



BEST PRACTICE NOTE ON HIGHWAY/ENVIRONMENTAL IMPROVEMENT WORKS AND AFFORDABLE HOUSING SECURED BY PLANNING CONDITIONS

General

Section 72 of the Town and Country Planning Act 1990 contains a general power to impose conditions on a planning permission but judicial decisions have limited this, and to be lawful a planning condition must be reasonable and relate to the development permitted by the planning permission. Conditions may not be used to require the payment of money or to require a developer to enter into a S106 obligation.

Detailed advice on the use of conditions is given in Circular 11/95 which stipulates that conditions should be necessary, relevant to planning and to the development to be permitted, enforceable, precise and reasonable in all other respects.

Grampian Conditions

This expression derives from the decision in *Grampian Regional Council v City of Aberdeen (1984)* and in essence it provides that a condition precluding the implementation of development permitted by a planning permission until some step has been taken is valid. There have been a number of subsequent High Court decisions on this point, in particular *British Railways Board v SSE* in 1994. As a result of these it is lawful for a local planning authority to grant planning permission, even in respect of land not within the planning applicant's ownership, subject to a negative condition restricting its implementation, in whole or in part, until some event has occurred. As a result of the judgement in *Merritt v SSETR and Mendip District Council* it is not possible to impose such a condition when there are no prospects at all of the action in question being performed within the time-limit imposed by the permission. (see para 40 circular 11/95) The utility of 'Grampian' conditions is nevertheless underestimated. They can be used to secure benefit across the whole spectrum of environmental and infrastructure improvements.

Use of Conditions and planning obligations

The determination of major planning applications can be delayed by the requirement for the applicant to enter into a Section 106 obligation. In a limited range of appropriate circumstances it is possible to use Grampian conditions as a prelude to obligations being entered into, so as to enable the application to be determined, but preventing implementation of the permission until such time that alternative arrangements i.e s106 obligation has been put in place. Suggested model conditions are set out later in this paper.

Clearly for such a condition to be acceptable to the Secretary of State it must satisfy the tests in Circular 11/95 and also Circular 1/97 which relates to planning obligations. Circular 1/97 specifies that a planning obligation should be necessary, directly related to the proposed development, fairly and reasonably related in scale and kind to the development and reasonable in all other respects. Planning obligations should not duplicate the substance of planning conditions and should only be sought where necessary to make a proposal acceptable in land use planning terms. When to use

this type of condition is a matter for judgement by individual local planning authorities. It is probably most suitable for use where the obligations have been negotiated and there is general agreement between the applicant and local planning authority as to what the requirements of a s106 obligation will be, but the expected delay before the agreement can be signed is too long, given that the applicant needs the assurance of having a planning permission before proceeding with land acquisition or disposal, or finalising a sale subject to conditional contract. Use of the model conditions is probably inappropriate where the substance of the proposed planning obligation is still unclear, either generally or with regard to important elements, it is substantial and wide-ranging, or contains unusual provisions. In such circumstances delaying the determination of the application until a s106 obligation or unilateral undertaking has been entered into would be preferable. In all cases the written agreement of the applicant should be obtained to the course of action proposed.

Subject to the above qualifications model conditions in this form are not dissimilar from others commonly used by local planning authorities precluding the commencement of development until certain steps have been taken. Examples can be seen in the model conditions in paragraphs 25 - 32 of appendix A to circular 11/95 dealing with landscaping matters and paragraph 37 dealing with access to land and buildings for disabled people.

