back to committee, they should be able to demonstrate that they were empowered to do this and it was appropriate to take the decision under delegated powers. It is a wise precaution to explicitly make provision for this either in the council's constitution (by making it clear that this is within the delegated powers of the chief planning officer) or by having a specific delegation in the recommendation on the committee report. The former approach is more efficient and consistent. Wording along these lines should cover it:

> *"In the event of any changes being needed to the wording of the committee's decision (such as to delete, vary or add conditions/informatives/planning obligations or reasons for approval/refusal, including in response to additional information or changes to the scheme) prior to the decision being issued, the Chief Planning Officer is delegated authority to do so, provided that the Chief Planning Officer does not exceed the substantive nature of the Committee's decision."*

## Imposing conditions

10. When drafting conditions, LPAs can enable future flexibility. Phrases such as "unless otherwise approved by the LPA" can enable details that are shown on plans or specified by condition to be revisited if the applicant wishes to do so. However, you do have to be mindful of the potential legal pitfalls associated with tailpiece conditions where they allow too much flexibility. There have been several court cases on this[10], but generally tailpiece conditions need to be constrained in such a way that they permit only minor, non-material variations.

11. Pre-commencement conditions need very careful consideration. LPAs sometimes require elements to be approved "prior to the commencement of the development" when this is unnecessary. For example, the approval of bricks, or other elevation materials, is only required before those elevations are commenced. This may seem unimportant on a house extension where there may only be a short interval between digging footings and construction of the walls taking place. However, on a major development with complex piling and basement levels, a development could be "in the ground" for a year or more before construction of the walls start. Therefore, careful thought needs to be given to the trigger events for such conditions. LPAs are now required to give specific reasons for pre-commencement conditions and the PPG contains advice[11] about the imposition and operation of conditions.

12. Where schemes are multi-phased, careful consideration needs to be given to both the drafting of conditions and how they relate to the individual phases. It is good practice to set out the conditions in groups: a site-wide set and separate sets for each phase. Whilst this produces a longer decision notice with a lot of repetition, it makes dealing with the subsequent discharge of conditions a much more

[10] Midcounties Cooperative Ltd v Wyre Forest DC [2009], Warley v Wealden DC [2011], Salford Estates (no.2) Ltd v Salford City Council [2011] and more recently, Hubert v Carmarthenshire CC [2015]
[11] Reference ID: 21a-007-20140306

straightforward process. Case officers when dealing with such large complex developments should start compiling the conditions in the pre-application stage and use an Excel spreadsheet or table to do so. Along the top of the spreadsheet are the development phases and down the side are the matters to be covered by condition with ticks or appropriate notes in the cells. This enables a systematic and iterative approach to what is a very complex task. Also, share it with the applicant. Leaving it to when you are drafting your committee report is way too late!

13. The final category of condition is often the first one that appears on the decision notice: the time limit for beginning the development. It is important to remember that you can vary the statutory default period, and that for major strategic developments this will often be necessary.

14. Government has recently introduced provisions for a default consent on conditions after eight weeks[12]. Historically there has been little discussion about conditions and their requirements prior to submitting material for approval. Given the potential for a deemed consent, LPAs are likely to move to determination rather than discussion. Developers and LPAs need to consider the benefits of pre-submission discussions to avoid this.

## Legal agreements

15. Section 106 of the 1990 Act enables a LPA to enter into an agreement with the applicant to secure matters that enable it to approve a development that would otherwise be unacceptable. A section 106 agreement must meet the three tests in section 122(2) of the CIL Regulations 2010 where it constitutes “a reason for granting planning permission for the development”. Again, similar considerations apply to the drafting of obligations as apply to the drafting of planning conditions. In particular wording that allows alternative approaches can sometimes be helpful.

16. It is also good practice to draft an agreement so that its terms also bite on any subsequent section 73 amendments. Without so doing, means that a fresh agreement or a variation will be needed; a waste of everyone’s time and money.

17. Careful consideration needs to be given to trigger events. For example, “commencement” would need to be clearly defined. I would suggest that you should avoid using “occupation of residential” as a trigger event as it is very hard for the LPA to enforce: preventing Mr and Mrs Smith from moving into their new house because the developer hasn’t completed the junction upgrade, doesn’t play well in the local press! Commencement of a later phase or the construction of the “X” residential unit is a much better trigger.

## Community Infrastructure Levy

18. The operation of the CIL Regulations, where authorities are charging CIL, can introduce a significant amount of rigidity into the implementation process as specific events trigger significant CIL payments. Furthermore, failure to follow CIL procedures (such as not submitting the right notices) can trigger liabilities that were unexpected or not enable relief that was expected.

19. CIL is calculated on the whole development. Part implementation of a planning permission triggers the CIL liability for the whole development. For example, if the

[12] Section 29 of the Infrastructure Act 2015 inserted section 74A into the Town and Country Planning Act 1990

planning permission contains a significant mezzanine level that, when the development was completed, was not constructed, the CIL would still be payable on the mezzanine floorspace. CIL is payable on commencement (including demolition). An instalment scheme for payment may be in place, but a LPA can exercise discretion here on individual cases, even if they don't have a formal instalment scheme in place. The phasing of a development also needs to be understood in the CIL context to enable staged payments and the relationship with the desired planning phases. The mix of uses and differing amounts of uses needs to be considered in the context of the charging schedule and how this impacts on overall CIL liability. Caution is needed that the discharge of conditions doesn't constitute development and represent commencement in CIL terms and trigger the CIL payment.

20. CIL is an added area of complexity that needs expert advice. The CIL Regulations are very complex and some LPAs and planning consultants are struggling with them, especially where there are differential rates.

## New applications

21. If dealing with changes through amendments is not an option, the developer needs to consider the submission of a fresh planning application. This can either be a whole replacement application or a partial one, often referred to as a "slot-in". With slot-in applications the case law in Pilkington[13] is relevant. You can apply for as many forms of development on a site as you like, but if one permission is implemented and it prevents another one being implemented, unless details of the latter are amended, there is a significant risk that the second permission will become incapable of implementation. Where the impossibility question arises, the proper course is to apply to the LPA for:

    - An application under section 96A;
    - A section 73 application; or
    - A new permission, relying upon the earlier permission as a material consideration.

22. On large, multi-phased, and particularly multi-use, developments a formal procedure to deal with slot-ins is good practice. The Olympic Delivery Authority adopted an excellent model for the 2012 Olympic Park development in East London[14].

## Conclusions

23. It is hoped that this advice about ways to optimise flexibility in the planning and development process within the current system is helpful to LPAs.

[13] Pilkington v. Secretary of State for the Environment and Others [1973] 1 WLR 1527 CA
[14] Details of this are available at: http://learninglegacy.independent.gov.uk/publications/effective-management-of-masterplan-changes.php