POS
Planning Officers Society

GOOD PRACTICE GUIDANCE NOTE

Making the planning system more flexible

Advice to LPAs on optimising flexibility

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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 published this guidance so our members can improve what they do.

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1 Introduction

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

2 Development plans

2.1 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.

3 Uses in an application

3.1 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.

4 The extent of the site area

4.1 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[1], i.e. there is at least some prospect of the applicant being able to deliver the pre-required works.

5 The description of the development

5.1 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.

5.2 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.

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

6 Amending applications

6.1 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.

6.2 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.

6.3 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 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."*

7 Imposing conditions

7.1 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[2], but generally tailpiece conditions need to be constrained in such a way that they permit only minor, non-material variations.

7.2 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[3] about the imposition and operation of conditions.

7.3 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 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!

7.4 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.

7.5 Government has recently introduced provisions for a default consent on conditions after eight weeks[4]. 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.

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[2] 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]
[3] Reference ID: 21a-007-20140306
[4] Section 29 of the Infrastructure Act 2015 inserted section 74A into the Town and Country Planning Act 1990

8 Legal agreements

8.1 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.

8.2 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.

8.3 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.

9 Community Infrastructure Levy

9.1 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.

9.2 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 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.

9.3 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.

10 New applications

10.1 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[5] 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.

10.2 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[6].

11 Conclusions

11.1 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.

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