Main advantages of the use of this type of condition

- it enables the administrative side of the processing of a planning application to be completed when the planning issues have been resolved;
- it assists local planning authorities to comply with the Audit Commission's Best Value indicator relating to the timeliness of the processing of planning applications;
- the conclusion of the planning issues by the grant of planning permission sooner than would otherwise be the case if it had to await the completion of a legal agreement sets the time from when a judicial review can be brought at an earlier date;
- granting the planning permission immediately with a Grampian condition precludes any later discussion as to whether or not the planning application should be formally reconsidered by the local planning authority if there is a long delay between the resolution to grant planning permission and its actual grant, whether by reason of the legal process or otherwise;
- the third and fourth bullet points above are equally of benefit to planning applicants, in particular developers. An advantage to developers alone is that it may allow them to exercise an option to purchase at an earlier date, certain in the knowledge that planning permission has been granted and that the development will be able to proceed on the completion of the planning obligation;
- it avoids the need for the planning obligation to be entered into by the existing owners where land is to be sold for development. This can sometimes be inconvenient and expensive as there may well be no contractual provision requiring an existing landowner to enter into a s106 agreement and sometimes a misunderstanding as to exactly what it entails.

Main Disadvantages in using this approach

- Use of such conditions is still somewhat novel and has not yet been tested in the courts. There is the risk that it will be found to be unlawful, notwithstanding that its form appears generally to be in the interests of everyone it could nevertheless be the subject of judicial review as the various cases on Grampian conditions have

shown.

Enforceability

This is relatively straightforward in that it is normally abundantly obvious when a development has begun (i.e. the permission has been implemented) and allows a local planning authority to take enforcement action if appropriate where the condition has been breached.

Model Conditions

The following conditions (1 and 2) are examples of existing good practice which should continue to be used for simple highways &/or environmental improvements:-

1. where the details have not been finalised but where a legal agreement is considered to be unnecessary.

- The development authorised by this permission shall not begin until the local planning authority has approved in writing a full scheme of works for improvement to:
 - (i)
 - (ii)
 - (iii) etcThe occupation of the development shall not begin until those works have been completed in accordance with the local planning authority's approval and have been certified in writing as complete by or on behalf of the local planning authority.

2. where the details have been finalised but where a legal agreement is considered to be unnecessary.

- The occupation of the development authorised by this permission shall not begin until the highway/improvement works shown on the drawings hereby approved and described in the letter dated from has been completed in accordance with those drawings and that letter and have been certified in writing as complete by or on behalf of the local planning authority.
(letter/drawings may be replaced by reference to whatever are the relevant documents)

The following conditions (3 and 4) are suggested for imposition for highways and/or environmental improvements in advance of a legal agreement being entered into, where the applicant has given written confirmation of their acceptance to this approach.

3. where the details have not been finalised

- The occupation of the development authorised by this permission shall not begin until:
 - a. the local planning authority has approved in writing a full scheme of works of improvement to:
 - (i)
 - (ii)
 - (iii) etc

and

- b. the approved works have been completed in accordance with the local planning authority's written approval and have been certified in writing as complete on behalf of the local planning authority;

unless alternative arrangements to secure the specified works have been approved in writing by the local planning authority.

4. where the details have been finalised

- The use authorised by this permission shall not begin until the works shown on the drawings hereby approved and described in the letter datedfrom.....have been completed in accordance with those drawings and that letter and have been certified in writing as complete by or on behalf of the local planning authority unless alternative arrangements to secure the specified works have been approved in writing by the local planning authority.

The following condition (5) is suggested for imposition for affordable housing provision where the applicant has given written confirmation of their acceptance to this approach.

5. The development shall not begin until a scheme for the provision of affordable housing as part of the development has been submitted to and approved in writing by the local planning authority. The affordable housing shall be provided in accordance with the approved scheme. The scheme shall include:

- i. The numbers, type and location of the site of the affordable housing provision to be made;
- ii. The timing of the construction of the affordable housing;
- iii. The arrangements to ensure that such provision is affordable for both initial and subsequent occupiers of the affordable housing; and
- iv. The occupancy criteria to be used for determining the identity of prospective and successive occupiers of the affordable housing, and the means by which such occupancy shall be enforced.

Informative

For the avoidance of doubt, the term 'affordable housing' means subsidised housing at below market prices or rents intended for those households who cannot afford housing at market rates. It is usually managed by a registered social landlord.

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